THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO.14 OF 2022

(From the Award of the Commission for Arbitration and Mediation for Mbeya at Mbeya in Labour Dispute No. CMA/MBY/Mby/61/2020/ARB.29.)

LETSHEGO BANK (T) LTD.....APPLICANT

VERSUS

AHMED MOHAMED NDOKA.....RESPONDENT

JUDGEMENT

Date of Last Order: 08.06.2023
Date of Judgment: 01.11.2023

MONGELLA, J.

The applicant herein has preferred this application under Rules 24(1), (2) (a), (b), (c), (d) and (e) of the Labour Court Rules, 2007, GN No. 106 of 2007 and Sections 91(1) (a), (b), (2) (b), (c) and 94 (1), (b) (i) of the Employment and Labour Relations Act [Cap 366 R.E 2019] (ELRA). He is seeking for this court to call, inspect the records and revise the award of the Commission for Mediation and Arbitration (CMA) in Dispute No. CMA/MBY/Mby/61/2020 and consequently make appropriate orders and grant any reliefs it deems fit to grant.

The brief facts of the case are that: the respondent was employed by the applicant on 06.11.2012 as a client Assistant for an unspecified period of time. During his employment, his roles in the bank kept changing whereby his last position, which he served prior to his termination on 24.04.2020, was a Customer Service Supervisor at Mbeya Branch.

On 24.03.2020, the applicant wrote a demand notice to the respondent requiring him to provide explanation on the following; **first**, violating Section 2 of safe and strong room management procedure on Responsibility/Dual control by: opening the strong room on 21.12. 2019 in absence of his fellow custodian; taking the head teller's strong room and vault keys without permission on 21.12.2019; and counting cash at the counting room in absence of fellow custodian. **Second**, violating section 5 and 6 of safe and strong room management procedure by: leaving the safe open while absent in the strong room on 09.01.2020; and leaving the teller entrance room open throughout the night on 05.03.2020.

The respondent replied to the demand notice on 26.03.2020. On 27.03.2020, he was served with a charge letter containing the above stated offences. He was also served a notification to attend a disciplinary hearing on 01.04.2020. The hearing was however conducted on 03.04.2020 and the committee delivered its decision on 11.04.2020. in its decision, it recommended for the management to take strong disciplinary actions including termination from employment.

Aggrieved by the decision, the respondent filed his appeal on 20.04.2020 before the Chief Executive Officer of the applicant Bank. His appeal was however found without merit. He was therefore terminated from

employment on the same day. The applicant's CEO issued the respondent with notice of termination of his employment on 21.04.2020.

Aggrieved by his termination, the respondent filed a claim before the CMA claiming that the termination was both procedurally and substantively unfair. He also sought to be reinstated or in lieu thereof be paid: 12 months' salary as compensation, which valued at T.shs.16,539,972/=; one month salary in lieu of notice valued at T.shs.1,378,331.9/=; April salary valued at T.shs.1,378,331.9/=; Severance pay valued at T.shs. 2,968,714/= and; repatriation charges valued at T.shs. 3,688,000/=. The total of all benefits being T.shs. **25,953,348.9/=**. He also requested for the original certificate of service, and original termination letter.

Upon hearing both parties, the arbitrator found the respondent's termination was substantively unfair, but procedurally fair. The respondent was therefore awarded: one month salary in lieu of notice valued at T.shs.1,378,331/=; severance pay valued at T.shs. 2,968,714/=; accrued leave valued at T.shs.1,378,331/=; 12 months' salary as compensation valued at T.shs.16,539, 972/= and original certificate of service. All benefits summed up to **T.shs. 22,265,347/=**. The applicant was aggrieved by the said award, hence filed this application for revision.

The applicant's chamber summons was accompanied by the sworn affidavit of one Thadeus Massawe, her principal officer. In his affidavit, Mr. Massawe alleged that the mediation at the CMA was illegally conducted as it was done by two mediators interchangeably without there being any reasons assigned. He also averred that the mediation was done for more than 30 days. He further challenged the CMA Award

for being improperly procured and for being unlawful, illogical and irrational. In that respect, he advanced three issues to be determined by this court in this application:

(a) *Whether the dispute was properly mediated as per the prescribed law and principles of natural justice?*

(b) *Whether the reason for termination can solely be based on what is written in the termination letter or what is contained in the disciplinary hearing form and outcome of an appeal?*

(c) *Whether the termination was fair both procedurally and substantively?*

The respondent opposed the application vide his sworn counter affidavit. The application was argued in writing whereby the applicant was represented Mr. Isaya Zebedayo Mwanri, learned advocate, while the respondent was represented by Mr. Hemed Mtoni, his representative.

Submitting on the first issue, Mr. Mwanri raised three improprieties conducted by the CMA during mediation being: first, changing of mediators; second, breach of confidentiality principles; and third, mediation concluded out of prescribed time.

With regard to change of mediators, Mr. Mwanri averred that mediation was illegally conducted by two mediators without the parties being notified or given the right to be heard on their changing. He further contended that no reason was accorded to the parties when the mediators were changed. He referred this court to page 1 to 3 of the typed proceedings averring that on 03.06.2020, the mediator was one

Naomi Kimambo, but on 16.10.2020, 17.10.2020 and 19.10.2020 one, Malekela TSA proceeded to mediate the dispute. He complained that the change of mediators happened without any reasons being explained to the parties which is a fatal irregularity. In support of his argument, he borrowed a leaf from the decision in **Mariam Samburo vs. Masoud Mohamed Joshi & Others** (Civil Appeal 109 of 2016) [2019] TZCA 288 TANZLII. He further cited the case of **Mantrac Cat vs. Tusajigwe Mwakyusa and Another** (Labour Revision No. 108 of 2020) [2020] TZHCLD 11 TANZLII, whereby the court insisted that it was mandatory for reason to be provided on transfer of a case from one judicial officer to another.

As stated earlier, Mr. Mwanry further alleged that the parties were denied the right to be heard before the alleged interchange of mediators. In his submission, he considered that amounting to violation of the principle of natural justice under **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977**. He cemented his argument with the case of **National Housing Corporation vs. Tanzania Shoes and Others** [1995] TLR 251 and that of **Abbas Sherally and Another vs. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported).

As to the assertion that there was breach of confidentially in the mediation process, Mr. Mwanri argued that according to **Rule 8 (1) and (4) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. 67 of 2007**, mediation process ought to be confidential in the sense that both parties, their representatives and the mediator are banned from disclosing any information obtained during mediation to a third party. He was of view that, in that regard, the proceedings are supposed to be off the record as guided by **Rule 10 (6) (d) of GN. No. 67 of 2007**. He said, contrary to the legal requirement, on diverse proceedings of

16.06.2020 and 17.06.2020 the presiding mediator put records of proposals by the parties during mediation and the updates on the same. He was of the view that the recording of the proposals and updates thereto led the arbitrator to become biased. That the arbitrator was influenced by the applicant's denial of the respondent's offers during mediation.

Concerning the issue that the mediation was conducted for more than 30 days without the parties' consent, Mr. Mwanri averred that the dispute was filed on 20.05.2020 and the mediation was marked failed on. 02.07.2020, which shows that the mediation process took 43 days to be finalized. He considered that contrary to **Section 86 (4) of ELRA and Rule 3 (2) and (4) of GN No. 67 of 2007** contending that the extension of such time without consent of the parties was illegal and improper. He supported his case with the case of **Barclays Bank T. Limited vs. Ayyam Matessa** (Civil Appeal 481 of 2020) [2022] TZCA 189 TANZLII averring that such act was an irregularity which rendered the entire proceedings null and void.

He finalized the first issue by stating that although the CMA is a quasi-judicial organ mandated to make decisions on labour matters, hence not bound as in adversarial legal procedures; irregularities and improprieties occasioned by mediators render him into believing that the mediation process was lightly bypassed. In his view, the CMA is not immune to the principles of natural justice. That, parties deserved to be informed on the reasons on changing of mediators. That, confidentiality ought to have been observed by the mediators and the mediation conducted on time.

Addressing the second issue, Mr. Mwanri contended that it was undisputed that the respondent's termination was a result of findings of the disciplinary hearing committee. He averred that according to **Rule 13 (10) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 47 of 2007**, upon termination the employee must be given reasons for the decision and reminded of any rights to refer the dispute to the CMA. That, by virtue of the said provision, the employee is to be reminded of challenging the decision of the disciplinary committee and not of the employer because the decision of the disciplinary committee supersedes the employer's decision to terminate the employee.

He added that, the employer always complies with the opinion of the disciplinary committee, hence if the reason of termination stated by the employer varies with that of the disciplinary committee, then what was stated by the committee shall prevail. He thereby made reference to exhibit R-6 arguing further that the respondent never proved that the applicant went contrary to the outcome of the disciplinary hearing and he did not challenge the reason for termination for being unjustifiable, but only questioned that the committee was biased as per "exhibit R-7."

Mr. Mwanri further contended that the respondent should not have challenged the termination letter "exhibit R-2" but the recommendation of the disciplinary committee since the letter merely elaborated on the offences of the respondent but did not introduce the punishment. He was of the view that the charge sheet well contained the details of his offence thus it was wrong for the arbitrator to rule that the respondent was unlawfully terminated merely on the ground that the termination letter differed with the outcome of the hearing.

With regard to the issue on whether the termination was procedurally and substantively fair; Mr. Mwanri was in agreement with the findings of the CMA to the effect that the procedures for termination were fair, since there was no need of proving fairness of procedures where the employee admits to the misconduct charged. However, he alleged that the arbitrator was wrong to state that the termination was substantively unfair while he noted that the employee had admitted the misconduct. He contended that it was the respondent's admission to the misconducts that led him to be found guilty of the disciplinary committee.

Mr. Mwanri finalized his submissions by praying that the application be allowed and the case file be remitted back to the CMA for proper mediation to be conducted before another mediator. He further prayed that, if the court finds the first issue without merit, then it should, subject to the findings on the other issues, set aside the award and quash the CMA proceedings, and hold that the termination was both substantively and procedurally fair.

In reply, Mr. Mtoni first prayed to adopt the counter affidavit as sworn by Ahmed Mohamed Ndoka, the respondent. He found the grounds for revision being baseless, misconceived and unfounded in law. Elaborating on his stance, he contended that the complaint was filed vide CMA Form No. 1 on 20.06.2020 and on the same day the respondent served the applicant vide one Upendo Mwambona, the applicant's SRO. That, mediation was fixed to be conducted on 03.06.2020 and summons was issued within 14 days as required. That mediation was conducted from 03.06.2020 to 02.07.2020 which was within 30 days as directed under **Rule 4 (1) of GN. No. 67 of 2007** and **Section 87 (7) (b) (i) of the ELRA**. He urged the court to make reference to the certificate of

non-settlement of the dispute issued by the CMA on 02.07.2020 by one Naomi Kimambo, the mediator.

Replying on the first issue, he contended that the mediation was procedurally and legally fair. He admitted that the proceedings reflect two mediators, one Hon. Naomi Kimambo and Hon. Malekela TSA, but the later only appeared to adjourn the proceedings and his presence did not occasion any miscarriage of justice. He insisted that the mediation hearing was fair as no one referred to anything said at mediation proceedings during subsequent proceedings as required under **Rule 17 of (1) of GN. No. 67 of 2007**. He was of the view that the mediator was appointed by virtue of **Section 86 (3) (a) of the ELRA** and **Rule 15 (1) (b) of GN. 67 of 2007.**

Regarding the claim on breach of confidentiality agreement, Mr. Mtani had the view that **Rule 8 (1) and (4) of the GN. No. 67 of 2007** was inapplicable as neither the parties nor their representatives disclosed any information obtained during mediation to a third party. He had the stance that all procedures under **Rule 12 (1), (2), (3), (4), (5), (6) and 13 (1), (4) of GN. No. 47 of 2007** were complied with.

Regarding the claim that the mediation was conducted for more than 30 days, Mr. Mtani reiterated his initial averment that the mediation commenced on 03.06.2020 and ended on 02.07.2020, thus within the prescribed 30 days.

Addressing the second issue, he averred that the findings of the Hon. Arbitrator were based on variation between the charges, proceedings of disciplinary hearing and termination letter which led to violation of the

right to be heard. He maintained the stance that the applicant did not comply with mandatory provisions of the law envisaged under **Rule 12 of the GN. 42 of 2007.** He referred the court to the case of **Bulyanhulu Gold Mine Ltd. vs. Charles Bwamakunu**, Revision No. 2 of 2016 (HC at Shinyanga, unreported).

Concerning the third issue, Mr. Mtani argued that it is trite law that for termination of employment to be considered fair, it must be based on fair reason and procedure as provided under **Section 37 (2) of the ELRA**. He mentioned the factors to be considered in reaching the decision to terminate an employee, being: gravity of the offence, circumstances of the infringement, the employee's circumstances and; if other employees have been dismissed or terminated for the same offence. In support of his stance, he referred the decision in **National Microfinance Bank (NMB) vs. Ethery E. Ntakabanyula Revision** No. 91 of 2015 (HC at Mwanza, unreported).

He reiterated his stance that the termination was both substantively and procedurally unfair as the factors were not taken into consideration, hence violating the principle of natural justice. In those bases he prayed for the application to be dismissed entirely and for the CMA Award to be upheld.

Rejoining on the first ground, Mr. Mwanri maintained that the matter was not properly mediated. He averred that there had been two mediators one Hon. Naomi Kimambo and Hon. Malekela TSA and the later proceeded with mediation as if he was the presiding mediator. He reiterated his argument that according to **Section 86 (3) (a) of the ELRA**

the CMA is empowered to appoint "a mediator" and not "mediators" to mediate a dispute.

On breach of confidentiality in mediation proceedings, he challenged the respondent's contention that **Rule 8(1) and (4) of GN 67 of 2007** is inapplicable on the question of confidentiality raised in the case as there is no any disclosed information to a third party. He reasoned that the presence of another mediator rendered him a third party. He added that there happened further breach of confidentiality when the mediator recorded in the proceedings the proposal offered by the parties during mediation.

On the second issue, Mr. Mwanri reiterated that the respondent's termination was a result of findings and outcome of the disciplinary hearing committee which was conducted in a proper manner. Regarding non-compliance with mandatory requirements of **Rule 12 of GN. No. 47 of 2007**, as provided in **Bulyanhulu** (supra), he refuted the assertion averring that the applicant complied with all necessary rules before terminating the respondent.

As to the last issue, he contended that the applicant observed both substantive and procedural fairness in terminating the respondent. He maintained that the termination was procedurally fair as held by the CMA because the respondent admitted the charges rendering no need to observe procedures. He referred the case of **Nickson Alex vs. Plan International** (supra). Mr. Mwanri further maintained that the applicant never violated the principles of natural justice. He prayed for the application to be allowed.

I have observed the rival submissions of both parties, the supporting affidavit and counter affidavit of both parties and the CMA record. In resolving this application, I will deliberate on the first issue and jointly deliberate on the second and third issues.

On the first issue, the applicant challenged the mediation proceedings before the CMA on three reasons; **one**, that there was change of mediators; **two**, that there was breach of confidentiality principles and; **three**, the mediation was concluded out of prescribed time.

With regard to the claim of change of mediators, Mr. Mwanri had the contention that the mediation was conducted by two mediators and both had their fair participation in the proceedings. He considered such act bearing legal consequences as it frustrated the mediation, rendered the mediation improper and unlawful for denying the parties the right to be heard. On the other hand, the respondent denied the allegations contending that the other mediator never participated in the mediation process, thus the mediation was never frustrated.

The CMA record, as I have observed, indicates that mediation commenced on 03.06.2020 before Hon. Naomi Kimambo, as the presiding mediator. Mediation was not conducted on the material day, but adjourned to 16.06.2020. On 16.06.2020, Hon. Malekela TSA presided over the mediation as evident on record. The mediation was again adjourned to 17.06.2020. On 17.06.2020, Hon. Malekela presided over the mediation whereby it was again adjourned to 19.06.2020. On that day the mediator again presided over the mediation and it was again adjourned to 02.07.2020. On 02.07.2020, Hon. Naomi Kimambo presided

over the mediation and therein marked the mediation failed. CMA F6 "certificate of non-settlement" was duly issued.

As part of the process in according the parties the power to exercise control of the mediation proceedings to some level and at the same time guide and restrain the mediators in performance of their duties; the Labour Institutions (Mediation and Arbitration Guidelines) GN. 67 of 2007 and the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) GN No. 66 of 2007 were put in place.

It is apparent on record that the two mediators were indeed involved in the mediation process. Hon. Naomi Kimambo presided at the beginning of the mediation, while Hon. Malekela TSA took over a bigger part of the mediation, but did not finalise the same. In the end, Hon. Neema Kimambo presided over and marked the process finalized.

I am aware of the position of the law requiring judicial officers to accord reason for change of presiding judicial officers when the matter has been re-assigned to them. I am also alive to the position that the failure to do so renders the proceedings irregular, especially where a party has been prejudiced. See: **Mariam Samburo** (supra); **Leticia Mwombeki vs. Faraja Safarali & Others** (Civil Appeal 133 of 2019) [2022] TZCA 349 TANZLII.

However, such argument cannot hold water in this case. While indeed mediation is an integral part of the dispute resolution process before the CMA, the same is only an initial step to dispute resolution which, when marked failed, the matter is no longer left in the hands of the parties, but those of the arbitrator who is endowed with the powers to determine the

dispute in somewhat an adversarial mode. At this point, I do not think it matters much how the mediation process was conducted, unless of course there is some dire issue such as the mediation not being conducted at all or the process being extended without the parties' discretion.

This brings me to the issue as to whether the mediation was conducted in more than 30 days. According to **Section 86 (4) of ELRA** and **Rule 3(3) of GN. 67 of 2007**, mediation has to be conducted within 30 days after the dispute is referred to the Commission. The time is computed from the date the matter is referred to the mediator, that is from the appointment of the mediator. The mediator only has 30 days to complete the mediation. This is drawn from the wording of **Section 86 (3)** and **(4) of the ELRA** which provides:

> **(3)** On receipt of the referral made under subsection (1) the Commission shall –
>
> (a) appoint a mediator to mediate the dispute;
>
> (b) decide the time, date and place of the mediation hearing;
>
> (c) advise the parties to the dispute of details stipulated in paragraphs (a) and (b).
>
> **(4) Subject to the provisions of section 87, the mediator shall resolve the dispute within thirty days of the referral or any longer period to which the parties agree in writing.**

The dispute was fixed to come for mediation on 03.06.2020 and the parties were duly notified on the same. All procedures were finalized on 02.07.2020 where the mediation was marked failed and CMF 6 duly filled

by Hon. Naomi Kimambo, the then presiding mediator. Counting the days, the mediation well appears to have been conducted within time. Mr. Mwanry's contention on time limit is therefore misconceived.

As to the issue of confidentiality, mediators are required to exercise confidentiality in the sense that they are not to disclose information obtained during mediation except with authorization to do so. This is pursuant to **Rule 9 of GN No. 66 of 2007** and **Rule 8 of GN No. 67 of 2007**. I will hereunder reproduce the provisions for ease of reference:

Rule 9 of GN No. 66 of 2007;

> "Every Mediator and Arbitrator shall observe confidentiality of information disclosed in the course of proceedings and shall not in anyway disclose such information except when authorization to do so has been obtained."

Rule 8 of GN No. 67 of 2007;

> "**8**(1) Without prejudice mediation is a confidential process aimed at helping the parties to a dispute to reach an agreement.
> (2) Information disclosed during mediation may not be used as evidence in any other proceedings, unless the party disclosing that information states otherwise.
> (3) The mediator may not be compelled to be a witness in any other proceedings in respect of what happened during the mediation.
> (4) The confidential nature of mediation proceedings prevents the Mediator, the parties and their representatives from disclosing any information obtained during mediation to any third party."

While **Rule 9 of GN No. 66 of 2007** is on the ethical values to be observed by the mediator, **Rule 8 of GN No. 67 of 2007** expressly states three conditions to be observed being; **one**, the information disclosed in mediation cannot be used in any proceedings unless the party disclosing the same states otherwise; **two**, a mediator may not be compelled to be a witness in any proceeding in respect of the mediation; and **three**, no party is to disclose information disclosed in mediation to a third party. It is in line with these requirements that **Rule 10 (6) (d) of GN No. 67 of 2007** requires the mediator to provide details on logistic arrangements which may include obtaining parties' commitment to certain ground rules such as the mediation being off record and conducted without prejudice basis. The provision states:

> "The Mediator shall inform the parties of any logistic arrangements, and in appropriate circumstances, obtain the commitment of the parties to certain ground rules during the process and these may include the understanding of the following: -
>
> (d) that the proceedings are off the record and conducted on a without prejudice basis;"

While it is apparent on the CMA record that the mediation proceedings were somewhat recorded, I do not think that the displayed recordings sufficed to prejudice either party, a fact which I also find needed to be proved by the respondent or his counsels but was not. I am of this view on the reason that, when the arbitrator adjudicated the matter, he did not make reference to the mediation proceedings at any time in his Award.

The procedure is that, when the parties fail to resolve their dispute through mediation, the presiding mediator marks the mediation failed. Thereafter, the matter is referred to arbitration. Unlike mediation, arbitration is the actual adjudication of the labour dispute wherein an arbitrator is endowed with the power to hear the parties and make his/her decision, which is binding upon the parties. Still, even at the stage of adjudication, mediation can be conducted if the parties consent to do so. This position is provided under **Section 88 (6) of the ELRA and Rule 15 of GN No. 67 of 2007**. **Section 88 (6)** provides:

> "88. (6) Where the parties to the dispute consent, the arbitrator may suspend proceedings and resolve the dispute through mediation."

In conclusion on this issue, I am of the view that, while the mediation process contained some improper issues, the same were not fatal irregularities. This is in consideration of the fact that the matter was not resolved vide mediation, but proceeded to arbitration which is an entirely different and independent process in resolving the dispute between the parties and was done by a different person.

On the second and third issues, the applicant seems to partly fault the CMA decision. This is because he agreed with the arbitrator's finding as to the termination being procedurally fair, but challenged the arbitrator's finding that the termination was substantively unfair. On the other hand, while the respondent seems to agree with the arbitrator's decision that the termination was substantively unfair, in rather odd way argues that the termination was also procedurally unfair. I shall however come with my own findings after examining the record.

Regarding substantive fairness, as evident in the charge letter "exhibit R5" the respondent was charged on various offences. First, violating section 2 of safe and strong room management procedure on responsibility/dual control by opening the strong room on 21.12. 2019 in the absence of his fellow custodian; taking the head teller's strong room and vault keys without permission on 21.12.2019; and counting cash at the counting room in the absence of fellow custodian. Second, violating section 5 and 6 of safe and strong room management procedure by leaving the safe open while absent in the strong room on 09.01.2020; and by leaving the teller entrance room open throughout the night on 05.03.2020. The respondent was required to attend his disciplinary hearing on 01.04.20202.

As testified by DW1, one, Charles Victor Mhagama and DW2, one Angelist Joseph Misanya, who were in the disciplinary committee, the respondent attended the said hearing on 03.04.2020 whereby he admitted to committing the said offences. His admission led the committee recommend that he be given the highest form of punishment such as termination. This is evidenced in the hearing form "exhibit R6." The employee was then terminated by the one Andrew Tarimo, the Chief Executive officer of the applicant on 21.04.2020 for gross negligence of breaching safe and strong room management procedures. This is evidenced in the termination letter "exhibit R2." The respondent unsuccessfully appealed before the CEO. His appeal was dismissed rendering his termination to remain intact as evidenced in the outcome of hearing appeal form "exhibit R7."

The two applicant's witnesses claimed that the respondent admitted breaching the said safe and strong room management procedures

which amounted to gross negligence. However, the demand notice "exhibit R3," the charge and the hearing form did not disclose the offence of gross negligence or that the breach of the mentioned provisions amounted to gross negligence. Both witnesses referred the arbitrator to paragraph 4.40 of the Recruitment Policy "exhibit R9" which reads:

> "LBT shall terminate an employee under certain circumstances including but not limited to gross negligence of duty or gross misconduct; theft; Dishonesty; forgery; embezzlement; fraud; bribery or corruption; including giving or accepting money to receive or provide special favours in breach of any of the Group Staff Declaration."

The plain translation of the said paragraph is that the applicant has the mandate to terminate an employee under certain circumstances not limited to gross negligence. The only cited policy in the provision is the group staff declaration which was not produced and seems unrelated to this matter. Put simply, the policy did not classify as to what actions amount to gross negligence. The strong room management procedures also do not provide explanations as to which breach of such terms would qualify as gross negligence. This makes it clear that the respondent was charged for different offences and terminated for a different offence.

It is well provided under our Constitution that in determining the right and duties of a person, the agency doing so ought to ensure that the trial is fair. This is well enshrined under **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania**, which states:

> "When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."

In labour disputes, for a fair hearing to be availed, the employee should be fairly charged, accorded the right to defend himself or herself. Fair hearing entails first, a proper charge to accord the employee the ability of understanding the nature of the offence or misconduct with which he or she is charged so that he or she can enter his or her defence accordingly. As evident in the charge letter and in the hearing proceedings, the respondent was aware that he was in breach of the strong room management procedures and he duly apologized the for same. However, from the initial stage of replying to the demand notice, the respondent justified the breach of such terms whereby he claimed that his intentions where purely for the benefit of the applicant. The record does not indicate that the respondent was at any point aware of the alleged seriousness of the charges levelled against him or that the same amounted to gross misconduct or gross negligence.

Rule 11 (3) of GN No. 42 of 2007 requires the application of standard of conduct to be made available to employees in a manner easily understood. The provision states:

> "(3) An employer's rules in the application of discipline and standards of conduct shall be made available to the employees in a manner that is easily understood."

Since there is no established connection between the alleged breached provisions in the charge letter and the gross negligence alleged in the letter of termination, I am of the considered view that the termination of the respondent was based on an offence which he was not charged with. This rendered the termination substantively unfair as correctly observed by the Hon. arbitrator.

In the foregoing, the argument that the termination was founded on the outcome of the disciplinary hearing and should not be solely based on the termination letter is found to lack merit. This is because the termination letter is the most vital document that eventually finalizes the dispute. In that respect, it ought to reflect the charge and the outcome of the proceedings and not introducing a new charge all together.

Under the law, it is the duty of the employer to prove that the termination of his or her employee was procured fairly both substantively and procedurally. This position is well provided under **Section 39 of the ELRA** and **Rule 9 (3) of GN. 42 of 2007**. In the matter at hand, the applicant is found to have failed to discharge this burden.

Now, on the question as to what reliefs the parties are entitled to. I first wish to note that in this application, while the respondent argued that the termination was also procedurally unfair, he did not present any arguments to cement his allegation considering the fact that the CMA found the procedure being fair. The respondent never challenged this finding by filing a cross revision. In this revision, he as well did not seek any other remedies than praying for the CMA decision to be upheld. I understand that this court has the discretion to award any reliefs including those not included in the CMA Form No. 1 as stated in **Balton**

Tanzania Limited vs. Victoria Galinoma and Another [2022] CAT- LCR 33 whereby the Court of Appeal held:

> "It does not need overemphasis to hold that when giving awards, the courts have discretion under Section 40 (1) (c) of the ELRA. An arbitrator or the High Court, as the case may be, has the discretion to award an unfairly terminated employee any relief including those ones not pleaded in the referral CMA Form No. 1"

Still, I am of the considered view that the CMA granted the respondent all deserved benefits, thus I shall make no alterations on the same. In the upshot, the application is found without merit and is hereby dismissed. No orders as to costs.

Dated and delivered at Mbeya on this 01st day of November 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA