IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

REVISION APPLICATION NO. 67 OF 2022

(Originating from Dispute No. CMA/ARS/472/21/11/22)

GWAMAKA JACKSON MWAMBONA _____ APPLICANT

VERSUS

CROWN PAINTS TANZANIA LTD _____ RESPONDENT

JUDGMENT

24/05/2023 & 14/07/2023

BADE, J.

The Applicant herein has been aggrieved with an award of the Commission for mediation and Arbitration in labour dispute No. CMA/ARS/ARS/17/2019. The Applicant moved this court under section 91(1), 91(1) a, 91(2), (c) and 94(1), (b), (i) of the Employment and Labour Relations Act 2004 (Act No.6 of 2004) Rules 24(1), (2)(a), (b), (c), (e), (f) and (3)(a), (b), (c) and (d), Rules 28(1), 28(1), (c), (d) and (e) of the Labour Court Rules G/N No.106/2007).

The Applicant had below prayers as presented in his chamber summons supported by his affidavit that, this Court be pleased to revise and set aside the whole award of the Commission for Mediation and Arbitration at Arusha (Hon. Anonisye – Arbitrator) in Employment and Labour case No. CMA/ARS/472/21/11/2022.

i. That, the award is bad in law since it was pronounced after the lapse of 30 days.

ii. That, this Court be pleased to call for the records and proceedings, revise and set aside the arbitrator's award delivered by Hon. Anonisye, to satisfy itself as to the correctness, legality and the orders contained therein in Dispute No. CMA/ARS/472/21/11/2022 delivered on the 28th October 2022.

The basis of the Applicant's prayers is upon the following grounds adduced via the notice of application for revision:

i. That, the presiding Arbitrator wrongly erred in law and in fact to hold that, the investigation was conducted via exhibit D3, while exhibit D3 was the internal audit and there was no documentary evidence adduced by the respondent herein to show how the investigation was conducted to justify the allegations against the applicant herein.

Further that, audit report on customer accounts management which is marked as exhibit D3 is relevant to the requirement of labour rules which require the employer to conduct the investigation.

ii. That, the presiding arbitrator erred in law and in fact to hold that, the evidence to support the allegations against the applicant was presented at the hearing, while the evidence adduced by respondent clearly showed that the applicant was not given a proper opportunity to question the witness called by the respondent herein. Further that, the charge was not investigated and witness was not interviewed.

iii. That, the presiding arbitrator erred in law and in fact to hold that respondent had valid reasons and procedure was followed to terminate the contract, while the Respondent herein failure to conduct the investigation as required by the code of good conduct and practise, and further that, the procedure to prove the misconduct was not followed since the company rules and policy was not impressed during the hearing.

iv. That, the presiding arbitrator erred in law and in fact to hold that the complainant is not entitled to be compensated with the remaining period of the contract of eighteen months, while the procedure was

not followed and there were no valid reasons to warrant the respondent herein to terminate the complainant contract.

v. That, the presiding arbitrator erred in law and in fact for holding that the complainant fails to prove the claims of transportation to home domicile (Dar es Salaam) and subsistence allowance, while the transportation allowance was paid during the mediation and partial settlement was signed under CMF F.7 dated 25th January 2022.

The highlight of this matter is that, the applicant was an employee of the Respondent in the position of Assistant Sales Manager from 01s1 January 2021 the Applicant was employed under renewable contract for specified period of time for a period of two years. On 24th November 2022 it is alleged that the Respondent unfairly decided to breach the applicant's contract with unjustifiable reasons of termination evidenced on Exhibit P5.

The facts to the instant Revision Application is that on 20th December 2021 the Applicant herein referred the dispute at CMA against unfair termination basing on the breach of contract. The Award was delivered on 28th October 2022 by Hon. A.K. Anonisye, Arbitrator after the lapse of statutory thirty days from the conclusion of the arbitration proceedings which is contrary to section 88(1)(i) of the Employment and Labour -Relations Act, [CAP 366

R.E.2019] together with rule 27(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rule. No. 67 of 2007.

Parties had sought to argue the Revision application by way of written submissions and were so granted a filing schedule that they had complied with. The applicant was represented by Mr. Herode Bilyamutwe, a Personal Representative while the respondent had the services of Advocate Emmanuel Shio. They both were quite industrious with lengthy submissions covering every aspect of the issues at length.

The Applicant put forth his argument that he challenges the Award of the Commission for Mediation and Arbitration in Dispute No. CMA/ARS/ARS/472/21 /11/22 against the material irregularities including being composed without adhering to proper procedure as laid under section 37 of the Act, and rule 12 and 13 of the Code of Good Practice Rules, 2007.

He clarifies that the dispute was on unfair termination based on breach of contract, the Applicant prayer was to be paid the remaining period of the employment contract, subsistence allowance, transportation to home domicile and certificate of service.

He submits that, he has carefully and thoroughly passed through the Award

delivered by the Trial Arbitrator and there is nowhere, the trial Arbitrator addresses or indicates the first issue of *Whether the Respondent breached the complainant's employment contract was answered, in affirmative or otherwise,* to answer the remaining other issues. In his views, it seems the Arbitrator completely ignored to indicate the determination of first issue. This he maintains, was a procedural irregularity.

It is a fundamental principle of adjudication that each issue is to be definitely resolved and failure of which renders the entire decision be shrouded by wanton infraction of the Law. This was stated in the case of **Shekh Ahmed Said vs The Registered Trustee of Manyema Masjid** [2005] TLR 61, where the Court held that:

"It is an elementary principle of the pleading that each issue framed should definitely resolve one way or the other. It is necessary for trial Court to make specific findings on each issue framed in a case.

Furthermore, he cited the case of **Hanil Jiangsu JV Limited vs Lucy Paulo Iwawutu,** Rev. No. 25 of 2020, where the position on the unresolved issue is cemented.

He contends that the Arbitrator erred in holding that the respondent had a valid reason to terminate the applicant while there is no supportive documentary evidence adduced by the Respondent to justify the same that the applicant entered into the customer's account without following the procedure. It is his further averment that, it should be noted that, exhibit D7 at page 1 paragraph 2, he quoted the said exhibit as follows:

"You have irregularly and unilaterally used cred customer accounts to serve other customer thus leading to *tremendous loss of company/products"*

This is quite different with the findings of the Hon. Arbitrator during determination of the issue, who states at page 1 that:

"*mantiki inayopatikana kwenye vielelezo P4 na D7 ni kwamba, ni kweli kuwa mlalamikaji alikuwa akiingia* kwenye *akaunti* za wateja *pasipo* kufuata utaratibu na kutoa mali ya mlalamikiwa"

He argues further that in view of that finding the Award of CMA is questionable, contending that in case the Applicant entered into the customer's account and take the respondent's goods in bad intention, he should have been charged with gross dishonest not gross negligence or

misconduct as it is merged in the disciplinary findings. It is his further submissions that, during the hearing of the Respondent's witness (DW1), while under examination in chief the commission was never told that the applicant has taken the respondent's goods. Also there is no documentary evidence to prove that the company incurred loss as per exhibit D2.

In further submissions, he states that the Learned arbitrator failed to consider that, there is no documentary evidence tendered by the respondent that the applicant had a previous bad record to result in the termination. He argues that this is the position of rule 12 (4) (a) (b) and (5) which provide that the first offence of an employee does not justify termination unless it is proved that the misconduct is so serious that it can make a continued employment relation intolerable. These provisions cited above require the employer to consider all the requirements set out by rule 12 of the code, therefore there was no fair reason for termination since there was no any record tendered by the respondent during the Disciplinary Hearing to prove the same, and the termination for the reason of exhibit D7 and P4 is irrelevant to the requirement of rule 12 the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 which states the fairness of the reason. He thus prays that this Court should make a finding

on the impropriety and revise the CMA award accordingly.

In a further submission, the issue of *whether the procedure was properly followed* the learned arbitrator erred in holding that the procedure followed while there was no documentary evidence tendered before the Commission to justify the disciplinary steps taken on the respondent before termination of the Applicant. He also submitted that, exhibit D3 are not supportive documents to justify the procedure, as the Applicant was not availed any charge and investigation report after suspension. The disciplinary action stated under exhibit D2 with a suspension letter show that the applicant has been suspended from work and advises the outcome of the investigation, after the preliminary audit which resulted into suspension, while the investigation was not conducted. Exhibit D2 at page 1 reads

"you *will be accordingly advised of the* outcome of the *investigation*"

He argues that the employer was aware that after suspension the investigation report is mandatory as per Rule 13 and the applicant should have been availed with it for his defense. He reasons, exhibit D3 the Audit Report on customer Account Management is the result of exhibit D2 the

suspension letter, and that in his view, Exhibit D3 is not an investigation report as stated in Arbitrator's Award.

Thus the applicant was not properly afforded a right to be heard since there was no investigation report issued to the Applicant after the suspension. Rule 12 of the Code sets out the bench mark, which the employer is bound to follow. Further Rule 13 sets out the procedure requiring the employer to conduct investigation to ascertain, whether there are grounds for hearing to be held. Rule 12(1) and 13 of the Code contains a number of guidelines in case of termination for misconduct which makes it mandatory for the employer to conduct an investigation to ascertain whether there are grounds for a hearing to be held, but the employer did not do so. Further the applicant was terminated directly without mitigation with an offence he was not charged with, citing the case of **NMB Plc Ltd vs Anael Thomas Maleso**, Revision No. 65 of 2019, at Mwanza; and Rule 13 (7) of the Code of Good Practice GN No. 42 of 2007 which provides that;

13(7) Where the hearing results in the employee being found guilty of the allegation under consideration, the employee shall be given the opportunity to put mitigating factors before a decision is made, together with brief

reasons.

This he reckons to be the position of the High Court, Labour Division in the case of **Furniture Collection Ltd vs Ally Salehe,** Revision No. 13 of 2021, at page 9 where it was held:

According to the wording that rule 13(7) of the Employment and Labour Relations(Code of Good Practice) G.N. No. 42 of 2007, it is a mandatory requirement of the law that, whenever an employee is found guilty by a Disciplinary Hearing Committee before imposition of any sanction, such employee must be given an opportunity to mitigate.

He firmly insists that skipping the process of disciplinary hearing after investigation; and failure to afford the applicant to mitigate after he was found guilty is material irregularity as it denied the applicant an opportunity to be heard.

Further, he argues that the learned arbitrator was erroneous to hold that Exhibit D3 was an investigation report while in the real sense it was a routine periodic customer report. The respondent failed to conduct the investigation as per the law. This is the position of this Court, in the case of **Yetu**

Microfinance Bank Plc vs Geofrey Dickson, Revision No. 23 of 2019, at page 11 holding that:

"....the employer failed to investigate the matter as required by the law and come up with an investigative report to that effect. Instead the employer had an audit report instead of investigation report. Thus faulted legal requirements"

In further argument, he maintains that even if the said account audit report is held and be relied by the Arbitrator to be an investigation report the same was not supplied to the Applicant before Disciplinary Hearing. In this regard, he urges, the applicant was terminated without being afforded the right to be heard, amounting to a fundamental irregularity. It was not fair to disregard the Applicant in the process of auditing as it was held in the case of **Severc Mutangeki and Rehema Mwasandube vs *Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)***, *where* the Court of Appeal of Tanzania, at page 19, held that:

The non-involving of the appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for the

hearing before the Disciplinary Committee of the respondent. Instead, it is the respondent who being in possession of the report and had all the ammunition to make a stronger case which was to the disadvantage of the appellants rendering what followed to be unprocedural.

He made reference to the case of **Kiboberry Limited vs John Van der Voort,** Civil Appeal No. 248 of 2021, at page 9, where the Court of Appeal held:

"As we held in Severc Mutegeki (supra), failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity. Inevitably, we uphold the concurrent finding by the courts bellow that the appellant failed to demonstrate that the impugned termination was for a valid and fair reason"

He submitted that the third issue as to which relief parties are entitled, is governed by section 40(1)(a)(c) and (3) of the Employment and Labour Relations Act, [CAP 366 RE 2019]. In his view, since the respondent failed to comply with labour laws particularly the Code of Good Practice, and due

to the nature of employment to be a fixed employment contract, the applicant is entitled to be paid 18 months the remaining period of the employment contract, equal to TZS 42,049,242.

Responding, the counsel for the Respondent submits as he adopts the notice of opposition, counter affidavit sworn by the Respondent's Human Resources Manager dated 3rd March, 2023. The Respondent submits that, the CMA F1 the Applicant indicated that his cause of action against the respondent is for the breach of contract and drew attention of this court at CMA F1 regarding this fact. According to the said form, there are listed a few causes of action for the litigant to tick the appropriate box which matches his cause of action; insisting on the importance of choice of the cause of action as the basis of the dispute that guides the subsequent procedure to be adopted in the framing of issues and ultimate prosecution, defense and award delivery on the dispute. He submits that in his view, as is evident from the records, the dispute between the parties that constituted the ***litis contestatio*** between them is a breach of contract and not the fairness of termination of the employment contract.

He argues, If the claimant had decided to join the two causes of action in

one case, he would have done so. Part B of CMA F1 inter alia requires a claimant who alleges unfair termination of employment, to specifically plead on the fairness of reasons and procedure. Once the claimant pleads on those aspects they will then form part of issues for determination of the claim for unfair termination in the subsequent stages of the proceedings. Failure to plead these aspects implies that there are no issues of validity of reasons for termination and fairness of procedure.

He maintains that in choosing to cancel part B of the CMA F1 is indicative that he had no issues with fairness of reasons and the procedure as adopted by the employer in invoking termination of his employment. In his view, in the circumstances like the one presented on this case, section 37 of the Employment and Labour Relations Act, Cap 366 R.E.2019 would not apply as the section regulates fairness of termination of employment and not breach of contract.

He argues that the disciplinary requirements under rule 12 and 13 of the Code of Good Practice Rules, GN No 42 of 2007 are a further extension or rather implementation of the statutory duties imposed on employers by section 37, and that if the claim submitted at CMA is that of breach of

contract, then the aspects of fairness of termination of employment as understood and provided by the provision ceases to apply.

He aptly argues further that the guiding document which shall be used to determine the rights of the parties is mainly their employment contract and other applicable provisions of the law with exception to the provisions which regulates fairness of reasons and procedure.

He reasoned that since the cause of action is breach of contract as the applicant has pleaded it is improper to add other claim of unfair termination which was not pleaded. The guiding evidence on this point is the CMA F1 which a number of authorities has said that it constitutes the pleadings which binds the parties, the CMA and this court in **Vara Tanzania Limited vs Ikuwo General Enterprises Limited,** Civil Appeal Number 309 of 2019 at page 10, the Court of Appeal citing with approval the case of **Barclays Bank (T) Ltd vs Jacob Muro,** Civil Appeal No. 357 of 2019 (unreported) in which it was observed that, it is important to honor the trite law that parties are bound by their own pleadings.

In He further submitted that, since unfairness grounds in termination were not pleaded, the court should not task itself on unfair termination but rather on breach of contract. In **Ngorongoro Conservation Area Authority vs**

Amiyo Tlaa Amiyo and Another, Labour Revision Number 28 of 2019, at page 15 this Court cited with approval the case of **Judicate Rumishael Shoo & 64 Others vs The Guardian Ltd** (2011-2012) LCCD 40 emphasizing that Applicants' claims must be pleaded in referral forms, and what is pleaded in CMA F1 is the one to adjudicate not otherwise.

On 14th November 2022 the applicant filed a statement of issues which he reckons to be a valid legal document filed pursuant to Rule 24(1) of the Labour Court Rules and the parties are bound to address their respective cases within the purview of the statement of issues. The said issues are were raised as follows:

i) Whether the arbitrator failed to consider the evidence and closing arguments presented by the applicant during (sic) the award stage.

ii) Whether the arbitrator properly (sic) erred in law and in fact in holding that, the audit report on customer account management is the investigation report.

iii) Whether or not the respondent terminates the applicant for an offence which (sic) was not charged with.

iv) Whether or not the arbitrator erred in law and in fact for not append (sic) the signature of each witness at the end of each witness at the

end of his testimony.

v) Whether the arbitrator failed to consider the other prayers of the applicant.

He maintains that despite bringing out all of these issues, they have dealt with only the 2nd and 3rd issues proposed, and have not discussed the 1st, 4th and 5th issues. He joins issue with the Applicant as he cited the case of **Sheikh Ahmed Said vs The Registered Trustees of Manyema Masjid** (2005) TLR 61 on the importance of the court making a finding on each specific issue raised; and thus conclude his argument urging that the court should ignore any arguments brought outside the scope of the filed list of legal issues.

On another note, the counsel made remarks on the Applicant's document titled counter affidavit to the respondent's counter affidavit which falls short of an affidavit and cannot be relied by this court due to the following reasons, *firstly* the document is prepared like written submission and not affidavit. Normally a reply to counter affidavit is an affidavit but in this case the applicant has not filed an affidavit as procedurally required, *secondly* the document misses verification clause, jurat and deponent. Anything stated in it is merely unsworn argumentative statements which cannot be taken as

evidence and hence the court can neither rely on that document nor accord weight to anything stated in it. *Thirdly* the said document is not attested by the commissioner for oaths as required by the law.

Meanwhile, the counsel admitted that the Applicant entered a two-year contract of employment from June 2021 ending on May 2023, which was however terminated by the employer in December 2021. Because of this termination of contract before its due time, the Applicant filed a case of breach of contract at the CMA which is the subject of this Revision Application. The legal question is whether such termination amounts to breach of contract, despite allowing earlier termination by either party particularly in Clause 6 of the said contract which stipulates this fact. He argues that parties had to contemplate in their minds about the provisions of the contract and not the provisions of the law sanctioning unfair termination as long as the dispute referred at CMA was that of breach of contract and not unfair termination.

He argues that the Applicant was supposed to prove that the employer breached the employment contract. He reckons that under section 37 of the Employment & Labour Relations Act, the duty to prove that termination of

employment was fair lies on the employer, even if it is the employee who alleges, but in the event the employee alleges breach of contract, the burden on the employee to prove that there is breach of contract.

The only requirement which the employer ought to observe under the contract before termination was to issue a one-month notice or make a payment in lieu of notice, which fact the record testifies to. It is his view that the employer had no requirement of even assigning reasons for termination after complying with contractual requirements of issuing notice of termination. He argues that the Applicant has failed to prove that the contract provided otherwise to show that the employer breached the contract, neither is it clear in the applicant's testimony as to which specific provision of the contract was breached by the employer.

He submits the Respondent on the other hand terminated the employment contract based on misconduct, which was committed by the Applicant, to wit, gross negligence. According to the records at the CMA, the employer had a valid reason to terminate the employment of the Applicant as he was found guilty of gross negligence; insisting meanwhile that it was not necessary for the employer to prove before the CMA that he had a valid and

fair reason for termination if the cause of action remains to be breach of contract. However, it was proved, which is an added advantage to the employer, in the instant application, there is ample evidence on record proving that the Applicant was found guilty of committing gross negligence as charged. He thus invites the court to examine exhibits P4 (the response letter) from the Applicant and exhibit "D7" (the proceedings of the Disciplinary Hearing), which demonstrate the proof that the Applicant was grossly negligent in the performance of his duties, and hence the employer had valid reason to terminate his employment. The arbitrator's analysis found in page 5,6 of his Award are sound and relevant because he urges, they reflect the true position of the evidence tendered before the CMA.

In further argument, he submits that ancillary to the fairness of reason, there is a complaint by the Applicant concerning the 1st issue at CMA not being answered affirmatively or not at all. He reiterated his position that this matter was a non-issue in the filed list of legal issues but more importantly, it is baseless. The meticulous reading of the CMA Award on this point leads to the conclusion that it was deliberated upon and affirmatively answered with a finding that the employer invoked a valid and fair reason when terminating the employment contract.

He aptly distinguishes the decisions cited by the Applicant on this point as irrelevant in point to the facts of this case. While in those decisions the courts failed to deliberate on issues framed, on the instant case the CMA properly deliberated on the issues and made a finding.

Responding to the issue on the Applicant complaint of being terminated on reasons not charged with, the counsel charges that this is misleading and misconceived. He reasons that the termination letter exhibit "P5" must be read and understood within the context of exhibit "D7". The termination letter clearly informed the Applicant that he committed a misconduct which he was found guilty of in the Disciplinary Hearing. He thinks the arbitrator cannot be faulted for holding that the term misconduct is a word of general nature that includes any mischievous behaviors of employees at workplaces like gross negligence rather than being a distinct offence as claimed by the Applicant. He observes that a close examination on part II of the Code of Good Practice Rules, 2007 item (i) deals with termination of employment generally, but when you proceed reading the same part item (ii) it is titled "misconducts" referring to unacceptable conduct generally. Also see rule 12(1), (2), (4) (a) etc.

Additionally, the Applicant complains that he was terminated from employment while the misconduct committed was a first offence citing rule 12 of the Code of Good Practice Rules, 2007 which states that the 1st offence of an employee may not justify termination of employment unless it is so serious that continued employment relations becomes intolerable. The counsel chimes in that this was duly considered during the Disciplinary Hearing where the chairman of the Disciplinary Committee stated in exhibit **D7** although the misconduct committed is the first offence yet it was serious given the position of the Applicant. The Applicant was a Sales Executive who was obliged to deal with customers diligently and in a manner that promotes the business of the company.

The respondent put reliance on rule 12(3)(g) of the Code of Good Practice Rules, 2007 which clearly show that gross negligence is among the misconducts which may justify termination of employment even as a first offence with no previous records.

Responding to complaints faulting the Arbitrators finding regarding option to charge the Applicant with misconduct while they could charge him with dishonesty and causing loss to employer, he views it as irrelevant in deciding

this Revision Application because the court is supposed to stick to the material findings of the CMA in line with the issues raised. He argues that the crucial issue was whether there was a valid reason to warrant termination of the contract by the employer which the learned Arbitrator made a proper finding on it.

This reasoning applies also on aspect of loss because irrespective of how many times the word loss has been used in the Disciplinary Hearing or CMA award, it is irrelevant in this application since the Applicant was not charged and found guilty with occasioning loss to the employer, but rather with gross negligence and this is the fact in issue at CMA.

Responding on the procedural issues which the Applicant complained that these were not issues raised at the CMA and would only be relevant if raised by the Applicant then. The Applicant did not allege any procedural violation in the CMA F1 and he is bound with his own pleadings in this aspect.

Responding further to the complaint that the Applicant was terminated on misconduct while there was no investigation report prepared by the employer before the conduct of the Disciplinary Hearing faulting exhibit D3 in being an audit report and thus falling short of investigation report as understood in law, and the cited authorities to support this contention. He

argues that the applicant is misconceived in understanding what an investigation report is, and that it is not determined by its form but rather by its content and purpose. The law in its wisdom, has not prescribe the format of an investigation report nor does it state how the content should be. In this case the investigation reports may vary in form and content from one employer to another and from one case to the other. The Applicant admits that when he was given exhibit P2 (the suspension letter) he was intimated that he will be advised once the investigation is complete. After that the employer did in fact conduct investigation in the form of an Audit on Customers Management Accounts and issued a report.

He expounds further that the said audit is not the normal audit usually done by organizations in their daily routine, but rather this was investigative audit specifically done to investigate the customers' accounts following complaints raised to the employer. It is the findings of this special audit that concluded that there were mishandling of customers' accounts by the Applicant hence recommended disciplinary action. He reasoned that the said report was a valid basis to make the employer make an informed decision about invoking disciplinary action, particularly because the same was prepared and met all the threshold standards of the law.

He argues further that the Applicant had ample time to challenge the report during the hearing because the report was presented during the hearing and the Applicant had opportunity to challenge any of its content. He insists that the Applicant had another opportunity to challenge or fault any of the contents of the audit report but failed to do so at the CMA. While the Applicant put much reliance on the provisions of rule 13 of the Code of Good Practice Rules, 2007 but views applicability of the cited rule only in the event the Applicant referred a dispute of unfair termination of employment.

On the issue of an applicant not being given an opportunity to make mitigations before final decision was made against, he respond to this complaint as irrelevant based on the nature of the cause of action filed at the CMA. He argues that the point could only have been valid if the dispute concerned unfair termination of employment.

Finally responding on the complain about delivery of the award beyond the prescribed time while the CMA had no jurisdiction to issue the award beyond the prescribed time. While it is true that the award was procured beyond the prescribed time, he faults it as enough ground to quash the whole decision for such reason.

He argues the position of law as being that the CMA should only give reasons

in the event it finds that it must deliver its award beyond the time prescribed. In examining the CMA award particularly at page 10 the, learned Arbitrator stated the reasons for the delay in issuing the award beyond the time prescribed. This he argues should be sufficient in law.

I found no need to reproduce the rejoinder since it is the repetition of the submission in chief, with no new matter rejoined.

Having dispassionately read the submission by the parties and scrutinizing the record of the CMA, the issue to determine before this court is whether the filed Revision Application against the CMA award is meritorious.

Before I am embark on the merit of the Revision Application, I must comment albeit in passing on how these submission and the other filed pleadings in regard to the Labour Revision have not been adhered to, despite being clearly prescribed by the law, on how the faulting of the Arbitrators Award has to be within the parameters of the Revision. In any case, it is my view that the Arbitrator guided himself correctly in addressing the issues of fairness of reason and procedure in looking at the labour dispute, despite not filling in part B of the CMA F1 to determine whether the employer was

warranted to terminate the employment contract before it came to lapse, as lamented by the Respondent's counsel.

This is much in line with the holding of this Court in **City Square Hotel vs Kassim Copriance,** Labour Revision No 373 of 2022, where my brother Mlyambina, J. elaborates, a view to which I subscribe:

> "....the employee under fixed term contract can sue for both breach of contract and unfair termination. It is my view that it is not fatal for an employee under a fixed term contract to fill both part A and B of the CMA F1. I say so because of the following reasons: **First,** there is no specific part in the referral form to be filled with an employee who claims only for breach of contract. **Second,** the principles of unfair termination apply to both types of contracts and the only difference between the said contracts will be on the reliefs awarded to the affected employee. In a permanent contract, the remedies are provided under section 40 of ELRA while in fixed term contract an employee is awarded salaries for the unelapsed period of the contract, a remedy which was developed by case law including the case of **Azama Rajabu Mbilanga vs Shield Security Services Limited,**

Rev. No. 113/2019. **Third,** a party cannot be condemned while the form itself is not exhaustive. As stated above the form does not have a specific part to be filled by an employee who claims for breach of contract. **Fourth,** the CMA is encouraged to conduct arbitration with minimal legal formalities as it is provided under section 88(4)(b) of the ELRA.

Having settled the doubts as put forth by the Respondent's counsel, Its now prime to deliberate on the Parties' submissions. In this task, the court shall be guided by the Employment and Labour Relations (Code of Good Practice), G.N. No. 42 of 2007 because almost all of the applicant's grounds for Revision faults the procedures with regards to the Applicant's right to be heard especially during the Disciplinary Hearing. Rule 13 of G.N. No. 42 of 2007 provides the procedures to be observed during Disciplinary Hearing before terminating someone from his employment:

13(1) The employer shall conduct an investigation 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 allegations using a form and language that the employee can reasonably understand

(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.

The failure to comply with such legal requirement, renders the Employer's act unfair and would infringe the Respondent's right to be heard before the termination of their employment contract.

On 1st ground for revision, this court has passed through and found that the Employer has made an investigation and among the steps he took is that he conducted a special audit as exhibit D3 shows, it is evidenced that the employee was summoned before the Disciplinary Hearing and was made aware of the investigation findings. After these steps the Applicant had made his defense, and I must agree with the respondent that he had ample time to fault the same during the hearing instead of raising this issue at this stage, where the court considers it as an afterthought. This ground is unmaintainable, and it fails.

With regards to the 2nd ground, it is the view of this court that, the evidence was presented before the hearing since there is a special internal audit report investigating how the Applicant had dealt with the customers' accounts

without due diligence. Even if, by way argument, it is supposed that the audit report could not substantiate the said allegation, still at page 4 of the exhibit D7 the outcome of the investigation made is clearly shown, that the applicant used the account of the customer to attend another customer which is unprofessional. The Applicant is also aware of this position as one of the misconducts allegations leveled against him by the employer while in the employment of the Respondent, a fact that he has not disputed. I think this ground is baseless and the Arbitrator cannot be faulted for his decision.

Turning to the 3rd ground, it is this court's considered view that, as **Rule 13(3), (4)** of the Code of Good Practice Rules of 2007 requires the accused employee to be given enough time before giving his defense. He was informed earlier before defending himself as the rules requires prior information to be given to him not less than 48 hours before putting in his defense. **Rule 13(5)** of the Code(supra) requires the evidence to be presented before the Disciplinary Committee a requirement which was observed during the Disciplinary Hearing, shortly it is on record that the Applicant was served with all the materials as required by the rules for him to defend himself, and that he did not dispute or raise any of these concerns during the Disciplinary Hearing. The Parties' renewal clause on the

employment contract at para 6 on page 2 is self-explanatory that the party wishing to terminate the contract is so allowed, and the reason for this termination has been substantiated by the Respondent as gross negligence. Furthermore, the applicant was allowed to defend himself and admitted the misconduct which was the use of a customer's account to attend to other customers. In **Stamili M. Emmanuel vs Omega Nitro (T) Ltd,** Lab. Div., DSM, Revision No. 213 of 2014, 10/04/2015, My sister Aboud, J. held that:

> *"It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment".*

In any case, termination of service is said to be fair according to section 37(2) if it is based on fair and valid reasons and carried out in observance of fair procedures stipulated in the provisions of the law. The fairness requirement under the Employment & Labour Relations Act Cap 366 emanates from the provisions of Termination of Employment Convention 158 of 1982, which establishes the core elements of the employee's rights as to include requirement for valid reason for any termination. The Convention

recognizes three valid reasons as misconduct, incapacity and operational requirements which have been duly incorporated in section 37(2) (b) (i) and (ii) of the Employment & Labour Relations Act, Cap 366.

This court is satisfied that the respondent was justified to terminate the applicant's employment. This ground of revision is found without any merit, and it thus fails.

In determining the 4th ground of this Revision, this court passed through the CMA Award and observed that the Commission was justified to decide the way it did, since all the required procedures as earlier pointed out were adhered to. I must agree with the learned Arbitrator that there were valid and fair reasons for the termination, as well as fair procedure leading to the termination since the terms of renewal contract under exhibit D1 were aptly observed. More importantly, the respondent adhered to the requirements of section 37 (2) of the Employment & Labour Relations Act Cap 366. This is quite contrary to the arguments put forth by the respondent's counsel who is quite misconceived that the clause of the contract that either party could terminate the contract without assigning reason is valid. This was rightly faulted by the learned Arbitrator, and I am at one with the Court of Appeal

on their guidance on the same issue. Cementing this position, the Court of Appeal in **St. Joseph Kolping Secondary School vs Alvera Kashushura,** Civil Appeal No. 377 Of 2021 sitting at Bukoba (unreported) looked at this point and framed an issue on it in the following terms:

> "The only issue which we shall consider and which sounds to be an issue of law is whether the employee could be terminated from her service basing on a termination clause in the contract without there being fair reasons and compliance with fair procedure."

As rightly answered, the Court was firm that it is not true that under our laws a fixed term contract of service can be prematurely terminated without assigning reasons. *This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts.* It is only inapplicable to those contracts whose terms are shorter than 6 months as per section 35 of the Employment & Labour Relations Act. In addition, creation of a specific duration of contract gives the employee legitimate expectation that if everything remains constant, he or she will be in the

service throughout the contractual period. The expectation is defeated if the same can be terminated at any time without reason.

On the foregoing reasons, I am inclined to hold that the said ground is without any merits.

With regards to the 5th ground of Revision, the CMA F7 shows that the applicant was paid the transportation costs to Dar es Salaam as he claimed, the fact which I need not discuss further since both Parties settled that issue, he was paid TZS 1.5 million and certainly this was not supposed to be one of the claims featured on the Revision Application.

In the upshot, I am inclined to hold that the Applicant's Revision Application lacks merit and it is hereby dismissed, the Commission's Award is upheld.

Dated at **Arusha** this **14th** day of **July 2023**

HIGH COURT OF TANZANIA

A. Z. Bade
Judge
14/07/2023

Judgment delivered in the presence of parties / their representatives in chambers /virtually on the **14th** day of **July 2023.**

A. Z. Bade
Judge
14/07/2023