IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

LABOUR REVISION NO. 29 OF 2020

(Arising from the decision and award of the Commission for Mediation and Arbitration at Moshi in Labour Dispute No. MOS/CMA/M/61/2020)

GILBERT KALLAGHO.....APPLICANT

VERSUS

MOSHI UNIVERSITY COLLEGE OF COOPERATIVE AND BUSINESS STUDIES(MUCCOBS).....RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The applicant has made this application under the provisions of section 91(1),(a) and (b), 91(2)(a)(b)and (c), 91(4) (a) and (b), and section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 read together with Rule 24(1),24(2)(a)(b)(c)(d)(e) and (f), and 24(3)(a),(b),(c) and (d) read together with Rule 28(1)(b)(c)(d) and (e) of the Labour Court

Rules, 2007 G.N. NO. 106 of 2007. In the chamber summons, the applicant is praying for the following orders: -

(1) That this Honourable Court be pleased to exercise its Revisional Jurisdiction to call for records and proceedings of the Commission for Mediation and Arbitration (hereinafter referred to as CMA) at Moshi in Employment Dispute No. MOS/CMA/M/61/2010 for the purpose of satisfying itself on the correctness, legality, rationality and propriety of the said proceedings, decisions therein and award delivered on the 30th day of July, 2020 at CMA Moshi by Honourable Lomayan Staphano.

(2) That, consequently this Honourable court, be pleased to revise, quash and set aside the whole arbitrator's Award made thereat in Employment Dispute No. MOS/CMA/M/61/2010, delivered on 30th day of July, 2020 at CMA by Lomayan Stephano.

(3) That the Honourable Court to find out that the applicant was unfairly terminated and consequently reinstate him in his former position without loss of remuneration.

(4) That, this Honourable court be pleased to make any other order(s), that this court shall deem fit, just convenient and necessary to grant

thereof in the interest of Justice, according to the circumstances of the case.

The application is supported by an affidavit deposed by the applicant herein named, Gilbert Kallagho. In it the deponent has averred that he was a public servant employed by the Respondent under a Contract in Permanent and Pensionable terms as the Dean of Students in 2004. During the pendency of his employment, he was a member and office bearer of a Trade union known as Researchers, Academician and Allied Workers (RAAWU) at the Respondent's workplace, and that he has been in the employment for five years until in 2010 when his employment was terminated for the allegation of serious misconduct, absence from station of work without permission and gross insurbordination.

The deponent has averred that following the decision to terminate his employment, he was aggrieved and filed a complaint at the Commission for Mediation and Arbitration (CMA) at Moshi which was registered as Employment Dispute No. MOS/CMA/M.61/2010. The decision and award were delivered by Honourable Lomayan Stephano, the Arbitrator on 30th

day of July, 2020. That the decision dismissed the complaint which made the deponent be further aggrieved.

Under paragraph 7 of the affidavit, the deponent has listed thirty-four grounds challenging the award. I won't reproduce them herein I will consider them in the course of dealing with the application. The applicant assigned paragraph 8 of the affidavit to list a number of issued which arise from the material facts in the case. The said issues are as follows:

i. Whether the respondent had a fair and valid reasons for the termination of the employment of the applicant and followed proper procedures as stipulated under section 37(2) and section 39 of the Employment and Labour Relations Act, No. 6 of 2004.

ii. Whether the respondent adhered to section 30 of Public Service Act, No. 8 of 2002.

iii. Whether the respondent adhered to section 43(1)(c) of the Employment and Labour Relations Act, No. 6 of 2004.

iv. Whether the respondent adhered to the whole of section 47 and 48 of the Public Service Regulations, 2003, G. N. No. 168 of 2003 regarding termination procedures of a Public Servant.

v. Whether it was proper and legally justified for the Hon. Arbitrator to dismiss the Applicants complaints as he did in the award.

The facts of the case are briefly stated in the affidavit although without disclosing the whole picture. In the affidavit, focus has been placed on the dispute rather than what actually happened in the chronological sequence of events. In order to put this matter in a clear perspective, below is a summary to show what happened

The applicant was employed by the Respondent as a Dean of Students in 2004 and his station of work was Moshi College Campus. Evidence was tendered in the Arbitration at the CMA that, at first his employment was placed under probational terms which due to under performance, the applicant's probational period was extended. However, when the status of performance could not change, the applicant was assigned another duty at Ushirika Conference Centre, in the Directorate of ICCDE. According to Dickson Stanley Kyando, who testified in the CMA as DW1, the applicant did not again perform well, so he was transferred to Kizumbi Centre at Shinyanga, this time as a Programme Officer II.

It is on record that the applicant reported at the station, Kizumbi Centre as his new Work Station. On 29/08/2008 he asked for permission, leave of absence from the station of work for five days, to go back to Moshi and then Mbeya to deal with family problems. He secured permission to leave for the days he had requested and left the station. He never went back to the new station, the only clear and express further statement is that he wrote a letter on the 09/09/2008 notifying his Superior, Coordinator of Training that after completion of the permitted time, he has reported at MUCCOBS Moshi to the Director, ICCDE. I could not see any other record showing the applicant ever reported back at Kizumbi Station. That also is the testimony of DW1. Hence, a series of correspondences between the applicant and superiors commenced. The exchange of communication with the leadership of the Respondent Institute on the absence of the applicant at his station of work and reason thereto until it reached a stage on the 11th March, 2010 when the employment of the applicant herein was terminated.

According to the termination letter dated 11th March, 2010 with reference No. MUCCOBS/PF/CPF/9/897 admitted as Exhibit D29, for two reasons: Absence from work station and gross insubordination.

The applicant was not amused with the decision, thus he filed a complaint in the commission for mediation and arbitration at Moshi. According to CMA F1 the applicant challenged the decision on the reasons of unfairness both procedural and substantive issues.

Procedurally the applicant clarified further the unfairness by listing reasons that he was not afforded adequate opportunity by a certain and clear charges; not given the chance and right to be heard; not given an opportunity to appeal and that was expanded further that the disciplinary committee was illegally constituted in terms of its members.

As to the substantive unfairness, the applicant averred that there was nonexistence of labour wrong of absconding or insubordination. He explained that the CMA at Moshi vacated from arbitral award in Labour Dispute No. MOS/CMA/M/294/2008 of 16/2/2009 against the respondent holding that the respondent should pay Tshs. 10,440,370/= to finance the applicant's transfer to Shinyanga and subject to that payment the applicant's stay at Moshi was lawfully justified. The applicant further alleged that the termination of his employment was contemptuous to the Court.

The third complaint was that there was defamation of the applicant by his employer through its principal officer. Mediation of the complaint failed and the matter went to the arbitration stage where parties tendered evidence through hearing of the application. At the conclusion, the commission for mediation and arbitration dismissed the complaint by the applicant for lack of merit. It was found that with the backing of evidence, the applicant was absent from his station of work without permission from the coordinator of the Centre and that he cannot complain that he was not heard as he was summoned but he refused to enter appearance for disciplinary hearing. It was also found that the allegations of misconduct for gross insubordination were valid and backed up with evidence.

In this application, the applicant has stated the reasons of his application and raised the grounds for challenging the decision of the CMA at paragraph 7 of the affidavit and also suggested issues at paragraph 8 of the affidavit.

The respondent however, is opposing the application as demonstrated by the notice of opposition. In the counter affidavit which has been deposed by Mr. Hassan Suleiman Herith; the deponent has stated that the applicant while in the respondent's employment committed serious misconducts,

which were grounds for termination of the applicant's employment and that the applicant was laid down following the procedures prescribed for termination employment. The applicant, according to the averment in the counter affidavit, has failed to show the illegality justifying this Court's interference with the arbitrator's award made in Labour Dispute No. MOS/CMA/M/61/2020.

The application was heard by way of written submission pursuant to the prayer by the parties to have leave to proceed that way and this court granting the prayer. Both parties duly complied to the scheduling order of this Court. The applicant has made a lengthy submission in effort to demonstrate the illegality of the impugned decision of the CMA. His focus has been on clarification on the absence of insubordination and that at no time he has been absent from his work station as charged and or reasons for the termination.

The applicant in his complaint in the CMA as per CMAF1 challenged the decision of the Commission for Mediation and Arbitration on the basis of unfairness both substantively and procedurally.

On the substantive fairness the applicant has submitted that he did not do the act of insubordination. His argument is that the employer, the respondent herein, failed to locate any statement in Exhibit D11. This exhibit is the reference document which according to the charges, it is said the applicant did show an act of insubordination to the Coordinator of Kizumbi Training Center. After all no key witness was called to prove hence the applicant prays an adverse inference be drawn.

As to his absence from his work station, the applicant has basically argued that the respondent has failed to oppose and challenge the evidence that he was not paid transfer expenses hence the applicant did not refuse to go to a new station as alleged in Exhibit D20. Further to that, he is of the firm view that his stay at Moshi Kilimanjaro instead of being at Kizumbi Training Centre is linking to the failure by the respondent to fund the transfer timely, hence he relies on the decision of the CMA in labour dispute No. MOS/CMA/M/294/2008 dated 16/02/2009.

According to the submission by the applicant, the employer, the respondent concede that the transfer expenses were paid on 11/3/2010, which is three

days after termination of the employment. In his opinion the allegations in Exhibit D20 were premature, illogical, irrational hence null and void.

In the submission, the applicant has submitted that reading exhibit D11 and Exhibit D20 the allegations leveled against him were not proved by the respondent. The two exhibits relate to the allegations that he was absent from his work station for a period of time and expressed insubordination to his superior through a response letter Exhibit D11. His argument is that there ought to have been proof of the same and it was necessary that the Coordinator of Kizumbi Training Centre ought to have been summoned to testify on the issue of insubordination. He has cited the case of **Mosolele General Agencies vs. African Inland Church Tanzania [1994] T.L.R. 192** where it was held that:

"once a claim for specific item is made, the claim must be strictly proved...."

The applicant is surprised that the Disciplinary Committee, the Governing Board and the CMA found that the employee committed the misconduct of insubordination. The applicant prayed that he be re-instated into his

employment as per section 40(1) (a) of the Employment and Labour Relations Act, No. 6 of 2004.

The respondent as said earlier was being represented by Mr. Hassan Herith, an Advocate and Corporate Counsel for the Respondent. In the submission he has argued that the application is totally misconceived, highly misleading and without merit. He argues that the application is incompetent for failure to set out in the affidavit is support of notice of application a statement of reliefs sought. In the applicant's affidavit there are no reliefs sought, which failure is a contravention of mandatory provisions of Rule **24(3) (c) and (d) of the Labour Court Rules G.N No. 106 of 2007** which provides that:

> *"(3) The application shall be supported by an affidavit which shall clearly and concisely set out:*
>
> *(a) a statement of legal issues that arise from the material facts; and*
>
> *(b) the reliefs sought."*

The respondent has submitted that the failure to set out relief is a contravention of mandatory provisions of Labour Court Rules, 2007 hence the applicant's application is incompetent before this Court. He has prayed the same to be struck out with costs.

The respondent also has submitted that the above quote provisions of Rules, particularly Rule 24(3) (c) and (d) of the Labour Court Rules G.N No. 106 of 2007 has the purpose of restricting parties to the suit to focus on the raised issues. The applicant raised issues at paragraph 8 of the affidavit (which issues have been quoted herein above (at page 4). The applicant in his submission has submitted in lengthy on the fairness of procedures and reasons of termination. The counsel for respondent has submitted that the applicant has failed to submit on issues which were set out in the affidavit as arising from the material facts. Instead, he has raised new issues during submission which is an abuse of Court process and procedure. He has thus urged this court not to entertain the same. The new issues are not acceptable as are contrary to the acceptable legal position laid down by the cited law and also the case of ***The Registered trustee of Archidiocese of Dar Es Salaam vs. Chairman Bunju Village Government and***

others, Civil Appeal No. 147 of 2006, Court of Appeal of Tanzania at Dar es Salaam (unreported at page 7 where the Court observed that:

> *"Since as correctly submitted by Mr. Mhango an affidavit is evidence we think it was expected that the reasons for the delay would be reflected in the affidavit. In the absence of reasons it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him.*
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> *We appreciate Mr. Elmaamry's point that a political settlement out of Court was given in the written submissions as a reason for delay. With respect however, submissions are generally meant to reflect the general features of party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence".*

The counsel has submitted that this Court should not grant the application the counsel for respondent has submitted further that the grounds for the application are set forth in paragraph 7(1) – 7(XXXIV).

In the submission, the has brought up new issues which are not founded in the affidavit, hence an afterthought. They were not raised in the CMA and CMA Form 1 and also his opening statement. His argument is that the whole application in this Court is an afterthought. The party is barred from setting out new facts at the High Court level. The counsel for the Respondent opines that the application be dismissed.

According to the respondent's counsel, the issues at the CMA were three: - whether the termination was procedurally fair and to what reliefs are the parties entitled. As a matter of law, the respondent, the employer is duty bound to, under Rule 9(3) of G.N 42 of 2007, establish the fairness of the applicant's termination. Two witnesses were called to testify namely Dickson Kyando (DW1) and Marietha Shell (DW2) and total of 33 documentary exhibits were tendered and admitted. The applicant had one witness himself (CD1) and tendered 15 documentary exhibits.

The respondent's counsel has taken off with the argument that the applicant's employment with the respondent was legally a nullity and therefore not worthy to discuss its fairness or otherwise. He has submitted that it is clear from the applicant's application letter and his CV admitted as

exhibit D1 collectively, that the applicant was previously employed by another Public Institution, the College of Business Education (CBE) but he did not disclose how the previous employment was terminated.

At the hearing in the CMA, when the applicant was being cross examined on the 12th November, 2019, the applicant informed the CMA that he terminated his previous employment by resignation from the employment. However, no any evidence was produced to verify his resignation from his previous employer, the College of Business Education (CBE). The applicant also admitted to have not obtained approval from the Chief Secretary for him to be re-engaged in the Public Service. This is in contravention of the mandatory provisions under Order D. 15 (1)(3) of the Standing Orders for Public Service, 2009 which provides that:

"D.15: Employment of a Person convicted or dismissed from the Public Service,

(1) a person who has been dismissed from the Public Service previously shall not be engaged for employment in the Public Service without prior sanction of the Chief Secretary.

(3) Any such person who wishes to be re-engaged in the Public Service shall be required to seek the sanction of the Chief Secretary by applying through Permanent Secretary (Establishment)."

The Counsel has submitted that the above quoted provision of law is coached in mandatory terms and there is no room for a Public Servant who resigned from the public service who can be re-employed in Public Service without seeking sanction of the Chief Secretary submitted through Permanent Secretary (Establishment). Since that was not done, the applicant gave false information regarding the status of this previous employment with the College of Business Education when he was employed.

The counsel for the respondent went further to submit that the act of not disclosing the previous employment is an indication that the applicant committed a fraudulent act of cheating in order to be employed and in terms of Rule D.12 of the standing order for the Public Service, 2009 this was a sufficient reason for his termination. The Rule provides as follow:

"D.12 giving false information an applicant who gives any false information shall be disqualified to the recruitment post and if such

falsification is realized after the appointment he shall be liable for disciplinary and criminal proceedings".

The Rule is applicable to the present situation facing the applicant and therefore there was no proper employment in the first place hence the employment of the applicant was properly terminated. The counsel has cited the case of **Janeth David Humphrey Versus Moshi University College of Cooperative and Business Studies,** Labour Revision No. 20 of 2021 that:

"In the circumstances, the applicant had a moral and professional duty, first to get the chief secretary's sanction before engagement to the respondent's institution. Secondly, to disclose her previous work experience to the respondent, failure of which her contract of employment was in straight terms void ab initio"

Basing on the above submission relying on the issue of non-disclosure of the previous employment, Mr. Hassan has submitted that the employer had a valid reason for termination of the applicant's employment contract and as a result the applicant's termination was substantively fair.

The counsel for the respondent also submitted on an alternative, assuming that the applicant's employment was proper on the issue whether the reason and procedure for termination were valid, the counsel answered in an affirmative. The counsel for the respondent has traced the argument from the evidence recorded during hearing in the CMA. On the 12th November, 2019, the applicant admitted to the fact that he was never confirmed at the position of Dean of students: instead of the position he was employed, his position was changed and was taken to ICCDE, conference and finally to Kizumbi Training Centre at Shinyanga as Programme Officer II. The counsel relied on exhibit D2, D3, D4, D5 and D6. He also argued that since the applicant was not confirmed at his position as Dean of students, at the time of termination he was still a probationer and in law he was not entitled to challenge the termination of his employment on grounds of unfair termination.

The applicant, however, has opposed the point arguing that due to lapse of time he was already confirmed at his position as the dean of students. That has been countered by counsel for the respondent who has cited the case of ***David Nzaligo Vs. National Microfinance Bank PLC, Civil Appeal No. 61 of 2016, Court of Appeal of Tanzania at Dar es Salaam***

(unreported). In that case, the Court considered the status of employment where the employee exceeds the time set for probation. It was held that

> *"We are of the view that confirmation of an employee on probation is subject to fulfilment of established conditions and expiration of the set period of probation does not automatically lead to a change of status from probationer to a confirmed employee".*

The counsel submitted therefore that at the time of termination the applicant was still a probationer. The question then is whether the probationer is legally entitled to challenge the termination of employment on the ground that it is unfair termination. The answer is in the above cited case. At page 22 the Court of Appeal of Tanzania held;

> *"We find the import of section 35 of ELRA though it addresses the period of employment and not the status of employment, the fact that a probation is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination it suffices that when assessing this provision, it is a provision that envisages an employee fully recognized by an employer and not a probationer".*

A probationer is not an employee fully recognized by the Employer and not protected by the provisions of the Employment and Labour Relations Act, 2004 on unfair termination.

On another angle the counsel for the respondent has submitted that even if the applicant would have been an employee fully recognized by the employer, and protected by the provisions of the Employment and Labour Relations Act, 2004 on unfair termination still the applicant's termination was fair both substantively and procedurally. It is substantively fair because there is ample evidence that his termination was based on grounds of misconduct committed at the work place.

It is clear that according to Exhibit D8 and D9 the applicant was given by his boss coordinator of Kizumbi Training Centre, five days permission of absence from his work from 1/9/2008 to 5/9/2008. He wrote a letter notifying his coordinator that he has reported to Director, ICCDE. Therefore, he never reported back until his termination on 8th March, 2010. The applicant was thus absent from his work station for the period. The applicant also wrote a letter to his superior, Exhibit D11 which had its contents with insubordination to his superior. The counsel has cited item 9 of the

Employment and Labour Relation (Code of Good Practice) Rules, 2007 G.N No. 42 of 2007.

"General offences and breaches of organizational Rules.

OFFENCES THAT MAY CONSTITUTE SERIOUS MISCONDUCT AND LEAD TO TERMINATION OF AN EMPLOYEE ABSENCE

1. *Absence from work without permission of without acceptable reason for more than five working days*

   INSUBORDINATION

   Commission of serious or repeated act of insubordination at the employee or during working hours against the employee."

The counsel submitted that the employer's decision to terminate the applicant was based on a valid reason.

On the question as to whether the applicant's termination was procedurally fair, the counsel answered in affirmative. The counsel has submitted that there is ample evidence that the employer followed the procedure laid down under *Rule 13(1) (2) (3) of the Employment and Labour Relation (Code of Good Practice) G.N. No. 42 of 2007.* The same provides that:

"13(1) The employer shall investigate to ascertain whether there are grounds for a hearing to be held

(2) where a hearing is to be held the employer shall notify the employee of the allegation using a form and language that the employee can reasonably understand.

(3) The employee shall be entitled to reasonable time to prepare hearing and to be assisted in the hearing by a trade union, representative or fellow – employee. What constitutes a reasonable time shall depend on the circumstances and complexity of the case but it shall not normally be less than 48 hours".

In the case of **W. Stores Ltd Vs. George Wandiba and two others, Revision No. 26 of 2007, High Court of Tanzania (Labour Division) at Dar es Salaam** (unreported) Hon. Mandia J (as he then was) observed:

"Under Rule 13(1) an employer is enjoined to investigate to ascertain whether there are grounds for hearing to be held. Once the employer decides that a hearing is necessary, he must serve the employee with the allegations against the latter and afford him a chance to prepare his/her defence. The local trade union or

fellow employee is given a chance to assist the accused employee. At the hearing evidence in support of the charge and evidence in denial is given before a decision is made".

In the present case, according to the counsel for the Respondent, the employer complied to the provisions of law ad afforded the applicant a fair procedure to prepare, and even to propose change of hearing date. He was also informed this right to bring witnesses. The counsel referred this court to the exhibit D16 and D20 which were communications of the applicant to his employer and vice versa.

The counsel for Respondent submitted that the respondent's decision to proceed with an exparte disciplinary hearing was proper because it was based on the law. The law under Rule 13(6) of the Code of Good Practice GN. No. 42 of 2007 provides that:

"Where an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee"

That was done and recorded in exhibit D23 Hearing form. The employer ensured fair hearing for the applicant by affording the applicant the right to have representation and the right to call witnesses against the allegations

but the applicant chose not to defend himself and that was underscored by testimonies.

In conclusion the counsel has prayed that the applicant is entitled to nothing other than dismissal of his claims. The claim in the CMA F1 for reinstatement is practically impossible because, in the first place the applicant was not entitled to be employed by the respondent for having been previously terminated from public service; claims of payment of the sum of money is untenable as well as the that there is no basis for issuing a certificate of service. He has prayed on basis of authorities the applicant's application be dismissed.

The applicant has submitted in rejoinder that the employer's argument that the applicant gave false information and thus contravened the provisions of Public Service Standing Order, 2009 is an afterthought and are intended to mislead this court. He has referred to Exh. D1 which is the application letter to the post of Dean of Students wherein he alleges that he disclosed information of his previous employment.

The applicant has basically reiterated the submission in chief denying the allegations levelled against him and urged this court to allow the application.

I have read the submissions which were lengthy; the applicant was terminated from his employment basically for serious misconduct as stipulated under Rule 9 of the schedule to the ***Employment and Labour Relations (Code of Good Practice) Rule, G.N. No. 42 of 2007.*** The said misconducts are absence from work place and act of insubordination to his superior. The record shows, the applicant was employed as the Dean of Students in 2004 and due to underperformance, he was not confirmed on the position but transferred to ICCD, Conference where again he could not perform according to the employers' standard. He was thus transferred to Kizumbi Training Centre at Shinyanga and his position had changed to Programme Officer II where he reported; and, on 29/08/2008 asked for permission, to travel for five days from 1/9/2008 to 8/9/20008 to Mbeya and Moshi Kilimanjaro so that he may attend family issues. It is in evidence that he never went back to his station of work until he was terminated from his employment.

In the record, exhibit D8 is a letter he wrote to the coordinator of the Centre on 9/9/2008 that he was informing him that after completing his leave of absence from work, that is the five days, he won't be available at Kizumbi Centre at Shinyanga (MUCCOBS Kizumbi). He will be reporting to MUCCOBS

Moshi to the Director, ICCDE. The reason he advanced is that he will be working on his transfer to Kizumbi Centre. He also informed him that he will report back after completing transfer procedure. The record shows he never reported as shown above. In the submission, the applicant has denied that he was absence at his work place without permission. His account is that he has never been absent from duty instead the alleged that he was at work place, working at Director ICCDE and also he has referred to the testimony of witnesses DW1 and DW2 that they were aware of his presence at the workplace as Secretary of Trade union RAAWU. The applicant referred this Court also to exhibit D5, a letter dated 22/07/2008 reference No. MUCCOBS/CC/C/PF/897 which is a letter with the heading: TRANSFER TO MUCCOBS – KIZUMBI. In the letter the Director of ICCDE is requested to provide the applicant details of job description including the attendance performance criteria.

In my understanding the applicant through exhibit D8 informed his superior that he is reporting to Director of ICCDE. There is no evidence anywhere that he was assigned to report there or there was any justification that he has been authorized by his superiors to be there for whatever reasons, for example, in the letter dated 30/07/2009 with reference No.

MUCCOBS/CPF/9/897 which was tendered as exhibit D18, the Principal of the College (Mkuu wa Chuo) wrote to the applicant asking him to show cause why disciplinary actions should not be taken against him for absence at his workstation. Excerpt read as follows:

> *"Barua hii Ilikutaka utoe maelezo ni kwa nini uslchukuliwe hatua za kinidhamu kwa kosa la kutokuwepo kwenye kituo chako cha kazi kuanzia Februari, 2009 hadi sasa kwa mujibu wa sheria zilizopo.*
>
> *Hadi tarehe ya barua hii yaani tarehe 30/07/2009 hujatoa maelezo hayo".*

He was thus given 48 hours to respond. In the reply letter dated 31/07/2009 (exhibit 19) the applicant wrote:

> *"Napenda kukutaarifu kuwa sijakataa kujibu barua yako ya tarehe 15/07/2009, ila katika barua hiyo ambayo nakala yake nimeambatanisha, haikuwa imetoa muda maalumu niwe nimewasilisha majibu yangu. Nilipokuwa nakusudia kuwasilisha majibu yangu, nikapokea barua yako nyingine yenye mada tajwa hapo juu ya tarehe 30/07/2009.*

Sistahili kuchukuliwa hatua yeyote ya kinidhamu kwa muda tajwa hapo juu. Niliitoa taarifa ya maandishi kwenye kituo cha kazi nilicho hamishiwa kuwa nipo hapa makao makuu ninamalizia kukamilisha maswala ya uhamisho na nitaripoti kituoni huko mara nitakapo kamilisha taratibu hizo. Hivyo basi sijakataa kwenda kituo kipya cha kazi na wala sijatoroka kutoka katika kituo cha kazi".

The letter referred in the response is exhibit D8, which was written on 9/9/2008. The charges were absence from work station for more than five days from 29/8/2008. Obviously, in absence of permission, the only explanation is that the applicant decided on his own will to stay at MUCCOBS Moshi and not MUCCOBS – Kizumbi and there is no further need of explanation. He was absent from his work station as alleged and it was proved and admitted by himself in writings.

As to the charges of insubordination, reference is being made to the letter to the coordinator Kizumbi dated 26/11/2008 with the hearing SHUTUMA KUWA SIPO ENEO LA KAZI. It was translated to demean the authority of his superior, hence insubordination;

An excerpt in the letter reads: -

"...katika barua yako, umekiri kuwa nilikuelekeza kuwa niko MUCCOBS Moshi nikifuatilia utaratibu wa uhamisho.

(i) jambo hilo uliliafiki ndio maana ulikaa kimya kipindi chote hicho.

(ii) Ni mimi ndiye niliyepagwa kukueleza kuwa nimeshalipwa haki zangu hizo au la, na siyo mtu mwingine.

(iii) Ni taratibu sahihi kumuuliza kama nimemaliza kama nimemaliza shughuli hiyo ya kufuatilia au la, kama umeona muda mrefu umepita name niko kimya, ni vyema ungeniuliza kama nimeshalipwa au laa..."

In the case **of Knight Support (T) Ltd Vs. Yahaya Aswed & Others, Labour Division at Dar es Salam,** Revision No. 106 of 2015, 7/10/2015, Nyerere, J. the respondents were terminated for alleged reasons of gross insubordination due to refusal to sign a decision of the disciplinary committee a reason which was not disputed by the parties, what they disputed was the reason which gave rise to the disciplinary committee which charged them for gross negligence which resulted to the occurrence of theft. In the event the Court found respondents were terminated for valid reasons.

In this case, the applicant was absent but also he could not see any need to seek permission or any way to alleviate the situation as to render it more practical at the benefit of both parties; that is seek arrangement to justify his stay out of work station. In my view, the acts were out of proper office arrangement. Thus, substantively there was a valid reason for termination assuming all other factors were proper as it will be discussed later.

On procedural fairness, the applicant has complained that he was not fairly terminated due to uncertain and unclear charges, not given right to be heard, and not given an opportunity to appeal and that the constitution of the committee was illegal.

The applicant allege that he had unclear and uncertain charge that is referred to the reference to abscondment and absence from place of work. However, the record shows the main charge against the applicant is absence from his station of work and insubordination. That can be drawn by reading Exhibit D17, D18, D19 and D20. It is absence from duty without permission. It cannot be said there was another charge than that one, save for the second count insubordination. In this case the relevant document is exhibit D20 and

exhibit 23. The record shows he did not enter appearance, so hearing was conducted in his absence.

In the letter of notification, the applicant was also informed of his right to have a representative a witness or colleague. It is difficult to understand the wrong alleged. In my view and opinion, the applicant slept over his rights and complaint at this level an afterthought not backed up with evidence.

The counsel for the respondent raised two issues which are extended probation and that of failure to disclose the previous employment before being employed with MUCCOBS.

As to the extension, the applicant has submitted that no evidence has been or was tendered to show that there was an extended probation for the applicant on his probation. In my understanding according to the case of **David Nzaligo Vs. NMB PLC.** (supra) confirmation of an employee who is on probation is subject to fulfilment of established conditions and expiration of the probation period does not automatically lead to a change of status from probation to a confirmed employee. Up to this level, the Court did not mince words it was categorical. So long as there was no letter confirming the applicant from probationer to confirmed employee, it is clear that he

never graduated to that level. However, I wouldn't say for sure he remained to be a probationer in his position as Dean of Student. Since there was change of his employment to Programme Officer II. No details were given thus it is safe to say the applicant's employment was terminated while he was a Programme Officer II under the Director of ICCDE at Kizumbi Training Centre. It is however, not clear, at which position he was arguing his position as he seems not to have accepted the changes.

However, given the issue of previous employment in the public office at CBE and there being no any approval from the chief secretary for re – employment, the applicant's employment was, on the strength of law and rules as cited by the counsel for the respondent, which I subscribe to, void ab initio.

For the reasons and explanations given, it will be noted and appreciated that the Arbitrator had rightly decided that this application has no merit to which position I have no reason to fault, hence this application is hereby dismissed.

It is ordered accordingly.

T.M. MWENEMPAZI
JUDGE
16/05/2023