IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT SUMBAWANGA

LABOUR REVISION NO. 01 OF 2020

1. JASTON WILSON KAYAGAMBE
2. SOSPETER LADISLAUS RUGAMILA } **..... APPLICANTS**

VERSUS

TRUSTEES OF THE TANZANIA NATIONAL PARKS.....RESPONDENT

(Original Labour Dispute No. CMA/RK/69/2016)

JUDGMENT

24th July 2020 – 31rd August, 2020

MRANGO, J;

This revision application by the applicants, Jaston Wilson Kayagambe and Sospeter Ladislaus Rugamila is brought under **Sections 91 (1) (a) (b)** and 91 **(2) (b), 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004** (herein ELRA) read together with **Rules 24 (1) 24 (2) (a) (b) (c) (d) (e)** and **(f) , 24 (3) (a) (b) (c)** and **(d)** and **28 (1) (c) (d) and (e) of the Labour Court Rules, Government Notice No. 106 of 2007** (herein Rules).

The application is supported by the affidavit sworn by Mr. Jaston Wilson Kayagambe, for both applicants.

The applicants prays for this court to call, inspect, revise and set aside the award of the Commission for Mediation and Arbitration for Rukwa at Sumbawanga (herein CMA) in Labour Dispute with reference No. CMA/RK/69/2016 which, was delivered by Hon. Ngaruka, O. (Arbitrator) dated on 22.11.2019 and thereafter declare that the arbitrator erred in law and facts by disregarding facts which if otherwise considered he would have reached in fair, rational and just decision to both parties, and order to quash the findings of the CMA in lieu for their reinstatement.

In opposing the application, the respondent, The Trustees of the Tanzania National Parks through their learned advocate one George Dalali filed a counter affidavit sworn by Theophilo Alexander, the Principal Officer of the respondent.

Before making my mind on the submissions made by the parties, I believe a brief resume of facts on this matter is worth making. It is in record that, the applicants were initially employed by the respondent on permanent terms from 1.11.2009 as Park Rangers until the year 2014 where the respondent took disciplinary action against them following loss

of the respondent's property as a result of negligence contrary to rule 89 (7) of the Tanzania National Parks Rules of 2011 and be involved in conducts which led to the theft of 60 litres of Diesel property of the respondent contrary to rule 89 (15) of the Tanzania National Parks Staff Rules of 2011. After disciplinary hearing, the applicants were officially terminated from employment by the disciplinary committee as from the date 18. 02. 2015. Thereafter, the applicants appealed to the Director General of Tanzania National Parks against the decision of the disciplinary committee, whereby the office of the Director General confirmed the decision of the committee.

Dissatisfied with the Director General's termination decision, the applicants instituted a Labour case no. **CMA/RK/69/2016** at the Commission for Mediation and Arbitration (CMA) for Rukwa at Sumbawanga complaining of unfair termination and prayed to be reinstated to their work. After hearing of the dispute, the CMA entered an award in the respondent's favour being satisfied that the termination of the applicants was fair under **section 37 (1) (2) (a) (b) (c) of Employment and Labour Relations Act, of 2004 and Rule 12 (1)(a)(b)(20 of Employment and Labour Relations (Code of Good**

Practice) Rules, GN 42 of 2007. The CMA ordered the applicants be issued with certificates of service.

The applicants were dissatisfied with the award given to the respondent by CMA hence this application for revision.

Unlike when the matter was before the CMA, before this court, the applicants had the legal services of Mr. Evans Nzowa, learned advocate; while, Mr. George Dalali, the learned advocate appeared for the respondent.

When the matter was called on for hearing on 28.05.2020, Mr. Evans Nzowa the learned advocate for the applicants informed this court that Mr. George Dalali, the learned advocate for the respondent was attending his sick wife at KCMC Hospital, but they prayed that this application be argued by way of written submissions. On my part, I had no objection. Hence schedule to file respective written submissions was set and in fact both parties filed their respective written submission as scheduled.

In support of the application Mr. Evans Nzowa, prayed the content of the affidavit as sworn by Mr. Jaston Wilson Kayagambe in this application be adopted and form part of his submission. He made his submission in form of answering issues.

As regards to the first ground Mr. Evans Nzowa submitted that it is his contention that the termination was procedurally unfair.

Mr. Nzowa further submitted that according to arbitrator's findings at page 15, second and last paragraph and at page 16 first paragraph, it is was proved beyond reasonable doubt that the applicants were given an opportunity to make their representations, were given notice of intention to be subjected to disciplinary proceeding, right to be represented, right to cross examine employer's witnesses and investigation report, right to defend themselves, right to choose language and copy of hearing form.

In addition, Mr. Nzowa said It is the arbitrator's conclusion that the commission was satisfied that, the respondent's followed and complied with rule 1 (1), 2,4 (1-15) 5 (1-3), 8 (104), 9(1-5) of G.N No. 42 (Kanuni za utendaji bora) MWONGOZO WA SERA NA TARATIBU ZA KUSHUGHULIKIA NIDHAMU, KUKOSA UWEZO NA KUTOHITAJIKA.

He was of the strong view that some of the paragraphs of the schedule to the Code of Good Practice G.N. No. 42 (2007) Guidelines for Disciplinary Incapacity and Incompatibility Policy and Procedure, quoted by arbitrator in his conclusion that were complied with by the employer are irrelevant and not applicable to this matter. He said paragraph 1(1) is

relating to the purpose of the guidelines, paragraph 2 is dealing with the aim of disciplinary measures which is correct employee's behavior, paragraph 5 (1-3) is dealing with suspension, paragraph 8 (1-4) is dealing with incompatibility and paragraph 9 (1-5) is general provision.

Mr. Nzowa submitted that the only relevant paragraph is paragraph 4 (1-15) but this paragraph and its subparagraphs are supplementing rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N No. 42 of 2007. Mr. Nzowa said according to annexture A and B of the applicant's affidavit, " the notice of intention to institute disciplinary proceeding and charge sheet " it was alleged that the transgression was committed on 28/02/2014 to 1/03/2014, the notice were handed over to the applicants on 7/03/2014 for Sospeter L. Rugamila (2nd applicant) and on 11/04/2014 to Jaston W. Kayagambe (1st applicant). The disciplinary hearing was conducted on 18/2/ 2015 and the applicants were terminated on the same date, which is more than 11 months from the date of alleged transgression and 11 months since the notice of intention to institute disciplinary hearing and charge sheet was served to Sospeter L. Rugamila and 10 months after the same notice and charge sheet was served to Jaston W. Kayagambe.

Mr. Nzowa made it clear that Rule 13 (4) of the Code of Good Practice GN. No. 42/2007 requires the employer to hold and finalise the disciplinary hearing within a reasonable time, he quoted for reference;

"13(4) the hearing shall be held and finalized within a reasonable time....."

He explained that the import of this rule is to the effect that, if the employer failed to take disciplinary action within reasonable time after he has become aware of the misconduct, he is deemed to have waived his right to terminate the employment of an employee for such misconduct.

To the effect, he quoted also paragraph 11 (3) of ILO recommendation No. 119 of 1963, recommendation concerning termination of employment at the initiative of the employer which was given it is effect in this country though the Employment and Labour Relations Act, 2004, Act No. 6 of 2004 and its Code of Good Practice GN. No. 42 of 2007 and he quoted for reference;

"11(3) an employer should be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."

Mr. Nzowa cited the case of **Idd Dilunga and 30 Others versus Industries Ltd**, Labour Revision No. 160 of 2006 at page 10 paragraph one and two and at page 11 first paragraph the Hon. Justice Mwipopo, J, the Chairperson of then Industrial Court of Tanzania (as he then was) interpreting paragraph 11 (3) of the ILO recommendation held that;

> "…. Hapa leo, mwajiri na mlalamikawa kwa upande wa walalamikaji akina Idd S. Dilunga, Hamidu Mohamed Ngaga na Thadeus Ukaliwasasi Luhwago waliachishwa kazi tarehe 4/2/2005 zaidi ya miezi miwili tokea mkutano wa suluhu tarehe 26/9/2005 uishe. Kwa kipindi chote cha siku 75 nzima (miezi 2 1/2) waliendelea na kazi kama kawaida mpaka tarehe 5/2/2005 ndipo waliachishwa kazi. Wote wengine waliachishwa kazi Kwenye mwezi Oktoba, 2005 ndani ya mwezi mmoja kati ya tarehe 13/10/2005 – 20/10/2005. Huo ndio reasonable time "……na mwajiri aliridhika hivyo na akakaa kimya mwezi Novemba, 2003 wote bila kuwaachisha kazi wafanyakazi hao. Disemba 5, 2005 naamua sio "reasonable" "tena kwa mwajiri kuendekeza zoezi la discretion aliyopewa

awachukulie hatua ya kuwaachisha kazi waliodhurika kwenye mgomo.....

Kwa hiyo, nashawishika kutumia kifungu cha 11 (3) ha pendekezo la ILO la 119 la mwaka 1963 ili mwajiri kuzuiwa kuendelea kuwaachisha kazi walalamikaji watatu ambao kwao anachukuliwa kuwa alikwisha achana na zoezi la kuwachukulia hatua hiyo baada ya miezi $2^1/_2$ kupita tokea "mandate" na mkutano wa suluhu wa tarehe 29/10/2005 ya kuwapa adhabu ya kuwaachisha kazi.

Mr. Nzowa submitted that ILO recommendation No. 119 of 1963 was superseded by recommendation No. 166 of 1982. He quoted paragraph 10 of recommendation No. 166 of 1982 for by reference. *10.*

"The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct."

It is his contention that the respondent failure to take disciplinary action for more than eleven months renders the termination of applicants'

employment unlawfully for violating Rule 13 (4) of the Code of Good Practice GN. No. 42 of 2007 as he quoted herein above, because the respondent had waived her right to terminate the service of the applicants for failure to take disciplinary action within a reasonable time after she had become aware of the misconduct.

Mr. Nzowa further submitted that Rule 13 (4) of the Code of Good Practice G.N 42/2007 read together with paragraph 4 (2) of the schedule to the Code of Good Practice, GUIDELINES FOR DISCIPLINARY IN CAPACITY AND INCOMPATIBILITY POLICY AND PROCEDURES, requires the chairperson of the disciplinary hearing to be impartial and should not have been involved in the issues giving rise to the hearing. He quote the said provisions for easy of reference.

> "Rule 13-(4)..... chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case."
>
> Paragraph 4 (2) the chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances a senior manager from a different office may serve as chairperson.

Submitting further he said that in this matter the chairperson was not involved in the issues giving rise to the hearing and he came from a different office, but he was impartial and biased. It is very clearly that the chairperson of the hearing was interested in the outcome of the hearing by making sure that the applicants are terminated. He added that the chairperson has shown his partiality in Exh. K-9 titled "maelezo ya kupinga rufaa "at page 3 line 19 where he wrote "ninapinga madai ya rufaa ya Bw. Jaston W. Kayagambe kama ifuatavyo:- and at page 6 he gave his advise to the appellate authority " kutokana na maelelezo ya hapo juu nashauri kuwa rufaa yake itupiliwe mbali"

Mr. Nzowa insisted that reading the contents of Exh. K-9. is very clear that, the chairperson exceeded his mandate and became party to the case, instead of be an impartial arbiter by violating paragraph 4(12) of the schedule to the Code of Good Practice Guidelines for Disciplinary Incapacity and Incompatibility Police and Procedures. he quoted the paragraph for easy of reference.

4-(12) an employee may appeal against the outcome of a hearing by completing the appropriate part of the copy of the disciplinary form and give it to the chairperson within five working days of being

disciplined, together with any written representations the employee may wish to make. The chairperson must within five working days refer the reasons for the disciplinary action imposed. The appealing employee must be given a copy of this report. (he emphasized by italics).

Mr. Nzowa said in this matter the chairperson did not prepare a written report as required by the law, instead he wrote his length submission why he opposed the appeal and prayer praying for the dismissal of the appeal as if he is the complainant in the matter. He further argued that from the actions of the chairperson, the applicants were prejudged before the hearing. It seems the chairperson had instruction or interest to terminate the services of the applicants. That is why he fought tooth and nail to make sure the applicants appeal is dismissed.

Mr. Nzowa submitted that it is a trite law that any decision made in contravention of the principles of natural justice (rule against bias), is nullity ab-initio. Under the circumstance it is his contention that the termination is unlawful because the chairperson was impartial contrary to the law.

Submitting further, he said **Rule 13 (7) of the Code of Good Practice** read together with **paragraph 4(8) of the Guidelines for Disciplinary, Incapacity and Incompatibility Police and Procedure** grants to the employee who has been found guilty, a right to put forward the mitigation factors before a decision is made. He quoted for easy of reference.

> Rule 13 (7) when the hearing results in the employee being found guilty of the allegation under consideration the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed.
>
> Para 4(8) the question of guilty and the penalty to be imposed should be considered separately and the employee or the representative is entitled to make representation in regard to an appropriate penalty. Mitigating and aggravating factors to be considered should include the

a) Seriousness of the offence and likelihood of repetition
b) Employees circumstances including personal circumstances, length of service and previous disciplinary record
c) Nature of the employee's job including health and safety consideration and

d) Circumstances of the infringement itself.

The import of the two provisions above, he said is to the effect that, the disciplinary hearing has two major parts, the first one is to hear evidence and determine whether the employee is guilty or not and the second part will be conducted only when the employee is being found guilty for the purpose of determining the appropriate penalty. It is in the second stage the employee is entitled to put forward his mitigating factors. In this matter the applicants were denied the legal right to put forward their mitigating factors contrary to the law hence renders the termination procedurally unfair.

It is his humble submission that the arbitrator erred in holding that the termination was substantively fair.

Responding to another ground he submitted that it is apparent that the applicants were terminated based on new allegations which they never been charged with before. According to the clause 12 of the hearing form Exh. K-7B, K-7, AP-5 and Exh. K-11 termination letters, the applicants were found guilty of – he quoted:-

> ".....kwa makosa ya uzembe kazini na kukosa uaminifu kwa mwajiri wake kwa kuruhusu kuwekwa kwenye

jenereta la mwajiri wake lita 60 za mafuta ya wizi yaliyokuwa yamekamatwa bila kutoa taarifa kwa viongozi wake wa kazi na bila kufuata taratibu zilizowekwa na hivyo kupoteza ushahidi kuhusiana na tukio zima la ukamataji wa lita 60 za mafuta hayo ya dizeli"

He said the above allegation is new and quite different from the allegation contained on the charge sheets. he quoted the relevant part ;

MAELEZO YA MASHTAKA

I..... kosa la kusababisha upotevu wa mali ya mwajiri kosa ambalo linaweza kukupelekea kuachishwa kazi kwa mujibu wa kanuni ya 89 (7) au (15) ya kanuni za Utumishi za Hifadhi za Taifa za mwaka 2011.

TAARIFA ZA MASHTAKA

.....unatuhumiwa kwa wizi na upotevu wa mafuta ya diesel lita sitini (60) mali ya mwajiri yaliyokuwa yamehifadhiwa katika pipa kwenye jingo la jenereta usiku wa tarehe 28/2/2014 kuamkia siku ya tarehe 1/3/ 2014.....

MAELEZO YA KOSA LA KWANZA

Kuzembea na kushindwa kutimiza majukumu ya kulinda mali ya mwajiri na hivyo kumsababishia mwajiri hasara kutokana na upotevu wa mali ya mwajiri kutokana na uzembe.....kwa mujibu wa kanuni ya 89 (7)

MALELZO YA KOSA LA PILI

Kujihusisha na matendo yaliyopelekea wizi na upotevu wa mafuta ya diesel lita sitini (60) mali za mwajiri, kosa hili ni utovu wa nidhamu uliokithiri..... kanuni ya 89 (15).

Mr. Nzowa said the purpose of Rule 13 (2) (3) of the Code of Good Practice read together with paragraph 4 (3) of the Schedule to the Code, the guidelines the Disciplinary, incapacity and incompatibility policy and procedure is to notify the employee in writing of the allegations using a form and language that the employee can reasonably understand, so that he can prepare for the hearing and defend himself properly. The rules meant that the charges must be clear, understandable and not vague.

Mr. Nzowa argued that in his matter apart from the fact that, the charges were vague, the applicants were terminated based on new allegations which they were never charged with before as he indicated herein above contrary to the law. He cited the case of **Cocacola Kwanza**

Ltd Emmanuel Mollel, Application No. 22 of 2008, unreported, the court held that,

> "The respondent was charged with gross negligence and disciplinary proceedings against him were conducted on the basis of the charge of gross negligence..... in the letter of termination, the employer cited the reason for termination as incapacity. The holding of a disciplinary inquiry and thereafter conducting an audit in which the employee was excluded and the dismissal of the employee based on the one sided audit was unfair termination within the meaning of section 37 (1) of the Employment and Labour Relations Act....."

It is his contention that, if in the process of disciplinary hearing, the employer discovers a new allegations, he is supposed to recharge the employees and give them an opportunity to defend themselves. He cited the case of **Elia Kasalile and Others versus the institute of Social Work**, Civil Appeal No. 145 of 2016, unreported, where the court held that;

"Having so discussed we find that the suit involved all the 21 applicants; and that since the appellants were not charged and heard before being terminated from their employment, it is obvious that the respondent violated the cardinal principle of right to be heard. Consequently the appellants termination was void and of no effect"

Mr. Nzowa submitted that looking at Exhibit K-6B, it is clearly that the charges are defective for duplicity. According to Exhibit K-6B the applicants were charged for;

1. Causing loss to employers properties
2. Theft and loss of sixty litres of diesel
3. Negligence or failure to perform duties as park ranger to protect employers properly and therefore to cause loss to the employer due to negligence
4. To associate with acts which lead to theft and loss of 60 litres of diesel

It is his contention that, the offence of theft requires proof of intention to deprive the owner of use and possession and

knowledge that the act was unlawful. It must also be proved that the employee committed an act by which the owner is actually deprived of possession, while negligence is a failure to comply with the standard of care that would be exercised in the circumstances be a reasonable person and cause damage or loss.

Mr. Nzowa submitted that it is his further contention that the offence of negligence and offence relating to theft, cannot come out of the one act and the same transaction because the elements of the two offences are different in nature. Under the circumstances, it is his humble submission that the charges were defective for duplicity and was drafted so with intent to confuse and give the applicants hard time to defend themselves. He cited the case of AUGUSTINO KALINGA V. NATIONAL BANK OF COMMERCE UCHUNGUZI WA MGOGORO NA. 169 WA MWAKA 2006 at page 8 last para, page 9 first para and page 13 second para, the Hon. Chairperson Justice Mwipopo J. (as he then was) held that;

> "Kwenye "Statement" ya kosa hili bado mashtaka yalikosea kumshtaki kwa pamoja na hali kuna utofauti wa kosa unaounda makosa matatu tofauti... kwenye hati ya shitaka la pili moja yamechanganywa yote.

"Willfully and negligently" na hali hayo ni makosa mawili tofauti. Hivyo, anadhurika katika kujitetea, kwani ikishtakiwa kwa makusudi suala la uzembe hapo hapo hakuna tena.....

Mashtaka ya mlalamikiwa yana kasoro kubwa zaidi kwani yalinyumbulishwa kuwa makosa mengi kwa tendo lilelile moja ambapo ingepaswa yawe "in the alternative" na si kama makosa 4 tofauti. Hii pia ilimdhuru mlalamikaji katika kujitetea na ilitosha kuwona hana hatia kwa kuchanganywa mashtaka mengi kwa tendo lilelile moja kinyume cha sheria (duplex disciplinary charges) mashtaka ya nyavu za makokoro zina madhara yake kwa mlalamikaji ya kujichanganya kiutetezi na kiadhabu"

Mr. Nzowa cited Rule 12 (5) of the Code of Good Practice, which require the employer to apply the sanction of termination consistently. He quoted for easy of reference:-

"12-(5) the employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past and

consistently as between two or more employees who commit same conduct."

He added that according to rule 12 (5) above it is unfair to treat employees who have committed similar misconduct differently. In this matter the applicants and two others DW1 Rebelatus G. Kinyonto AND DW2 Jafar J. Mkelemi were charged for similar offence from the same transaction but the applicants were terminated and the other two DW1 and DW2 were given warnings (refer the testimony of DW1 and DW2).

It is his contention that this inconsistency is the clear evidence of arbitrary action on the part of the employer which renders the termination unfair. He said the evidence of DW3, DW4 and DW5 was hearsay evidence. For example in his testimony the DW4, claimed to send the unknown informer who he did not mention his or her name. It is the said informer who was informing him of what is happening. The testimony of DW4 is totally lies by any standard with no credibility at all. The same applies to DW3 and DW5. The only reliable and credible testimony is from DW1 and DW2 who was present at the scene.

He submitted further that respondent's witnesses, especially DW3, DW4 and DW5 did not testify before the disciplinary hearing. The

employer's witness at disciplinary hearing was Mr. Alexander Alex Haguma who did not testify at CMA. It is his contention that the respondents failed and did not prove the allegations against the applicants.

Mr. Nzowa argued that the applicants' employment was terminated by the chairperson of the disciplinary hearing who is not the employer or their disciplinary authority. According National Parks Act (Cap. R.E. 2002).

> "20-(1) the trustees may, appoint such officers and they may deem necessary for the carrying out of the objects of and their functions, duties and powers under this act, and may in their discretion remove or dismiss such officers and servants.

According to **rule 77 (b) of the Tanzania National Parks Staff Regulations, 2011**, the disciplinary authority of the applicants is the Management's Appointments and Disciplinary Committee not the chairperson of the disciplinary hearing.

> "Disciplinary authority over all employees shall be the Trustees but for practical implementation the trustees have relegated some of such authority to the management in the following manner-

a).....

b) The Management's Appointments and Disciplinary Committee is delegated power by the Board of Trustees to act on its behalf as the appointing and disciplinary authority in respect of all employees holding posts whose salary scale is G.1 to G.6 and TAN 01 to TAN 05.

It is his contention that the termination is unlawful because the chairperson of disciplinary hearing has no authority to terminate the services of the applicants.

Finally he submitted that based on his submission here in above he humbly submitted that the termination of the applicants were both procedurally and substantively unfair. Under the circumstances he prayed to this Hon. Court to revise and quash the decision and award of the CMA and order the respondents to re-instate back applicants in their position without loss of their entitlement as including remunerations.

In reply, Mr. George Dalali – learned advocate for the respondent *In primoloco* he prayed to adopt affidavit as sworn by Theophilo Alexander, the Principal Officer of the respondent, filed in this Hon. Court and served to the applicants.

Mr. Dalali submitted that in the course of composing his submission he took note pertinent points of laws which he berg to bring them into attention of this Hon. Court.

1. The second applicant Sospeter Ladislaus Rugamila has not swear and file his affidavit in support of his application contrary to ***Rule 24(3) of Labour Court Rules, Government Notice Number 106 of 2007.***

2. Reading the affidavit of first applicant: Jaston Wilson Kayagambe, it is clear that, the first applicant has instituted this application as a representative of the second applicant: Sospeter Ladislaus Rugamila contrary to **Rule 44 (2) of *the Labour Court Rules, Government Notice Number 106 of 2007.***

With regard the first point of law. Mr. Dalali submitted that failure of the second applicant, Sospeter Ladislaus Rugamila to file an affidavit in support of this application renders his application incompetent. The reason is crystal clear, ***Rule 24(3) of Labour Court Rules, Government Notice Number 106 of 2007*** dictates that, all applications brought

before this Hon. Court should be supported by the affidavit. He quoted the same for easy of reference:

The application shall be supported by an affidavit, which shall clearly and concisely set out...

He prayed for this Hon. Court to dismiss this application with costs for being incompetent for want of supporting affidavit of the second applicant one **Sospeter Ladislaus Rugamila**.

With regard the second point of law, Mr. Dalali submitted that the first applicant has instituted this application as a representative of the second Applicant. This can easily be seen by visiting his affidavit filed in this Hon. Court:

i. At paragraph 2.1 of the affidavit he has jointly given the particulars of himself and the second applicant,
ii. At paragraph 3.2 he has sworn on the facts which are exclusively for the second applicant one Sospeter Ladislaus Rugamila,
iii. In all paragraphs he has refers himself and the second applicant as applicants and

iv. In paragraph 5.0 he has prayed for reliefs for himself and for the second respondent.

He added that the situation shown above refers to only one thing: the first applicant has instituted this application as a representative of the second applicant, that is to say: **"a Representative suit" contrary to Rule 44 (2) of *the Labour Court Rules, Government Notice Number 106 of 2007*.** He quoted the mentioned Rule for easy of reference:

> *"Where there are numerous persons having the same interest in a suit, one or more of such persons may, **with the permission of the Court** appear and be heard or defend in such dispute, **on behalf of or for the benefit of** all persons so interested, except that the Court shall in such case give at the complainant's expenses, notice of the institution of the suit to all such persons either by personal service or where it is from the number of persons or any other service reasonably practicable, by public advertisement or otherwise, as the Court in each case may direct."*

Faced with similar situation, he said this Hon. Court defined the word suit in ***Hashim Jongo and 41 Others Versus Attorney General and T.R.A, Misc. Civil Appeal No. 41 of 2004 High Court at Dar es Salaam***. At page 12, it held:

> *"... The word "suit" has not been defined in the Civil Procedure Code 1966. However, the Oxford Dictionary of Law Fifth Edition defines "suit" as follows:*
>
> *"A court claim. The term is commonly used for any court proceedings although originally it denoted a suit in equity as opposed to an action in law..."*
>
> *Applying the above definition of the word "suit" to the present proceedings, I have no doubt in any mind that* ***the application being a "court proceeding", it is a suit*** *for the purpose of Order 1 Rule 8".*

It is his emphasis that, the first applicant: Jaston Wilson Kayagambe **has neither sought nor obtain permission of this Hon. Court** to appear and be heard on behalf of the second applicant: Sospeter Ladislaus

Rugamila as **Rule 44 (2) of *the Labour Court Rules*** (quoted supra) dictates.

Subsequently, the question here is this: what are the consequences of filing such a representative suit without this Court's permission (leave)? The answer to this question is not hard to find as there is unbroken chain of authorities regarding this situation:

In **Hashim Jongo and 41 Others versus Attorney General and T.R.A, Misc. Civil Appeal No. 41 of 2004 High Court at Dar es alaam** (quoted supra), this Hon Court faced with similar situation and at page 12 and 13 of the Ruling it unequivocally held that;

> *"... Since this court proceeding has "numerous persons having the same interest in the same proceedings" and since one or more of these persons wish to represent the others, the permission of this court has to be obtained.*
>
> *In short the provision of Order 1 Rule 8 of the Civil Procedure Code, 1966, apply to an application of this nature.* ***It is immaterial that the applicants are known to the respondent.*** *The question is whether the*

permission to institute the proceedings on behalf of the others was obtained. Since permission to represent the other applicants in these proceeding was not sought and obtained, this application brought on behalf of 42 applicants is incompetent and liable to be struck out".

In **Christopher Gasper, Richard Rukizangabo and 437 Others versus Tanzania Ports Authority, Misc. Labour Application No. 281 of 2013 High Court of Tanzania at Dar es Salaam**, this Hon. Court held the following at pages 6 and 7 of the Ruling:

"I also minded with the position of the law as clearly stressed by this court in the case of ***Mhoja Mangombe & 16 Others Vs. Akida General, Labour Revision No. 8 of 2010 (Unreported)*** *where Rweyemamu J, held that:*

"the issue of an employee or party requiring court permit before appearing in a representative suit is not a mere technicality; a party whom leave is not sought and obtained may rightly refuse to be bound by the decree

which he was not properly part of ... My understanding of the law is that, even if an employee had acted in such capacity in the CMA, he could only proceed to represent them in this court by making an application and obtained leave of the court"

The rationale behind holding that a party should obtain leave to act as representative was stressed in the Case of **Hamis Kaka and 78 Others Vs. Tanzania Railway Corporation and Kunduchi Leisure and Farming Co. Ltd Civil Appeal No. 68 of 2008 Court of Appeal at Dar es salaam (Unreported).** Bwana J.A held that:

"The party whom leave is not sought and obtained may refuse to be bound by the decree passed by the court against him"

Therefore, since the application was filed by the named two parties without leave for representative suit as required in law as discussed above, it is improperly before this court, because that is fundamental irregularities involving the jurisdiction of this court.

In the circumstances, the application is struck out before this court for being incompetent..."

In light of his submission above and fundamental legal irregularities expounded, he prayed that this application be dismissed with cost.

Responding to the first argument as submitted by the learned advocate for the applicants, he submitted that; first the ground is a new issue/matter which was neither raised nor canvassed nor deliberated in the Commission for Mediation and Arbitration (CMA) which heard the matter at the first time. He insisted that that is afterthought improperly before this Hon. Court. Secondly, he said the issue of the time spent by the employer before taking disciplinary action against the applicants is a matter of fact which attracts provision of evidence which cannot be tendered at this stage. By raising this new matter at this revision stage, the applicants are trying to improperly take the right of the respondent to be heard and provide evidence on the matter. Thirdly, he argued that this Hon. Court has no jurisdiction to entertain matters of facts which were not raised at CMA. There is a long chain of authorities which have taken the stance that matters not canvassed by lower courts (in our case: CMA) cannot be raised at Appellate or revision stage. He invited this Hon. Court to seek inspiration

from the decision of the Court in **Melita Naikiminjal and Another Versus Sailevo Loibanguti (1998) TLR 120** (page 125) quoted with approval in **Simon Godson Macha Versus Mary Kimambo, Civil Appeal No. 393 of 2019, Court of Appeal at Tanga** where the Court held (see page 11 of the attached Judgment):

> *"Obvious, the appellants cannot be heard to complain against the first appellate judge, as that judge was not bound to decide the appeal on issues or matters not raised by the appellants. After all, both appellants were represented by experienced counsel and the judge was entitled to assume that any apparent error which has been omitted by the counsel has been omitted for good reason.*
>
> *The court emphasized at page 13:*
>
> *"... in the circumstances, we are in agreement with the submissions made by Mr. Raulencio, that what is being done by Mr. Paul at this stage is only an afterthought.*
>
> *In view of the aforesaid, we find the entire appeal to be devoid of merit and it is hereby dismissed with costs."*

He further submitted that the time spent by the employer before taking disciplinary action against the applicants was reasonable time spent for investigation of the matter. He further argued that, the case of **Iddi Dilunga na Wenzake 20 Versus Bora Industries Ltd, Uchunguzi wa Mgogoro wa Kikazi Na. 160 wa 2006** relied by the applicants is distinguished with the situation at hand as in that case the issue was that two bunches of employees were terminated at different time while the alleged offence was committed by all of them in one transaction. The situation in this case is different; all the applicants were terminated on the same time and based on the findings of the same disciplinary committee. He prayed for the ground be dismissed.

With regard the second argument, Mr. Dalali submitted that it was improper for the Chairman of the Disciplinary committee to oppose the appeal of the respondent. It was not the duty of the Chairman of Disciplinary Committee to determine the appeal before it was heard by the Director General and that by doing so he showed that he was biased (see pages 3 and 4 of the Applicants' submission). He maintained that for the following reasons;

i. That what the Chairman did was to comply with the law. Guideline number 4(12) of the Guidelines for Disciplinary, incapacity and Accountability Policy and Procedures part of Employment and Labour Relations (Code of Good Practice) Rules, Government Notice number 42 published on 16th February 2007 states:

> *"An employee may appeal against the outcome of a hearing by completing the appropriate part of the copy of the disciplinary form and give it to the Chairperson within five working days of being disciplined, together with any written representations the employee may wish to make. The Chairperson must within five working days refer the matter to the more senior level of management,* ***with a written report summarizing reasons for the disciplinary action imposed.*** *The appealing employee must be given a copy of this report."*

He argued that what the Chairperson did was submitting a written report summarizing reasons for the disciplinary action imposed. That was the legal requirement. By doing that, the Chairperson did not prejudice the respondent in any way. The applicants appeals were heard by the Director

General and the results were properly given. He prayed that this ground for revision be dismissed for want of merits. He argued that the argument is devoid of merits on the following reasons: First the ground is new issue/matter which was neither raised nor canvassed nor deliberated in the Commission for Mediation and Arbitration (CMA) which heard the matter at the first time. He insisted that that is afterthought improperly before this Hon. Court. Secondly, is a matter of fact which attracts provision of evidence which cannot be tendered at this stage. By raising this new matter at this revision stage, the applicants are trying to improperly take the right of the respondent to be heard and provide evidence on the matter. Thirdly, he said this Hon. Court has no jurisdiction to entertain matters of facts which were not raised at CMA. There is a long chain of authorities which have taken the stance that matters not canvassed by lower court cannot be raised at appellate or revision stage. He invited this Hon. Court to seek inspiration from the decision of the Court quoted supra. And fourthly the applicants were given chance to put forward their mitigation.

He attached **Minutes of the Disciplinary hearing session of the First Applicant (Muhtasari wa Kikao Cha Shauri la Bw. Jaston Wilson Kayagambe)**. he quoted from the page 13 for easy of reference:

"3. Muhtasari

Baada ya mahojiano hayo kila upande ulipewa nafasi ya kueleza kwa ufupi maoni na mapendekezo yake kuhusiana na shauri. Pande husika zilieleza kama ifuatavyo:

Mwakilishi

Mwakilishi wake alieleza kwamba mtumishi ***amekiri kosa la kuweka mafuta kwenye Jenereta na kumruhusu raia kubeba madumu yaliyokuwa yamebebea mafuta ya wizi.*** *Alieleza kwamba kwa kuwa hilo ni kosa la kwanza anaiomba kamati iangalie kosa hilo kama kosa la kwanza na hivyo, impunguzie adhabu.*

Mtumishi

Mtumishi alieleza kwamba ameulizwa maswali na amejitahidi kuyajibu. ***Aliiomba Kamati kumsamehe au kumpunguzia adhabu*** *kwa kuangalia mazingira ya kosa na* ***aliahidi kutorudia makosa ya namna ile.***

He attached **Minutes of the Disciplinary hearing session of the Second applicant (Muhtasari wa Kikao Cha Shauri la Bw. Sospeter Ladislaus Rugamila)**. he quoted from the page 11 for easy of reference:

3. Muhtasari

Baada ya mahojiano hayo kila upande ulipewa nafasi ya kueleza kwa ufupi maoni na mapendekezo yake kuhusiana na shauri. Pande husika zilieleza kama ifuatavyo:

Mwakilishi

Mwakilishi wake alieleza kwamba mtumishi ***amekiri kosa la kuweka mafuta kwenye Jenereta na kumruhusu raia kubeba madumu yaliyokuwa yamebebea mafuta ya wizi.*** *Alieleza kwamba kwa masuala ya wizi*

mtumishi hahusiki na kwamba hilo lilikuwa kosa la kwanza. Mwakilishi wake aliiomba kamati kuangalia kosa hilo kama kosa la kwanza la aina hiyo hivyo impunguzie adhabu.

Mtumishi

Mtumishi alieleza kwamba ***alitenda kosa la kuweka mafuta kwenye Jenereta na kumruhusu mhudumu kuondoka na madumu yaliyokuwa na mafuta. Aliomba msamaha kwa makosa hayo.***

For the reason stated above, he prayed for this court to dismiss the third ground of this revision for want of merit.

As regard the fourth ground, Mr. Dalali submitted that the ground is a new issue/matter which was neither raised nor canvassed nor deliberated in the Commission for Mediation and Arbitration (CMA) which heard the matter at the first time. He insisted that this is afterthought improperly before this Hon. Court and this Hon. Court has no jurisdiction to entertain matters of facts which were not raised at CMA. He invited this Hon. Court to seek inspiration from the decision of the Court quoted supra.

He added that by looking at the Disciplinary Hearing Forms for both 1st and 2nd Applicants, it is clear that the applicants were found guilty of negligence for their failure to perform their duties as park rangers to protect the employer's property. He quoted from page 3 of the said hearing form which is *parimateria* with each other:

> *"Kamati ... imebaini kwamba Bw. Sospeter Ladislaus Rugamila alitenda makosa ya Uzembe kazini na kukosa uaminifu kwa mwajiri wake kwa kitendo chake cha kuruhusu mafuta ya wizi yaliyokuwa yamekamatwa ndani ya Hifadhi kuwekwa kwenye Jenereta la Mwajiri wake bila ruhusa na bila kuhakikisha kwamba taratibu za kuweka mafuta kwenye Jenereta zinafuatwa na hivyo kuharibu ushahidi wa tukio la wizi wa lita 60 za mafuta ya Dizeli pamoja na kutotaka kutoa taarifa kwa kiongozi wake wa kazi kuhusiana na tukio zima la ukamataji na uwekaji wa mafuta kwenye Jenereta".*

Mr. Dalali asked himself is it true that the applicants were terminated based on new allegations which they were never been charged as they

allege in their submission? He answered the question in negative. Looking at the charge sheet it is clear that these allegations were not new as the applicants' alleges. The applicants were charged with the same offences which they were found guilty with. He berg to quote from the charge sheet:

> *"Kuzembea au kushindwa kutimiza majukumu yako kama Askari ya kulinda mali ya mwajiri... Kosa hili ni utovu wa nidhamu uliokithiri kwa mujibu wa Kanuni ya 89 (7) (15) za mwaka 2011 ambalo adhabu yake ni pamoja na kuachishwa kazi"*

Mr. Dalali submitted that his reading of paragraph 11 of the hearing form (page 4) it is clear that, the provisions which the applicants were charged against are the same provisions which the Disciplinary Committee found them guilty of. Hence it is incomprehensible why the Applicants are alleging that they were convicted on new allegations.

As regard the fifth ground, Mr. Dalali argued that the ground is a new issue/matter which was neither raised nor canvassed nor deliberated in the Commission for Mediation and Arbitration (CMA) which heard the matter at the first time. He insisted that that is afterthought improperly

before this Hon. Court and it is matter of fact which attracts provision of evidence which cannot be tendered at this stage. By raising this new matter at this revision stage, he said the applicants are trying to improperly take the right of the respondent to be heard and provide evidence on the matter and lastly, he argued that this Hon. Court has no jurisdiction to entertain matters of facts which were not raised at CMA.

As regard the sixth ground, he argued that the applicants have not expounded on how they question the credibility of respondent's five witnesses who testified at CMA. He said the testimony of DW3, DW4 and DW5 was direct and credible. That is why the Trial CMA which had an opportunity to test the demeanor of the witness believed them. He quoted the observation of the Hon. Arbitrator at page 11 of the Award:

> *"... ushahidi wote toka upande wa mlalamikiwa kupitia DW1 hadi DW5 umedhihirisha wazi pasipo kuacha shaka wala utata wowote kwamba, walalamikiwa wote wawili kama askari wanyama Pori walitenda kosa la uzembe kazini kwa kushindwa kulinda Eneo lao la Lindo na mipaka*

yote hadi kupelekea kutokea kwa Uwizi wa mafuta katika Jenereta..."

Mr. Dalali said, it is apparent clear that, the applicants admitted the offence of negligence before the disciplinary committee. The applicants admitted to commit the charged offence and consequently their testimony corroborated the testimony of respondent's witnesses at CMA. He quoted the Arbitrator's findings at page 13:

"... Walalamikaji katika ushahidi wao walionyesha wazi kushindwa kutekeleza jambo hili ilihali kanuni hizi ziliwataka watoe taarifa. ***Lakini Tume ilipopitia kielelezo AP – 8 kilichokubalika na kila upande ilibaini kwamba, walalamikaji walikubali kwamba ni kweli walifanya uzembe mkubwa kuruhusu mafuta kuwekwa katika Jenereta na kuruhusu madumu kufichwa na tatu kukaa kimya bila kutoa taarifa kwa mwajiri wao".***

He added that at page 14 the Hon. Arbitrator proceeds:

"... Lakini wao kama walinzi wa lindo ambao walikuwa na uhakika hakuna mtu aliyeiba mafuta wala kuingia katika lindo lao na walikuwa makini, kwanini walikuwa rahisi kukubaliana na ... kurudisha mafuta kwenye Jenereta wakati hakukuwa na wizi wowote? Na kwanini hawakuwa na subra ya kusubiri alfajiri ilikujiridhisha au kumuuliza kiongozi wao ili kupata amri ya utekelezaji wa kijeshi zaidi kwa mali iliyokamatwa? ... Maana kama tukio la uwizi lilitokea nje ya lindo lao, haikuwa na maana bila hata kuongozwa na sheria kukubali mali ya wizi kutumika katika eneo unalolilinda maana kuikubali mali ya uwizi inamaana ni lazima ni lazima itakufanya uitolee ripoti au maelezo kwakuwa itaongeza idadi ya mali ulizokabidhiwa kuzilinda wakati unakabidhiwa lindo... Maswali ni mengi zaidi ambayo majibu yake mengi yanaonyesha kulikuwa na mpango na maridhiano makubwa ya kufichwa kwa ukweli ..."

As regard the final ground. Mr. Dalali submitted that what the Chairperson of the Disciplinary hearing did was to fill-in the lawful

prescribed hearing form (Hearing Form) which is part of *the Guidelines for Disciplinary, incapacity and Accountability Policy and Procedures part of Employment and Labour Relations (Code of Good Practice) Rules, Government Notice number 42* published on 16th February 2007. He quoted as follows;

> *"Disciplinary action should be recorded on the prescribed form. An employee's signature on any form shall not be an admission of guilt and is merely acknowledgement of that the employee has received the form"*

Mr. Dalali further argued that the chairperson of the Disciplinary Committee is bound to provide the **outcome of Hearing**. It is from this clear position of law that, the employee is given the chance to appeal against the outcome of hearing reached by the Chairperson. Guideline No 4(12) of the Guidelines cited *supra* provides:

> *"An employee **may appeal against the outcome of a hearing** by completing the appropriate part of the copy of the disciplinary form and give it to the chairperson within five working days of being disciplined, together with any*

written representations the employee may wish to make. The chairperson must within five working days refer the matter to the more senior level of management, with a written report summarizing reasons for the disciplinary action imposed. The appealing employee must be given a copy of this report."

He submitted that, he joined hands with the Arbitrator that, the termination of the applicants was substantively and procedurally fair as per Rules 12 and 13 of ***the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice No. 42 of 2007.*** He quoted the relevant findings of the CMA at page 15 for easy of reference:

"kuhusu kuachishwa kazi kulingana na taratibu halali kama kifungu cha 37(1)(2)(c) SAMK, No. 6/2004. Tume imekubaliana na hoja na ushahidi wote toka upande wa mlalamikiwa hususani kupitia DW5 ambaye ndiye Afisa Utumishi na Utawala na mhusika mkuu wa utunzaji wa Taarifa za watumishi (custodian of document) ambapo kupitia ushahidi wa ***vielelezo K-1, K-2, K-3, K-4, K-5, K-6(b), K-7, K-8, na K-9 (a)(b), K-10(a) mpaka K-11***

vilitosha kuthibitisha pasipo kuacha shaka hata moja kwamba walalamikaji walipatiwa nafasi ya kutoa maelezo yao wakati wa uchunguzi wa awali, walipatiwa taarifa ya kusudio la kuchukuliwa hatua za kinidhamu, walipewa haki ya kuwakilishwa, Haki ya kuhoji ushahidi na repoti za uchunguzi, walipewa haki ya kutoa utetezi na ushahidi wao, walipewa haki ya kuchagua lugha fasaha kwao, haki ya kupitia Mwenendo wa Kamati ya nidhamu, walipewa matokeo ya shauri kupitia fomu maalumu, na pia ushahidi unaonyesha walipewa utaratibu na haki ya kukata rufaa ngazi inayofuatia hususani ya Mkurugenzi Mkuu na hatimaye CMA. Ushahidi huu na hoja hizi hazikuweza kupata upinzani wowote toka upande wa Walalamikaji, na hivyo ni wazi hoja na ushahidi wote ulikuwa halali na wazi na ulikubalika kwa kila upande.

Tume imekubali na kuridhika kwamba mlalamikiwa alifuata na kuzingatia Kanuni ya 1(1), 2, 4(1-15), 5(1-3), 8(1-4), 9(1-5) T.S Na. 12... Tume imeridhika kwamba ulikuwa

uamuzi halali chini ya misingi yote ya ***sababu halali*** *na* ***Taratibu halali.***"

In concluding, he prayed for the revision be dismissed with costs

In rejoinder, learned advocate for the applicants submitted that the application before the Court is brought by two applicants, **Jaston Wilson Kayagamne and Sospeter Ladislaus Rugumila** whose names appear in the application the First and Second applicant respectively. Both applicants signed Notice of application as required by Rule 24(2) of the Labour Court Rules, 2007, he quoted the relevant part for easy reference;

> 24(2) The notice of application shall substantially comply with form No. 4 in the schedule to these Rules, signed by the party bringing the application and filed and shall contain the following information:-
>
> (a).....
> (b).....
> (c).....
> (d).....
> (e).....
> (f).....

Mr. Nzowa further submitted that it is a trite law that an affidavit may be made by any person having cognizance of the facts deposed to. (Ref to SAKAR'S CODE OF CIVIL PROCEDURE TENTH EDITION, 2002, VOLUME 1 at page 1303), that is why advocates on several occasions, have been swearing and/or affirm affidavits in support of their clients' applications before the Court of Law. He argued that Rule 24(3) of the Labour Court Rules, 2007, requires an application to be supported by affidavit, but did not say the affidavit must be of the applicant or applicants if there are more than one, which means an affidavit supporting the application may be made by any person who knows the facts of the matter. He quoted the said Rule for easy reference:-

> 24(3) the application shall be supported by an affidavit, which shall clearly and concisely set out
>
> (a).....
> (b).....
> (c).....
> (d).....

He added that the present application is not a representative suit, both applicants have signed the notice of application as required by the law. The fact that the application is supported by affidavit sworn by one of

the applicants, does not render the application a representative suit or incompetent. He is of the view that the application is competent and he prayed to this honourable Court to disregard and dismiss the two points of law raised for Lack of merit.

Responding to the merit of the matter, Mr. Nzowa submitted that on the issue of reasonable time to take disciplinary action is not a new issue but part and parcel of the issues framed at the CMA. He said the issues framed before the CMA were two. He quoted the said part for easy reference.

1. Endapo uachishwaji kazi ulikuwa halali
2. Nafuu inayostahili kila upande

In order to determine whether the termination was lawful or not, he cited Section 37 of the Employment and Labour Relations Act, 2004 (the Act) and Rule 12 and 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN No.42/2007 and Paragraph 4 of Schedule of Code of Good Practice GUIDELINES FOR DISCIPLINARY, INCAPACITY AND INCOPATILIBILITY POLICE AND PROCEDURE as a guiding principles. He quoted Section 37(1) (2) (a) (b) (c) of the Act for easy of reference;

37(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove;

(a) that the reason for termination is valid

(b) that the reason is fair reason

(i) related to the employee's misconduct, capacity or incompatibility or

(ii) based on the operational requirements of the employer and

(c) that the employment was terminated in accordance to fair procedure

In misconduct cases, he rejoined by submitting that fair procedure is stipulated under Rule 13 of the Code, read together with paragraph 4 of the Guidelines and valid reason is determined using Rule 12 of the Code read together with regard 4 (ii) of the Guidelines. Under Section 37(2) and 39 of the Act, the burden of proof that the termination of employment was fair lies on employer. He quoted Section 39 for easy reference;

39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair.

According to Section 37(4) of the Act, it is mandatory for employer, arbitrator or Labour Court to take into account the Code of Good Practice in deciding whether a termination by an employer is fair, he quoted the said Section for easy reference;

37(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99.

He argued that the issue of taking action within a reasonable time is mandatory under Rule 13(4) of the Code and is not a new issue. The evidence adduced before the CMA is very clear that the alleged misconduct purported to have happened on 28/02/2014, according to all witnesses who testified before the CMA, DW1, DW2, DW3, DW4, PW1 and PW2. DW2 tendered exhibits, which shows the disciplinary hearing having being conducted on 18/02/2015, that is more than 10 months after applicants

were served with CHARGE SHEET (refer also to page 21, last paragraph of the CMA proceedings).

It is his submission that this is not a new issue as alleged by the respondent's side because it is a mandatory requirement that both CMA and this Court have to take into account onto determining the fairness of the applicants' termination. It is his humble submission that, the respondent failed to take appropriate actions within a reasonable time waived her right to take disciplinary action. The case of **IDDI DILUNGA** is proper case under the circumstance.

On the issue of chairperson's biasness he reiterated what has been submitted in his submission In-Chief that he was in fact bias and its not true that he submitted a report as asserted by the respondent. The Chairperson submitted a written submission opposing the appeal as if he is a party to the matter and that proves that he had interest on the outcome of the hearing.

On the issue of mitigation he also reiterated what has been submitted in his submission In-Chief. The mitigation is supported to be conducted after the guilty verdict and not before it.

On the issue that the applicants were terminated on allegations they were never charged with before, he said that is a new issue as it is apparent on the documentary evidence tendered by respondent's side themselves. It is very clear that the charges in the CHARGE SHEET are different from the allegations the applicants were alleged to have been found guilty of.

On the issue of consistency, he said that is not a new issue as the applicants themselves raised it in the appeal to the Director General, DW1 and DW2 who actually returned the Diesel to the generator were pardoned and the applicants who are accused of not reporting the incident were terminated.

On the issue of Credibility of the witnesses he reiterated what he has submitted in his submission In-Chief. He said the evidence of DW3, DW4 and DW5 was hearsay evidence. The evidence of DW1 and DW2 was direct evidence and favoured the applicants.

Lastly, he reiterated his position as submitted in his submission In-Chief, that the Chairperson of the Disciplinary hearing had no authority to terminate employment of the applicants. Therefore, it is his contention that

the termination of both applicants was both substantially and procedurally unfair.

I have carefully perused this Court and the CMA records, and duly considered the submissions of both parties in this revision. The issue to be determined by this court is whether the Arbitrator properly considered the matter before him in view of the proper interpretation of the law in the available facts.

However, before going into discussing the merit of the matter, this court see it better to address the legal point as raised by the learned advocate for the respondent. As to whether failure by the second applicant to swear and file an affidavit in support of the application is fatal in law and renders the same to be incompetent.

The rule governing applications in labour court is **rule 24 (3) of the Labour Court Rules, GN No. 106 of 2007**, it provides thus;

> **The application shall be supported by an affidavit, which shall clearly and concisely set out;**
>
> **(a)The names, description and addresses of the parties**

(b)A statement of the material facts in a chronological order, on which the application is based

(c).....

(d).....

(e).....

So having the above in mind, it is mandatorily requirement of the law that all application must be supported by the affidavit. The word shall as seen in the rule pre-supposes that it is mandatory when filing an application for revision to file also a supporting affidavit. The position was emphased by Hon. Mipawa, J in **Faustine Nangale versus SHIRECU**, Labour Revision No 10 of 2012 where among other thing he observed that the word shall has an effect which goes to the root of the matter if it is not complied with.

My strict glance on the record reveals that it is only one applicant one Jaston Wilson Kayagambe who sworn and filed an affidavit in this application in exclusion of the second applicant which I think is fatal. It has been held that affidavit sworn by one applicant at the exclusion of the other is not proper in law is as if the application has not properly joined the

second applicant to the suit. See the case of **Jackson Mwakosya and Another versus The Pope Yohane Paul XXIII**, Labour Revision No. 25 of 2014.

Having said so above, it is very clear that the application is defective for offending mandatory provision of the law as hinted upon above.

In this application I find no reason for proceeding with the merit of the matter as this irregularity pointed out above suffices to make the application incompetent. Having said so I order this application struck out.

It is so ordered.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY

D. E. MRANGO

JUDGE

31. 08. 2020

Date	-	31.08.2020
Coram	-	Hon. D.E. Mrango – J.
1st Applicant 2nd Applicant	}	Both present in persons
Respondent	-	Mr. Benjamini S. Mwakasege - HRO
B/C	-	Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 31st day of August, 2020 in presence of the Applicants in persons and in presence of Mr. Benjamini S. Mwakasege – Human Resource Officer (HRO) for the Respondent.

Right of appeal explained.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SUMBAWANGA DISTRICT REGISTRY

D.E. MRANGO

JUDGE

31.08.2020