IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LABOUR REVISION NO. 01 OF 2022

(Arising from Labour Dispute No. CMA/KIG/206/2020)

1. **FARAJA MSAKI ----------APPLICANT**
2. **ZITHA KILONGO----------APPLICANT**
3. **MWAYA WAMBURA----------APPLICANT**
4. **ANNA GAMBA----------APPLICANT**
5. **MAWAZO NYANDWI----------APPLICANT**
6. **LEAH CHAMGENI----------APPLICANT**

VERSUS

CRDB BANK PLC----------RESPONDENT

JUDGMENT

Or- August & 30th January, 2023

MANYANDA, J.

The applicants namely, Faraja Msaki, Zitha Kilongo, Mwaya Wambura, Anna Gamba, Mawazo Nyandwi and Leah Chamgeni, hereafter referred to as the ist, 2nd, 3rd, 4th, 5th, and 6th Applicants, respectively, complained

before the Commission for Mediation and Arbitration (CMA) for Kigoma at Kigoma against their employer, the CRDB Bank PLC, now the respondent in this Application. They are protesting against termination of their employment on a main complaint that it was unfair termination. They are claiming for various terminal benefits including general damages.

After full hearing, the CMA dismissed their application save for the fifth applicant whose employment termination the CMA found to be unfair. However, it awarded him 12 months' salary compensation of which he was dissatisfied. He chose to joined the race with his colleague applicants in this Court in order to challenge the CMA award.

The applicants are moving this Court by a Chamber Summons under the provisions of section 91(1)(a) and (b), (2)(b), (4)(a) and (b), and 94(1)(b) and (i) of the Employment and Labour Relations Act (ELRA) [Cap. 366 R. E. 2019] and Rules 24(1) and (2)(a), (b), (c), (d), (e) and (f), (3)(a), (b), (c) and (d) and 28(1)(a), (b), (c), (d) and (e) and (2) of the Labour Court Rules, GN No. 106 of 2007. It is supported by an affidavit affirmed by Sadiki Aliki. The Respondent countered this application in a counter affidavit sworn by Wilbard R. Kilenzi.

Both, the affidavit and the counter affidavit give the following background in brief. That, somewhere in 2020, the Respondent got tipped of about some banking malpractices concerning a Bank Account of one their major clients namely, Tanzania Ports Authority, hereafter referred to by its acronym "the TPA, for Kigoma Branch. The malpractices are alleged to be occasioned in violation of its laid down rules and procedures. The allegations were that the applicants were authorizing and paying cheques drawn to the TPA Bank Account without verifying the authorized signatures and comparing them with those in the client's mandate file and without call back confirmation to the client, conducts which according to the employer, amounts to gross negligence.

They have raised a total of twelve (12) legal issues, in their statement of legal issues as follows: -

1. *Whether the learned trial Hon. Arbitrator correctly analyzed evidence on record and arrived at the conclusion that the applicants committed gross negligence, regarding essential ingredients and the law on gross negligence;*
2. *Whether the allegations of exposing the respondent bank to potential loss amounts to actual loss in proving ingredients of gross negligence;*

3. *Whether the learned trial Hon. Arbitrator correctly and legally arrived at the conclusion that the applicants admitted to have committed gross negligence in absence of proof of the alleged provisions of the Cash Operating Manual, 2017;*
4. *Whether it was legally correct to uphold the decision of the respondent to terminate the applicants basing on the alleged admission which was not proved during disciplinary hearing and the alleged investigative findings were not part of the evidence in the disciplinary hearing;4*
5. *Whether it was legally correct for the applicants to have been condemned before the disciplinary committee with new charges which were not raised in the demand for explanation;*
6. *Whether the learned trial Hon. Arbitrator considered the closing arguments/submissions of the applicants on the Commission's finding that the applicant admitted the offence they were charged with;*
7. *Whether on the basis of the evidence on record it was legally correct for learned trial Hon, Arbitrator to have held that procedures for disciplinary hearing were followed;*
8. *Whether the learned trial Hon. Arbitrator considered the applicant's defence during disciplinary hearing;*

9. *Whether the fourth applicant was double jeopardized by being punished twice for the same offence;*
10. *Whether the learned trial Hon. Arbitrator was legally correct in refusing to grant "any amount of general damages" and "36th months' salaries" to the 6th applicant and whether the Commission exercised its discretion judiciously;*
11. *Whether the trial Hon. Arbitrator considered Exhibit C2 as it was defended by the 3rd and the 4th applicants that the cash transactions followed section 6.1.3 of the Cash Operating Manual; and*
12. *Whether in absence of a report on signature mismatch the Ho. Arbitrator was correct to have found that there was valid reason for the applicants' termination.*

At the oral hearing of the application, Mr. Sadiki Aliki, learned Advocate, represented all the applicants, he also represented them at the CMA and the respondent enjoyed representation by Mr. Sileo Mazula, learned Advocate.

Mr. Aliki, submitted in support of the application by adopting the affidavit then he went on arguing on all the 12 issues generally. In order to reveal the gist of the complaint I will paraphrase his submissions. The

Counsel submitted that the gist of the complaint is on the finding of the Arbitrator at page 40 of the award where he found that all applicants save for the 5th applicant that they admitted the disciplinary offences they were charged with. It was the view of the Counsel that termination of all the applicants was unfair. The Counsel elaborated that the allegation against the applicants was gross negligence as per the Demand for Explanation (Exhibit C1) on grounds that the applicants effected some transactions in violation of the respondent's Cash Operating Manual (COM) of 2017. According to the testimony of DW1, the violations were by the applicants' making payments through cheques without comparison of the signatures on the cheques and the official ones in the client's mandate file and failure to call back to the client for verification.

Mr. Aliki grouped his argument into three main groups. Firstly, he dealt with the ingredients of gross negligence and attacked the CMA on its finding about proof of the same elements. Secondly, the Counsel dealt with what was regarded as admission by the applicants to be a basis of proof of the disciplinary charges. Thirdly, the Counsel dealt with compensation quantum assessment.

As regard to the first group concerning gross negligence, the Counsel listed its ingredients to be existence of a duty of care, breach of the said care and the resulting loss from the breach of care. He cited the case of **Donoghue vs Stevenson** 1932] UK HL 100. He went on submitting that, from page 40 of the award, the Arbitrator cited some paragraphs from the defences by the applicants which were wrongly treated as admission. In his views the statement in those paragraphs do not amount to admission of gross negligence. He admitted that the applicants had a duty of care based on the Bank's policies but denied breaching that duty because they didn't violate any principle or policy of the Bank.

The Counsel said, according to the charges, the applicants were alleged of effecting payments through cheques with disparity of signature causing the employer to suffer potential loss and the evidence was not led to prove loss but potential loss. The Counsel was of the view that the important element of negligence, which is loss, was not proved. He referred this Court to Exhibit C2, Reply to the Demand for Explanations, and C4, the applicants vividly denied breaching the COM because they acted within the policy.

The Council added that none tendering of the COM which could have availed the CMA with the terms, adversely affected the evidence of the respondent because the dispute surrounded that document.

In respect of the second group about admissions, Mr. Aliki submitted that the Arbitrator ought to have deeply scrutinize the evidence in order to find out the elements of admission on the quotations he relied. The Counsel was of the view that the admissions were of a different matter not gross negligence. He argued that mere praying for excuse, pardon or apology by a party do not mean admission of the allegation.

To bolster his point, he referred this Court to a case of **NMB Bank PLC vs. Leila Mringo and 2 Others,** Civil Appeal No. 30 of 2018 where the Court of Appeal of Tanzania said at page 17 that admission of loss is not the same as dishonest or deceitful conduct. He also cited the case of **Given Kessy vs. SOS Children's Village Tanzania**, Labour Revision No. 62 of 2020 where this Court said at page 7 that where there are allegations of admissions such admissions must be clear and unequivocal. Then the Counsel opined that in the matter at hand the paragraphs quoted by the Arbitrator are equivocal and fall far from establishing gross negligence.

As regard to the third group, Mr. Aliki submitted that the Arbitrator went astray in law by awarding compensation of 12 months' salary compensation after finding that there was unfair termination of the 5th applicant's employment. The Counsel stated further that the 5th applicant deserved 30 months' salary compensation and other reliefs prayed in CMA Form 1 because he was denied of right to work. He cited the case of **Bollore Africa Logistics (T) Ltd vs. Magret Luther Shimbi,** Labour Revision No. 473 of 2019 (unreported), no copy was supplied.

In respect of the other applicants, the Counsel submitted that since their allegations were not proved, they also deserve compensation of 30 months' salary and other reliefs prayed in CMA Form 1. The reason he gave is that all have been denied future employment in other banks or financial institutions due to the Bank of Tanzania's letter. The BOT circulated a letter to all banks and financial institutions requiring reporting to it names of all employees terminated or dismissed on gross negligence or misconduct. Further the Counsel added that their images have been spoiled. He referred this Court to the case of **Tanzania Bureau of Standards (TBS) vs. Anita Kaveva Maro**, Labour Revision No. 35 of 2016 where this Court stated at page 20 that sending negative reports to other institutions is a ground for general damages.

The Counsel was of further opinion that general damages come after proof of a claim. To support his opinion cited the case of **Stanbic Bank (T) Ltd vs Abercrombie & Kent (T) Ltd,** Civil Appeal No. 21 of 2001 (unreported), but did not supply a copy.

Then he prayed the application to be allowed, the award of the CMA revised, quashed and compensation of 30 months' salary and other reliefs prayed in CMA Form 1 be granted.

On his side, Mr. Mazula submitted in opposition to the appeal generally supporting the CMA findings. Then, he adopted the counter affidavit and argued the application starting with the complaint on admission as proof of gross negligence. He submitted that termination of the applicants' employment was fair, there were fair reasons and fair procedure. Mr. Mazula pointed out that the main reason for termination was the finding of gross negligence on the part of the applicants. He was of the view that the Arbitrator dully analysed the evidence of admission by each applicant and rightly found each of them liable, save for the 5th applicant.

Then, Mr. Mazula went on analyzing admissions by of each the applicants as found by the CMA. Starting with the 1st applicant, **Faraja Msaki,** he submitted that in her explanations per Exhibit C10, she

conceded the conducts that gave rise to gross negligence as quoted at page 40 of the award. As regard to the 2nd applicant, **Zitha Kilongo**, he stated that in her explanations per Exhibit C10 conceded the conducts that gave rise to gross negligence as quoted at page 41 of the award. That, in her explanations, **Mwaya Wambura**, the 3rd applicant, admitted in Exhibit C10 as quoted in the award at page 41. and **Anna Gamba,** the 4th applicant, admitted in Exhibit C10 as quoted at page 41 of the award. **Leah Chamgeni,** the 6th applicant, admitted in Exhibit C10 as was quoted at page 41 of the award

Mr. Mazula went on analysing the applicant's testimonies in cross examination at pages 66 and 67 of the proceeding that **Zitha Kilongo (PW2)** admitted effecting payment through cheques without using specimen signatures in mandate files to check disparity of signatures. That, evidence showing breach of duty by **Leah Chamgeni** is found in her cross examination at pages 74, 79, 80 and 81 of the proceeding. He also submitted that the evidence against **Mwaya Wambura (PW4)** in her cross examination at page 89 where she admitted to have made 3rd part payments in contravention of the COM. That **Anna Gamba (PW5)** admitted at page 99 of the proceeding.

Mr. Mazula concluded that the admissions by the applicants are unequivocal, hence the finding of the Arbitrator on gross negligence is correct.

Then, Mr. Mazula admitted on the position of law as expounded in the case of **Donoghue vs. Stevenson** (supra) as far as gross negligence is concerned. Mr. Mazula added a case of **Tanzania Revenue Authority vs. Thabit Miilimo and Another**, Labour Revision No. 246 of 2014 LCCD I (191) 2015 in which this Court gave elaborations on the elements of gross negligence as being, existence of duty of care, breach of the duty of care and loss or damage.

Mr. Mazula argued further that a duty of care is the heart of banking business, therefore, its breach has a devastating effecting. He cited the case of **NMB Bank Ltd vs Andrew Aloyce**, (2013) LCCD 84 where it was said by this Court that in banking industry, the employees must exercise his or her duty of care in executing her duties.

He added that under Regulation No. 12(2) and (3) of the Employment and Labour Relations (Code of Good Practice) Regulation, GN No. 42 of 2007 gross negligence is one of the misconducts which justify termination of employment.

As regard to non-production of the COM, he was of the view that it did not affect the respondent's evidence before the CMA for two reasons namely, the relevant provisions were cited in the Demand for Explanations (Exhibit C1); and the applicants admitted complicity. He cited the case of **NMB Bank Ltd vs. Aizack Mwampulule**, (2013) LCCD 70 where this Court held inter alia that in absence of a manual, the duty of care guides the discharge of duties by employees.

Regarding the reliefs, awarded to the 5th applicants, Mr. Mazula referred this Court to the provisions of section 40 of the ELRA which provides for remedy in unfair terminations whereby compensation provided is that of 12 months' salary. He also referred to Rule 32 of the GN No. 67 of 2007 that it also provides for a similar compensation to section 40 of the ELRA. He attacked the general compensation awarded by the Arbitrator arguing that in labour law, there is no relief known as general compensation but rather re-instatement, re-engagement and compensation.

As regard to the procedure for termination, Mr. Mazula submitted that the same was proper and fair. He added that the law does not require every step to be followed to the letter. He was the view that even if one step was not followed, yet could not be generalized that it vitiated the

termination. He cited the case of **Consolata and 2 Others vs. Mansoor Daya and Chemical Company Ltd**, Labour Revision No. 315 of 2016 (unreported). He concluded that since the applicants were given opportunity to state their cases before the Disciplinary Committee, then hearing and the ultimate termination was fair.

Mr. Mazula went on distinguishing the cases cited by Mr. Aliki arguing that the case of **Tanzania Bureau of Standards vs. Anita Kavera Maro (supra)** is distinguishable because Anita was sick and was terminated without been heard while in the instant case, apart from lack of basis for award of general damages, gross negligence was proved. He also distinguished the case of **NMB Bank Ltd vs. Leila Mringo (supra)** arguing that in that case, Leila did repeated misconducts while in the instant case they were first disciplinary offenders. In regard to the case of **Given Kessy (supra)** he argued that Given was charged with negligence but admitted stealing while in the instant case the applicants admitted gross negligence. He prayed the Court to accept the CMA's findings and dismiss the application in its entirety.

In rejoinder, Mr. Aliki reiterated his submissions in chief. He insisted that since the disciplinary charges against the applicants and their reply were either violation or not of the COM, then it was imperative to have the

COM availed to the CMA as well this Court, for the same to test its wording. As regard to admissions by the applicants, Mr. Aliki re-joined that they applied Know Your Customer (KYC) banking policy which is admissible in the banking industry.

Then, the Counsel conceded on the position of the law in the cases of **TRA vs. Miiligo and Another (supra)**, **NMB Bank Ltd vs. Andrew Aloyce (supra)**, Rule 12 of GN No. 42 of 2007, the case of **NMB Bank Ltd vs. Aizack Mwampulule (supra)** as good law. However, he disputed the allegations that the applicants acted negligently and with dishonest because the same was not proved and were not charged with failure to act in good faith.

Moreover, Mr. Aliki conceded that section 40 of the ELRA does not provide for general damages but urged this Court to construe the provision as covering both reliefs that is, compensation and general damages as well. He also conceded the position of the law in the case of **Consolata and 2 Others (supra)** that the checklist principle is applicable, but he quickly pointed out that the same principle is inapplicable in the circumstances of this case because the procedural defects go to the root of the case. Then, the Counsel reiterated his prayers.

Those were the submissions by both parties, it is now turn to determine the controversy.

The main issue in this matter is whether the application is meritorious. In determining this issue there are three sub-issues namely, whether termination was with fair reasons; whether termination procedure was fair; and if the 1st and 2nd issues are answered in affirmative, what are reliefs the 1st, 2nd, 3rd, 4th, and 6th Applicants are entitled and whether the reliefs granted to the 5th Applicant are just in law. I will start with the first sub-issue, whether termination was with fair reasons.

Before the Disciplinary Committee the applicants were charged with disciplinary offences as indicated in the Exhibit C1 Collectively, the Demand For Explanation (DFE), which allege that the applicants committed offences of gross negligence whose appropriate penalty is termination of your employment.

The charges were followed with particulars of irregularities in which generally it was alleged that the applicants made payments via cheques with signature disparities without verifying the signatures on the concerned cheques with those in the bank's computer system or customers' mandate files and without call back to confirm counter signatories.

It followed that all the applicants were convicted by the Disciplinary Committee and their employments were terminated after been found to have acted with gross negligence in the discharge of their duties. The Disciplinary Committee findings are indicated in the hearing minutes "Exhibit C4 Collectively", they have similar, though not identical wording that they performed transactions and paid money to un-introduced TPA officials and didn't do signature verification in the mandate file as well as in the system contrary to the Cash Operating Manual, while knowing that it was against the procedure and there were no any instructions whatsoever from TPA.

The applicants faulted the Disciplinary Committee findings before the CMA whereas in its award, the CMA agreed with the 5th applicant but dismissed the complaints by the rest. The finding of the CMA is based on what it held to be admissions by the applicants of committing the gross negligence.

Mr. Aliki challenges the finding of the CMA on ground that it wrongly treated the defences by the applicants as admission of gross negligence. Mr. Mazula contended that the CMA was right.

In the first place, I agree with the parties that the law on negligence is as was propounded in the famous case of **Donoghue vs Stevenson**

1932] UK HL 100 where the ingredients are duty of care, breach of the said care and the resulting into damage which is foreseeable from the breach of care.

In Tanzania, the elements of gross negligence were considered in the case cited by Mr. Mazula that of **Tanzania Revenue Authority vs. Thabit Milimo and Another (supra).** In that case, this Court, Hon. Nyerere, J. as she then was stated as follows: -

> *"in my understanding of general principles of law on negligence, liability arises where there is a duty of care, and a person breaches that duty as a result of which, the other person suffers loss or injury/damage. A person acts negligently* ***when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.*** *Negligence is the opposite of diligence or being careful."* (emphasis added)

I subscribe to the position of the law on negligence as put by Hon. Nyerere, Judge, in the above cited case. I may add that it is a legal requirement that for a party to prove negligence must prove all the elements of negligence cumulatively that, there exists a duty of care, that there has been breach of the said duty of care and the said breach resulted into damage or loss.

In the instant case however, the complaint is about allegations of gross negligence by the applicants. The term "gross negligence" was defined in the case of **Twiga Bancorp (T) Ltd vs. David Kanyika,** Labour Revision No. 346 of 2013 (unreported), where this Court, Hon. Rweyemamu, J. as she then was, stated as follows: -

> *"gross negligence means a **serious carelessness**, a person is gross negligent if **he falls far below the ordinary standard of care that one can expect. It differs from ordinary negligence in terms of degree.**"* (emphasis added)

It follows, therefore, from the definition above that there is a difference between gross negligence and mere negligence in that the former is the aggravated situation of the later.

A question now is whether the respondent proved gross negligence on the part of the applicants. The CMA found that the respondent proved gross negligence basing on what it called admissions by the applicants. I have asked myself a question, did the applicants admit gross negligence? In other words, do the quotes made by the CMA amount into admission of gross negligence.

I will examine the charges and the responses of each applicant to the Disciplinary Committee, which evidence the CMA used to reach its decision, and, the evidence before the CMA itself.

Starting with the first applicant, **Faraja Msaki**, was charged according to Exhibit C2, the DFE, as follows: -

> *"**Irregularity**: Gross Negligence: contrary to Rule 12(3)(d) of offences which constitute serious misconduct under the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 read together with section 6.1.3(e)(ii) and (viii) of the Cash Operating Manual of March 2017, section 3.3(a) of the Operational Risk Policy of October 2017, section 8.6(g) and 8.7(a)-(h) of the Anti-Corruption and Fraud Risk Policy of July 2018, whose appropriate penalty is termination of your employment.*

The particulars of the gross negligence read as follows: -

> *"On 26th August 2018 you acknowledged a cheques payment with number 302953 amounting to TZS 9,680,500.00 (Tanzanian Shillings Nine Million, Six Hundred and Eighty Thousand Five Hundred only) while the said cheque had one signature of a non-account signatory and you did not call back to confirm counterpart signature;*

Between 21st May 2019 and 16th July, 2019, you failed to verify and properly confirm cheque payment through account number 01J1019884405 while the cheque had one signature in disparity with the one in customers' mandate file and you did not call to confirm with counterpart signatory. The said omission resulted to fraudulent approval of TZS 208,433,311.80 (Tanzanian Shillings Two Hundred and Eight Million, Four Hundred and Thirty-Three Thousand Three Hundred and Eleven with Eighty Cents only) and;

Moreover, on 16th June 2019, you authorized cheque payment in cash amounting to TZS 27,950,000.00 (Tanzanian Shillings Twenty Seven Million, Nine Hundred and Fifty Thousand only) through cheque number 000332 and paid to unauthorized person, while there was no official introduction letter from the customer to authorize the said payment.

The omission above has exposed the Bank to a ***potential financial loss*** *of TZS 246,063,811.80 (Tanzanian Shillings Two Hundred and Forty-Six Million, Sixty THree Thousand Eight Hundred and Eleven with Eighty Cents only)."*

Faraja Msaki's response to the DFE is found in Exhibit C2. In respect of the first allegation, her response was that the cheque was dully signed at the back by the signatories, That there was no requirement under

section 6.1.3(a) of the COM of calling back to a counterpart signatory before payment authorization when one signatories is in court and has signed the cash cheque in question, That there was an internal memo from the Manager for expediting services to 15 minutes; and that a letter dated 19/02/2018 did not make it clear about cancellation of Morris as a signatory in the like manner the previous letters did.

In respect of the second allegation, she stated that the payment was proper and the signature on the back of the check was the same as in the mandate file available in the Bank computer system. That she was used to the signature of the signatory for TPA and that one of them was physically present in the Bank. Moreover section 6.1.3(a) of the COM is silent on requirement of making call back confirmation where one of the signatories is physically present in the Bank.

In respect of the third allegation, she conceded that she was the one who facilitated the payment of the TPA cheque to one Benjamin, a staff of TPA, after receiving a confirmation call from TPA senior official who was also a signatory, one Robert Bundala, who later on confirmed to her that he received the money.

In the proceedings, at page 53, Faraja Msaki testified admitting that she owed a duty of care and that she discharged her duties within the realms

of the Bank policy instruments which were the HR Manual and the COM. For that matter she refuted breaching her duty of care in the discharge of her duties. She stated at page 53 of the typed proceedings as follows: -

> *"Kingine nilituhumiwa kuwa alikuwa anasaini mtu ambaye alishaondolewa kwenye signatories. Kwamba sikufanya verification wala call back. Si sahihi kwa kuwa nilifanya verification. Lakini hatuna mwongozo wa kufanya call back. Hii inafanyika endapo payment ya hundi inapofanyika kwa mtu wa tatu..... Mpaka sasa sijapata lalamiko kwamba hizo hela hazikufika."*

Literally means she was accused of allowing payments to a cancelled signatory. That it is not true that she didn't verify and call back. That, they didn't have directives of calling back except where the payments involved a third party. Moreover, she didn't receive any complaint on failure of the money to reach the targeted payee.

In a length cross examination, Faraja Msaki stated that she knew the allegations of gross negligence levelled against her and that she knew the transactions she alleged to have negligently handled. She stated at page 56 as follows: -

> *"Swali: Katika utetezi wako ulisema kama kuna mapungufu? Jibu: Sikusema. Swali: Wakati Bruno na*

Kulwa wanafanya uchunguzi ulihojiwa na kutoa maelezo yako? Jibu: ndiyo. Swali: Unakumbuka wakati unahojiwa ulikiri kosa la uzembe? Jibu: Hapana. Swali: Ulikiri kwamba hukufanya uhakiki? Jibu sikumbuki. Swali: Kielelezo C10, maelezo uliyoyatoa kwa mchunguzi ukisema ni kweli ulikuwa mzembe? Jibu: Hapana. Swali: Umekiri kwenye C10 kwamba hukufanya verification, je kweli ulikosea? Jibu: Akija mtia sahihi hakuna haja ya kufanya verification ya mtia sahihi mwingine."

Literally means that she didn't admit gross negligence during interrogation by Bruno and Kulwa. That she did not confess negligence in Exhibit C10. That there is need of conducting verification of the other signatory where one of them is at the counter in the Bank.

As it can be seen, Faraja Msaki, admitted to have a duty of care and handling of the queried transactions, but did not admit breaching the duty of care nor commit gross negligence as she acted within the realms of the Bank policies as provided in the HR Manual and COM.

The CMA did not analyse her testimony, instead it acted on interrogation between her and the investigator, one Bruno Mohamed Mchopa, contained in (Exhibit C10) where it quoted a part of it and treated the same to be an admission of gross negligence. But the applicant Faraja Msaki refuted admitting gross negligence in Exhibit C10.

In his testimony, Bruno Mohamed Mchopa, who testified as DW2, stated at page 34 of the typed proceedings that he investigated the allegations against Faraja Msaki, he conceded that the disputed signatures were not examined by handwriting experts, he did not interrogate the accounts owners about handwriting disparities, therefore his report based on his own opinion.

My navigation through the hearing minutes concerning Faraja Msaki, (Exhibit C4), it is clear that she pleaded not guilty to the disciplinary charge. Moreover, Exhibit C10 was not among exhibits listed before the Disciplinary Committee to be used against her and the respondent conceded before the Disciplinary Committee that investigation report was not furnished to her. Moreover, the Disciplinary Committee did not rely on Exhibit C10 in its findings.

This makes me find that it was not proper for the CMA to assume admission of the allegations of gross negligence on the part of the applicant, Faraja Msaki, whose evidence as well as that of the respondent did not reveal gross negligence. The CMA was supposed to analyse the evidence as a whole and come to a balanced and just finding which I believe it could have found in negative.

It is my increasingly firm views that the CMA was wrong to act on Exhibit C10 and base its findings because the said investigation report was not even part of evidence before the Disciplinary Committee and that it was not a basis of the Disciplinary Committee finding. The applicant, Faraja Msaki, denied to have admitted gross negligence on her side. The finding by the CMA that Faraja Msaki admitted gross negligence basing on words quoted from Exhibit C10, which was not part of exhibits before the Disciplinary Committee, is not correct.

In respect of the allegations that were preferred against **Anna Gamba**, as appears in Exhibit C2, the DFE, reads as follows: -

> *"**Irregularity**: Gross Negligence: contrary to Rule 12(3)(d) of offences which constitute serious misconduct under the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 read together with section 6.1.3(e)(ii) and (viii) of the Cash Operating Manual of March 2017, section 3.3(a) of the Operational Risk Policy of October 2017, section 8.6(g) and 8.7(a)-(h) of the Anti-Corruption and Fraud Risk Policy of July 2018, whose appropriate penalty is termination of your employment.*

The particulars of the gross negligence read as follows: -

"Between 29th June 2018 and 09th January, 2019, you authorized cheques payment transaction through account number 01J1019884405 amounting to TZS 751,104,540.00 (Tanzanian Shillings Seven Hundred and Fifty-One Million, One Hundred and Four Thousand Five Hundred and Forty only) and you did not do call back to confirm counterpart signatories;

Moreover, between 2nd July 2018 and 09th January, 2019, you deliberately authorized cheques payment transactions in the system of TZS 415,763,750.00 (Tanzanian Shillings Four Hundred and Fifteen Million, Seven Hundred and Sixty-Three Thousand Seven Hundred and Fifty only) from account number 01J1019884405 without verification from customer's mandate file and you did not call to confirm with counterpart signatory;

Furthermore, between 15th January 2019 and 28th January, 2020, you deliberately approved cheque payment amounting to TZS 1,280,600,830.00 (Tanzanian Shillings One Billion, Two Hundred and Eighty Million, Six Hundred Thousand Eight Hundred and Thirty only) while the cheque had one signature which was inconsistence with the one's customers' mandate file and no call back was done to confirm with the counterpart signatory; and

Furthermore, between 15th January 2019 and 28th January, 2020, you deliberately authorized payments in the systems amounting to TZS 723,095,200.00

(Tanzanian Shillings Seven Hundred and Twenty-Three Million, Ninety-Five Thousand Two Hundred only) while the cheque had one signature, inconsistent with the one's customers' mandate file and no call back was done to confirm with the counterpart signatory.

Your omission above has exposed the Bank to a ***potential financial loss*** *of TZS 2,888,270,501.80 (Tanzanian Shillings Two Billion, Eight Hundred and Eighty-Eight Million, Two Hundred Seventy Thousand Five Hundred and One with Eighty Cents only) and to reputation damage."*

Anna Gamba's response to the DFE is found in Exhibit C2 where in respect of the first allegation she responded that there was no requirement of calling back to a counterpart signatory before payment authorization where among signatories signed the cheque in question. She said, such a requirement is mandatory for third party payments per section 6.1.3(e)(ii) of the COM.

In respect of the second allegation, she stated that the payments were not irregular as they were signed by account signatories as per mandate files, the TPA official letter on change of signatory instruction was silent about deletion of signatories and section 6.1.3 (page 9-10) don't necessitate call back where the cheques were signed by signatories and one of them is present before a counter in the Bank.

In respect of the third allegation, she responded that she used KYC which is a practice and observed that signatures do sightly change especially with aging, she insisted that there were no signature disparities in this case. At no point did she admit the allegation in her Response to the DFE.

In the proceedings, at page 94, Anna Gamba testified admitting that she owed a duty of care and that she discharged her duties within the realms of the Bank policies which were the HR Manual and the COM. For that matter she refuted breaching her duty of care in the discharge of her duties. She stated at page 95 as follows: -

> *"Kwa kadri navyofahamu mimi gross negligence lazima uwe na duty of care, nilikuwa na wajibu na majukumu ambayo nilipaswa kuyatekeleza kwa mujibu wa taratibu na miongozo ya Benki ambayo ni HR Manual na Cash Operating Manual. Kutokana na utaratibu huo sikuwa na breach of duty of care yoyote kwa sababu nilifanya kazi kwa mujibu wa miongozo ya Benki. Hakuna hasara yoyote ambayo nimeisababishia Benki katika utendaji wangu."*

Literally means she understood that she had a duty of care of discharging her duties in accordance with the Bank policies which were HR Manual and Cash Operating Manual. That she did not breach that duty of care because she discharged her duties in accordance with the

directives stipulated in those instruments. Moreover, she didn't occasion any loss to the Bank. Further, Anna Gamba, testified that it was the policy of the Bank that where the signatory appeared personally there was no need of call back for confirmation, unless, the payment concerned a third party.

Further that she got satisfied that there were no signature disparities in the transactions complained of. Moreover, she testified that she was not a final officer, there was also a controller who inspected the transactions, she did daily to verify propriety thereof.

In lengthy cross examination, Anna Gamba stated that she used to verify signatures by comparing with those available in the computer system which were been posted by the Head Office of the Bank. It was not her duty to post or cancel specimen signatures in the said computer system, even a letter from Tanzania Ports Authority did not instruct the Bank to cancel the name of Morris as a signatory.

As it can be seen, Anna Gamba, admitted to have handled the queried transactions, but did not admit breaching the duty of care nor commit gross negligence. The CMA did not analyse her testimony, instead it acted on an interview between the applicant, Anna Gamba and the investigator, one Bruno Mohamed Mchopa. It is from the investigation

report (Exhibit C10) where the CMA quoted part of it and treated the same to be an admission. But the applicant, Anna Gamba, complains that the said investigation report was not availed to her before she entered in the Disciplinary Committee.

On the other hand, in his testimony Bruno Mohamed Mchopa, who testified as DW2, stated at page 34 of the typed proceedings that he investigated the allegations against Anna Gamba, he conceded that the disputed signatures were not examined by handwriting experts, he did not interrogate the accounts owners about signature disparities, therefore his report based on his own opinion.

Moreover, I have navigated through the hearing minutes concerning Anna Gamba before the Disciplinary Committee, (Exhibit C4) it is clear that she pleaded not guilty to the disciplinary charge. Moreover, Exhibit C10 was not among exhibits listed before the Disciplinary Committee to be used against Anna Gamba and the respondent conceded before the Disciplinary Committee that investigation report was not furnished to Anna Gamba. Also, the Disciplinary Committee did not rely on Exhibit C10 in its findings.

This makes me to find that it was not proper for the CMA to assume admission of the allegations of gross negligence on the part of the

applicant, Anna Gamba, whose evidence as well as that of the respondent did not reveal gross negligence. The CMA was supposed to analyse the evidence as a whole and come to a balanced and just finding which I believe could have found in negative instead of relying on an investigation report interrogation, of which contents apart from been unknown to the applicant, Anna Gamba, she denied complicity.

It is my increasingly firm opinion that the CMA wrongly acted on Exhibit C10, investigation report, to base its findings because the said investigation report was not part of evidence before the Disciplinary Committee and was not a basis of the Disciplinary Committee finding.

In respect of the allegations preferred against Mwaya Wambura, as appears in Exhibit C2, the DFE, read as follows: -

> *"**Irregularity**: Gross Negligence: contrary to Rule 12(3)(d) of offences which constitute serious misconduct under the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 read together with section 6.1.3(e)(ii) and (viii) of the Cash Operating Manual of March 2017, section 3.3(a) of the Operational Risk Policy of October 2017, section 8.6(g) and 8.7(a)-(h) of the Anti-Corruption and Fraud Risk Policy of July 2018, whose appropriate penalty is termination of your employment.*

The particulars of the gross negligence read as follows: -

"Between September and October 2019, you in appropriately processed and recommended personal loans disbursement to three borrowers/customers without conducting physical verification/visit to work stations thus causing financial loss to the Bank of TZS 17,275,700.4 (Tanzanian Shillings Seventeen Million, Two Hundred and Seventy-Five Thousand Seven Hundred with Four Cents only); and

On 13th April 2019 and 07th September, 2019, you authorized payment of cheques with numbers 000144 and 000375 respectively of TZS 60,100,000.00 (Tanzanian Shillings Sixty Million, One Hundred Thousand only) f without proper call back confirmation and signatures differed significantly with the ones stipulated on mandate file/form;

Your omissions above have exposed the Bank to a ***potential financial loss*** *amounting to TZS 77,375,700.04 (Tanzanian Shillings Seventy-Seven Million, Three Hundred and Seventy-Five Thousand Seven Hundred with Four Cents only)"*

Mwaya Wambura's response to the DFE is found in Exhibit C2, in respect of the first allegation she responded that there was verification through Lawson System of the employer. However, in that system there was wrong posting of names which read Getrude M. Mpombeye where Getrude Moses Mpombeye was paid a loan borrowed by Getrude Mathias

Mpombeye, that the mistake was without her intention but system mistake.

In respect of the second allegation, she stated that she effected the cash payments but the same payments were not irregular as they were signed by account signatories per mandate files, That, section 6.1.3 of the COM don't necessitate call back where the cheques were signed by one of signatories and that it is mandatory to third party payments which she did.

In respect of the third allegation, she responded that she used KYC which is a practice and observed that signatures do sightly change especially with aging which is permissible. That though there appear some signature differences but the same signatures were signed by the account signatories which has no negative impacts. At no point did she admit the allegation in her Response to the DFE.

In the proceedings, at page 84, Mwaya Wambura testified admitting that she owed a duty of care and that she discharged her duties within the realms of the Bank policies which were the HR Manual and the COM. For that matter she refuted breaching her duty of care in the discharge of her duties. She stated at page 95 as follows: -

"Kwa uelewa wangu, naelewa kwenye uzembe uliokithiri. Mimi kama mwajiriwa nawajibika kutekeleza majukumu yangu kuendana na miongozo na HR ili kuepuka hasara..... hakuna shahidi aliyethibitisha hasara kutokanana huo uzembe wamesema nimefanya... COM inasema call back information haikulazimu kufanya kwa mteja aliyekuja kutoa pesa na ni signatory wa akaunti. Lakini call back information inalazimika kufanyika kwa 3rd party customer." Kwenye hundi ya cash, alikuja mteja, nikakagua kiasi kilicho andikwa kwa maneno na tarakimu nikaangalia sahihi zote 2 katika mandate file katika SAVY System, nikaipeleka kwa supervisor. Kilichopo kwenye hardcopy na mfumo ni zile zile, unaangalia hard copy kama taarifa huoni kwenye mfumo.

Literally means she understood that she had a duty of care of discharging her duties in accordance with the Bank policies. That, there was no need of call back for confirmation, unless, the payment concerned a third party. She inspected the cash cheque and after getting satisfied that the payment was genuine submitted it to her supervisor. The signatures in the SAVY System and the hardcopy mandate file are the same, one referred to the hardcopy after failing to find the records in the System. That, there was no witness who established any loss to the Bank.

In a lengthy cross examination at page 88 of the typed proceedings, Mwaya Wambura stated that she made two cash cheque payments. One of the signatories and another of a 3rd party, in both transactions she followed the laid down procedures, including call back and endorsed at the back of the cheque, then submitted it to her supervisor.

As it can be seen, Mwaya Wambura, admitted to have handled the queried transactions, but did not admit breaching the duty of care nor commit gross negligence. The CMA did not analyse her testimony, instead it acted on an interview between the applicant, Mwaya Wambura, and the investigator, one Bruno Mohamed Mchopa. It is from the investigation report (Exhibit C10) where the CMA quoted part of it and treated the same to be an admission. But the applicant, Mwaya Wambura, complains that the said investigation report was not availed to her before she entered in the Disciplinary Committee.

On the other hand, in his testimony Bruno Mohamed Mchopa who testified as DW2 stated at page 34 of the typed proceedings that he investigated the allegations against Anna Gamba, he conceded that the disputed signatures were not examined by handwriting experts, he did not interrogate the accounts owners about signature disparities, therefore his report based on his own opinion.

Moreover, I have navigated through the hearing minutes concerning Mwaya Wambura before the Disciplinary Committee, (Exhibit C4) it is clear that she pleaded not guilty to the disciplinary charge. Moreover, Exhibit C10 was not availed to her and not tendered as exhibits before the Disciplinary Committee.

This makes me find that the CMA assumed admission of the allegations of gross negligence on the part of the applicant, Mwaya Wambura, whose evidence as well as that of the respondent did not reveal gross negligence. The CMA did not analyse the evidence as a whole and come to a balanced and just finding. Instead, it relied on interrogations in the investigation report of which contents apart from been unknown to the applicant, Mwaya Wambura, she denied the allegations.

It is my findings that the CMA wrongly acted on Exhibit C10 as a base for its findings because the said investigation report was not part of evidence before the Disciplinary Committee.

In respect of the allegations that were preferred against Leah Chamgeni, as appears in Exhibit C2, the DFE, reads as follows:

> *"**Irregularity**: Gross Negligence: contrary to Rule 12(3)(d) of offences which constitute serious misconduct under the Employment and Labour Relations (Code of*

Good Practice) Rules, GN No. 42 of 2007 read together with section 6.1.3(e)(ii) and (viii) of the Cash Operating Manual of March 2017, section 3.3(a) of the Operational Risk Policy of October 2017, section 8.6(g) and 8.7(a)-(h) of the Anti-Corruption and Fraud Risk Policy of July 2018, whose appropriate penalty is termination of your employment.

The particulars of the gross negligence read as follows: -

on 19th January 2019, you facilitated diversion of TZS 12,000,000.0 (Tanzanian Shillings Twelve only) from customer's funds to M-Pesa agent with account number 404362 while there were no official written instructions from the Bank customer to deposit the said amount to M-Pesa

Furthermore, on 13th July 2019, you facilitated payment through cheque number 000280 amounting to TZS 24,780,000.00 (Tanzanian Shillings Twenty-Four Million, Seven Hundred and Eighty Thousand only) without verification and confirmation by the customer service unit while the said cheque had one signature in disparity with the one in customer's mandate file and you did not call to confirm counterpart signatory.

The omissions above you contributed exposed (sic) the Bank to a ***potential financial loss*** *amounting to TZS 36,780,000.00 (Tanzanian Shillings Thirty-Six Million, Seven Hundred and Eighty Thousand only)"*

Leah Chamgeni's response to the DFE is found in Exhibit C2 where in respect of the first allegation she responded that she verified and sought reasons for transferring the money to M-Pesa, account, she got informed that the account holder wanted to pay labourer who had no bank accounts. That there was no instrument in place controlling such a transaction.

In respect of the second allegation, she stated that the COM is silent on requirement of call back where a cheque is brought by a signatory but it is mandatory to third party payments, an act which she did.

In the proceedings, at page 74, Leah Chamgeni testified admitting that she handled the queried transaction but did so after following the whole procedure and asked the purposes for withdrawal of the money whereas the answer she got from Madaraka Robert of TPA was that they were going to pay labourers who had no bank accounts. She stated as follows:-

> *"Tuhuma ililetwa kwangu kwa kuwa niliandika nyuma ya ile hundi kwamba baadhi ya zile pesa zilitoka kwenye akaunti ya M-Pesa. Niliandika hivyo kwa sababu mteja anapokuwa anatoa pesa nyuma ya hundi unaandika maelezo ya malipo ili kuweka kumbukumbu"*

Literally means diversion allegations were raised because she endorsed at the back of cheque that the money was deposited into M-Pesa account, an act which she did for memory purposes. As regard to mismatched signatures payment, she stated at page 75 of the proceedings as follows; -

> *"Tuhuma hizo zote sio kweli. Ukweli ni kwamba nilifanya verification kupitia SAVY Flow System, Saini zilikuwa sawa na confirmation haihusiki kwa mtu anayekuja kuchukua hela kama ni mtia Saini.....hakuna kifungu nilichovunja kilichopelekea hiyo hasara.....ingekuwa kweli basi angeileta kuthibitisha, kuhusiana na hasara ni jambo la kufikirika."*

Literally means that the allegations for non-verification are not true because she verified through SAVY Flow System, confirmation is not needed where the signatory is personally withdrawing his money. She neither breached her duty nor occasion loss.

Leah Chamgeni also testified that neither a handwriting expert about signature disparities, nor account signatories were involved.

In a lengthy cross examination at page 80 of the typed proceedings, Leah Chamgeni maintained her position in examination in chief. She stated that asking for pardon does not mean admission of the allegations.

In respect of Leah Chamgeni, it can be seen that she admitted to have handled the queried transactions, but did not admit breaching the duty of care nor commit gross negligence. The CMA acted on interrogations between the applicant Leah Chamgeni and the investigator, one Bruno Mohamed Mchopa, it did not analyse her testimony. It is from the investigation report (Exhibit C10) where the CMA quoted part of it and treated the same to be an admission. But the applicant Leah Chamgeni complains that the said investigation report was neither availed to her nor tendered before the Disciplinary Committee.

On the other hand, in his testimony Bruno Mohamed Mchopa who testified as DW2 stated at page 34 of the typed proceedings that he investigated the allegations against Leah Chamgeni, he conceded that the disputed signatures were not examined by a handwriting expert, he did not interrogate the account owners about signature disparities, therefore, his report based on his own opinion.

Moreover, I have navigated through the hearing minutes concerning Leah Chamgeni before the Disciplinary Committee, (Exhibit C4) it is clear that she pleaded not guilty to the disciplinary charge.

The CMA assumed the admission of the allegations of gross negligence while the respondent did not prove gross negligence. The CMA relied on

interrogations in the investigation report of which contents were repudiated by the applicant, Leah Chamgeni.

It is my findings that the CMA wrongly acted on Exhibit C10 as a base for its findings because the said investigation report was not part of evidence before the Disciplinary Committee.

In respect of the allegations that were preferred against Zitha Kilongo, as appears in Exhibit C2, the DFE, reads as follows: -

> *"**Irregularity**: Gross Negligence: contrary to Rule 12(3)(d) of offences which constitute serious misconduct under the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 read together with section 6.1.3(e)(ii) and (viii) of the Cash Operating Manual of March 2017, section 3.3(a) of the Operational Risk Policy of October 2017, section 8.6(g) and 8.7(a)-(h) of the Anti-Corruption and Fraud Risk Policy of July 2018, whose appropriate penalty is termination of your employment.*

The particulars of the gross negligence read as follows: -

> *On 05th October 2019 and 01st December, 2019, you authorized payment transactions through cheques number 000407 and 00498 amounting to TZS 38,600,000.00 (Tanzanian Shillings Thirty-Eight Million, Six Hundred Thousand only) while the cheques had only one signatory*

contrary to the customer's mandate file and you did not do a call to confirm the counterpart signature;

Your actions and omissions above you (sic) exposed the Bank to a ***potential financial loss*** *of TZS 38,600,000.00 (Tanzanian Shillings Thirty-Eight Million, Six Hundred Thousand only)"*

Zitha Kilongo's response to the DFE is found in Exhibit C2 where in respect of the allegation of failure to call back she stated that a person who presented the cheque before her was one of the approved signatories, hence didn't breach the COM which in such a situation was silent. She used KYC which is a practice and observed that signatures do sightly change especially with aging which is permissible. She didn't admit the committing gross negligence.

In the proceedings, at page 62, Zitha Kilongo admited that she owed a duty of care and that she discharged her duties within the provisions of the policies and directives of the bank. That the signatures which she acted on were similar and loss was proved. For that matter she denied breaching her duty of care in the discharge of her duties. She stated at page 63 as follows: -

"Mimi nilifanya signature verification na sahihi zilikuwa sawa kabisa kati ya iliyoonekana kwenye hundi, tulitumia system iliyoko kwenye computer inaitwa SAVY. Hakuna

ushahidi wowote uliotolewa na mwajiri kuonesha hizo tofauti. Tuhuma za call back, mwongozo unasema unafanya call back confirmation pale unapokuwa unamlipa mtu wa tatu na sio signatory.....hakuna shahidi aliyethibitisha hasara na hakuna signatory yeyote aliyefuatwa kuulizwa uhalali wa sahihi yake katika hundi husika."

Literally means she verified and found the impugned signature and the one in SAVY System were identical, there was no evidence proving disparity of signatures by her employer. That, there was no need of call back for confirmation, unless, the payment concerned a third party. That, there was no witness who established any loss to the Bank and no signatory was summoned to testify on genuineness of the impugned signature on the cheque.

In a lengthy cross examination at page 66 of the typed proceedings, Zitha Kilongo stated that before the investigator she stated that there was disparity of the signatures in issue, but, denied acting on experience and practice as opposed to established procedures, that the Branch Controller was also responsible for verification.

In his testimony Bruno Mohamed Mchopa who testified as DW2 stated at page 34 of the typed proceedings that he investigated the allegations against Zitha Kilongo, he conceded that the disputed signatures were not

examined by handwriting experts, he did not interrogate the account owners about signature disparities, therefore his report based on his own opinion.

Moreover, I have navigated through the hearing minutes concerning Zitha Kilongo before the Disciplinary Committee, (Exhibit C4) it is clear that she pleaded not guilty to the disciplinary charge. Moreover, Exhibit C10 was not availed to her and not tendered as exhibits before the Disciplinary Committee

This makes me also find, just as for other applicants, that the CMA assumed admission of the allegations of gross negligence on the part of the applicant, Zitha Kilongo, whose evidence as well as that of the respondent did not reveal gross negligence. The CMA did not analyse her evidence so as to arrive at a just finding. Instead, it relied on interrogations in the investigation report of which contents were denied by the applicant.

It is my findings that the CMA wrongly acted on Exhibit C10 as a base for its findings because the said investigation report was not part of evidence before the DC.

From the length analysis of the evidence tendered before the Disciplinary Committee and the CMA is clear that the applicants were charged with

similar allegations of committing acts of gross negligence contrary to Rule 12(3)(d), offences which constitute serious misconduct under the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 read together with section 6.1.3(e)(ii) and (viii) of the Cash Operating Manual of March 2017. That all applicants denied the allegations. That an investigation was conducted and the applicants were interrogated by DW2 Bruno Mchopa, but his report not only that it was not availed to the applicants but also not tendered before the Disciplinary Committee.

It is also gleaned from the record that the allegations against the applicants generally were that they approved various financial transactions by cheques with signature disparity to those of signatories. However, no forensic investigation was carried by handwriting expert. All the applicants testified before the Disciplinary Committee and in the CMA that there were no such disparity and they verified the signatures using specimen signatures posted in the Bank's Computer System called SAVY. It is further gleaned that that none of the signatories were summoned to state on genuineness or otherwise of their signatures and that no loss or damage was proved, but rather it was alleged that there was potential or anticipated loss.

Moreover, there is evidence that there was a supervisor and a Branch Controller, these were also responsible with verifications of propriety or otherwise of the transactions. Despite all these weakness findings in evidence, still the CMA held all the applicants, save the 5th applicant, as guilty with gross negligence.

As stated above, it based its findings on what referred to as admissions during interrogations between them and the investigator, which the applicants repudiated. Moreover, the said report was not tendered before the Disciplinary Committee. In the circumstances, the CMA wrongly acted on evidence which was neither tendered in the Disciplinary Committee nor used to convict the applicants. In other words, it was not part of evidence used by the Disciplinary Committee.

The CMA did not analyse the applicants' evidence as it just assumed that the applicants admitted the allegations during interrogations. I have read the excerpts relied upon by the CMA, the same show admissions by the applicants handling the transaction, they are not admissions of committing gross negligence as defined in the cases of **Donoghue vs. Stevenson (supra), Tanzania Revenue Authority vs. Thabit Milimo and Another (supra), Twiga Bancorp (T) Ltd vs. David**

Kanyika (supra) and **NMB Bank Ltd vs. Aizack Mwampulule (supra).**

It is my understanding of the law that apart from proving existence of a duty of care and breach thereof, it is equally important that the resultant damage, injury or loss must also be proved.

Further, there must be no contributory acts by other officials of the Bank such as supervisors. In the case of **Twiga Bancorp (T) Ltd vs. Zuhura Zidadu and Mwajuma Ally,** LCCD (2015)1 18 where it was revealed that a supervisor was also responsible for verification, this Court, Hon. Aboud, J. stated, inter alia, as follows: -

> *"According to the records of the case at hand, it is undisputable fact that the respondents had a duty of care as cashiers of the applicant. They had a legal obligation to ensure the procedure for posting of funds are adhered so as to protect the applicant from suffering any loss. However, under the circumstances of the case as the records revealed respondents were not the final person to endorse the transaction as they were vouchers which were signed by the Branch Account."*

In the instant matter, it was made clear by Anna Gamba, Mwaya Wambura, Leah Chamgeni and Zitha Kilongo, that they were not final

officers because there was a supervisor and a Branch Controller who were charged with a duty of verification.

The applicants' Counsel argued that not only that the applicants were not charged with gross negligence as a disciplinary offence but also the same was not proved. On the other side, for the respondent, it was argued that though the applicants were not specifically charged with gross negligence, they confessed complicity based on the particulars provided in support of the offences. The case of **NMB Bank Ltd vs Andrew Aloyce**, (supra) was relied upon by Counsel for the Respondent. It is true, this Court rightly held in that case that in banking industry, the employees must exercise his or her duty of care in executing her duties. However, in this matter, as analyzed and found above, there has been neither proof of breach of duty of care nor evidence disclosing gross negligence.

Having found the first sub-issue answered in negative, I now turn to the second sub-issue that is whether termination procedure was fair. This issue does no concern the 5th Applicant Mawazo Nyandwi, whose termination was found to be unfair by the CMA.

Mr. Mazula submissions in respect of the procedure, was in support of the CMA findings that all the procedures were followed. Hie views were

that the none compliance irregularities were so minor such that they cannot be generalized as amounting to unfair procedure. On his side, Mr. Aliki conceded on that position of the law which he termed as check list principle that minor irregularities do not amount to unfair procedures unless they go into the root of the case. I agree on the position of the law as submitted by the Counsel for both sides and as spelt in the case of **Consolata and 2 Others vs. Mansoor Daya and Chemical Company Ltd (supra).**

The issue is whether there are procedural irregularities in this matter. The Applicants Counsel did not submit in detail on the alleged violated procedures. The Respondent's Counsel admitted that there might be some procedural irregularities without explaining but insisted that the same do not go to the root of the case.

The Arbitrator analysed the evidence tendered before her at page 43 of the award referring to Rule 13 of the **Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007** and found that all the basic procedures were complied. According to the Arbitrator, there was investigation of the alleged disciplinary misconducts, the Applicants were notified about the misconducts, were accorded with opportunity to defend before the Disciplinary Committee. I

don't see any reason to differ from the Arbitrators findings as far as the procedure is concerned. All the basic procedures were followed.

However, since I found that there was no proof of fair reasons for termination, then termination of the Applicants' employment remains to be unfair. This takes me to the last sub-issue, that is if the 1st and 2nd issues are answered in affirmative, what are reliefs the 1st, 2nd, 3rd, 4th, and 6th Applicants are entitled and whether the reliefs granted to the 5th Applicant are just in law.

Mr. Aliki submitted in support of general damages, which the Arbitrator declined to grant, persuading this Court to grant the same on grounds that the Applicants the 5th Applicant inclusive, proved their claims that they denied opportunity to be employed in other financial institutions pursuant to a letter written by the Bank of Tanzania (BOT) which required all financial institutions to refrain from employing persons terminated on gross negligence or misconducts. He reasoned that the BOT's letter spoiled their career image. To bolster his point cited the case of **Tanzania Bureau of Standards vs Anita Kaveva Maro,** Labour Revision No. 35 of 2016 (HC) where it was said that sending negative reports to other institutions is a ground for general damages. He also relied on the case of **Stanbic Bank (T) Ltd vs. Abercrombie**

and Kent (T) Ltd, Civil Appeal No. 21 of 2001 (unreported - CAT) where it was held that general damages follow after proof of a claim. On top of general damages, he also prayed for 36 years months' salary compensation.

As far as remedies are concerned, Mr. Mazula relied on the provisions of section 40 of the EALR and Rule 32 of the GN No. 67 of 2007 which provide for 12 months' salary compensation as remedy for unfair termination. He was of the view that there is no general damages in labour law. He supported the findings by the Arbitrator.

In rejoinder, Mr. Aliki conceded that there is no law which provides for general damages in labour laws hence he did not cite any decided case, instead he urged this court to grant the same so as to enrich the jurisprudence of labour law in our jurisdiction.

My understanding of the law as rightly submitted by Mr. Mazula the remedies for unfair termination are found in section 40 of the EAL which reads as follows: -

> *40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months remuneration.

Rule 32 of the GN No. 67 of 2007 only makes reference to section 40 of the EALR.

As it can be seen from the provisions of section 40 cite above, there are three remedies which may be awarded that is reinstatement, re-engagement or compensation. The proviso to this section provides that compensation may be awarded as addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of "any law or agreement".

My view is that the words "any law or agreement" refer to labour laws or employment agreement. Moreover, general damages which are compensatory in nature when awarded in labour disputes are calculated basing on month salaries. It will be double jeopardy to the employers to award monthly salary compensation and general damages for the same

unfair termination transaction. It is on this reason that I decline to grant the prayer by the Applicants for general damages.

In the result, for reasons stated above, I find that the Arbitrator award of compensation of 12 months' salary compensation to the 5th Applicant, after finding that his termination was without fairness, is commensurate with the circumstances of this case.

It is also my findings that termination of the 1st, 2nd, 3rd, 4th, and 6th Applicants was without fair reasons. That the said 1st, 2nd, 3rd, 4th, and 6th Applicants also deserve compensation award, since termination of their employment is under the same circumstances as the 5th Applicant, I also find that they deserve the same compensation.

Consequently, in exercise of revisionary powers of this Court, I do hereby revise the CMA award and quash its finding that termination of employment of the 1st, 2nd, 3rd, 4th, and the 6th Applicants was fair and make the following orders: -

1. The award of 12 months' salary granted to the 5th Applicant, namely, Mawazo Nyandwi is upheld;
2. The said 1st, 2nd, 3rd, 4th, and the 6th namely, Faraja Msaki, Zitha Kilongo, Mwaya Wambura, Anna Gamba, and Leah Chamgeni

respectively are hereby awarded with compensation of 12 months' salary.

It is so ordered.

Dated at Kigoma this 30th day of January, 2023

F. K. MANYANDA

JUDGE