**IN THE HIGH COURT OF TANZANIA**

**[LABOUR DIVISION]**

**AT SUMBAWANGA**

**LABOUR REVISION NO. 04 OF 2020**

**(Originating from the Decision of Hon. Ngaruka, Arbitrator in Labour Dispute No. KTV/CMA/03/2019 dated 24th February, 2020)**

**KATAVI AND KAPUFI LIMITED .....1st APPLICANT**

**KATAVI MINING COMPANY LIMITED .....2nd APPLICANT**

**VERSUS**

**EMMANUEL DOTTO IBRAHIM AND 8 OTHERS.....RESPONDENT**

**JUDGEMENT**

**26th June-24th August 2020**

**MRANGO, J**

This application is made by the two applicants, **Katavi & Kapufi Limited** and **Katavi Mining Company Limited** under **Sections 91 (1), 91 (b) and 91 (2), 91 (2) (b), 91 (2) (c), 94 (1), 94 (1) (b) (i) of the Employment and Labour Relations Act, No .6 of 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) (d) and (e)** and 28 **(2) of the Labour Court Rules, Government Notice No. 106 of 2007** (herein Rules).

The application is supported by the affidavit sworn by Mr. William Kipenye, the Principal Officer/ Human Resources Officer for the both two applicants.

The applicants prays for this court to call, examine, the record of all the proceedings of the Commission for Mediation and Arbitration for Katavi at Mpanda (herein CMA) in Labour Dispute with reference No. **KTV/CMA/03/2019** revise it and set aside the said award which, was delivered by Hon. A. Ngaruka, O (Arbitrator) dated on 24.02.2020 with a view to satisfy itself as to legality, propriety, rationality, logical and correctness thereof and any other relief this Honourable court may deem fit to grant.

In opposing the application, the respondents, Emmanuel Dotto Ibrahim, Husein Daud Tatala, Wanzala Tiluhumula, Mussa Hassan Mussa, Fales Tyazo, Bedasto A. Mpalasinge, Emmanuel Evarist Kipawa, John Frednard Pesambili, John Japhet Katabi jointly through their personal representative one William Mambo filed a counter affidavit sworn by himself.

For a better understanding of the essence of this application I find it pertinent to briefly narrate the facts of this matter. It is in record that, the respondents were employed by the applicants on different posts from 2016

to 2018. Bedasto A. Mpalasinge, Wanzala Tiluhumula, Mussa Hassan Mussa, John Japhet Katabi and Emmanuel Evarist Kipawa were employed as plant helper while Falesi Tyazo as offside miner, Hussein Daud Tatala as plant operator, John Frednand Pesambili as construction technician helper and Emmanuel Dotto Ibrahim as mechanics. Seven respondents were recruited within Katavi region while Hussein Daud Tatala was recruited from Tanga and Wanzala Tiluhumula was recruited from Mwanza. On 11th day of February 2019, the applicants did terminate the respondents on the allegation that the respondents have absconded from work for the five consecutive days.

Dissatisfied with the applicants' termination decision, the respondents jointly filed/instituted a Labour Dispute No. **KTV/CMA/03/2019** at the Commission for Mediation and Arbitration (CMA) for Katavi at Mpanda complaining of unfair termination. The CMA entered an award in the respondent's favour being satisfied that their termination by the applicant was unfair under **section 37 (1) (2) (a) (b) (I) (II) (c) of Employment and Labour Relations Act, of 2004 and Rule 13 (1)(2)(3)(4)(5)(7) and (9) of Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007**. The CMA ordered the applicant payment of all benefits for the period under

termination, including notice payments, gratuity payment, annual leave payments, compensation, and be issued with clean certificates of service.

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

At the hearing of this application, Mr. Deogratius Sanga – learned advocate holding brief on behalf of Ms. Sekela Amulike – Learned Advocate represented the applicants while Mr. William Mambo – personal representative represented the respondents. Mr. Deogratius Sanga prayed for the application to be argued by way of written submission, where Mr. William Mambo conceded. Each party filed respective written submissions as scheduled and ordered by this court.

In support of the application Ms. Sekela Amulike learned advocate for the applicants prayed for the content of the affidavit in this application be adopted and form part of her submission. She made her submission in form of answering issues.

As regard to the ground that the award was improperly procured as the respondents representative one William Mambo represented before the Commission as an advocate while not, Ms. Amulike submitted that labour laws in Tanzania provided for those having *locus stand* to represent a party before labour institutions, including Commission for Mediation and

Arbitration. She cited **Rule 7 (1) of the Labour Institutions (Mediation and Arbitration guidelines), 2007 and Rule 23(1) of the Labour Institutions (Mediation and Arbitration), 2007** as they require only advocate or a member to represent parties in dispute before the Commission for Mediation and Arbitration.

Ms. Amulike added that the award of the CMA at page 1 & 3 referred one William Mambo as an advocate while in real fact is not. She argued even the Tanzania Advocate Management System (TAMS) does not recognize him as an advocate. To prove that fact she annexed an exhibit to that effect. Ms. Amulike cited the case of **Edson Osward Mbogoro versus Dr. Emmanuel John Nchimbi & Attorney General**, Civil Appeal No. 140 of 2006, where Court of Appeal made the following observation at page 13 that;

> "If an advocate in Tanzania practices as an advocate without having a current practicing certificate, not only does he act illegally but also whatever he does in that capacity (including filing documents) as unqualified person has no legal validity. To hold otherwise would be tantamount to condoning illegality."

Ms. Amulike insisted that the act of CMA to refer one William Mambo as an advocate was illegal and urged this court not to tolerate such illegality. Ms. Amulike further submitted that Mr. William Mambo had no *locus stand* to represent the respondents before the CMA as provided by **Rule 7 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) 2007** as well as **Rule 23 (1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007** (supra) as only advocate and member or personnel from trade union or employment association have *locus stand* to represent parties before CMA and not personal representative. She made it clear that personal representative are allowed only to appear before the Labour Courts according to **section 56 (b) of Labour Institution Act, 2004**. Section 3 of the said Act defines Labour Court to mean the Labour division of the High Court.

As regard to the ground that Hon. Arbitrator entertained respondent oral applications which were not procedurally brought before the CMA, Ms. Amulike submitted that Labour laws allow different applications before the CMA. She cited **Rule 29 of the Labour Institutions** (Mediation and Arbitration) Rules, 2007 which allow different applications such as condonation, joinder, substitution, variation or setting aside award, jurisdiction dispute. She added that while the said rule allow different

applications, however it provides for a procedure to be adhered wherever a party brought application before the CMA as stipulated on **Rule 29 (1) (a) (b) and (c) of Labour Institutions (Mediations and Arbitration) Rules**, 2007. She said all applications before the CMA must be in written form. With that position, Ms. Amulike argued that the oral application submitted at the CMA by one William Mambo as regard joinder of parties, joining of cases and amendment of CMF. 1 was illegal.

She added that it was material illegality for the CMA to allow and entertain oral application made by William Mambo which did not adhere to the due procedures as per the law above. Ms. Amulike insisted that it is a position of the law that nothing legal can be procured arising from illegality, as it was observed in the case of **Tanzania One Mining Ltd and Andre Ventre, Labour Revision No. 276 of 2009** HC, DSM, unreported, at page 4 the court had this to say;

> "All what is based on illegalities is rendered illegal. Hence all the findings and orders made therefrom were illegal."

In concluding, Ms Amulike was of the strong view that the proceedings of the CMA were based on the illegality as pointed out above.

As regard the ground that the award was improperly procured as some of the respondents were granted accrued leave without application

for condonation, Ms. Amulike submitted that it is a trite law that anything before court must be brought on prescribed period provided or after application to extend the prescribed period. She further submitted that the time to bring the disputes before the CMA if the dispute is on termination is thirty (30) days and if the dispute arises from any other angle be it contract or any other which the CMA has jurisdiction to entertain, the time stipulated is sixty (60) days.

Ms. Amulike insisted that annual leave is granted for a period of at least 28 days per year according to **section 31 (1) of the Employment and Labour Relations Act, Cap 2004**. She added in this dispute at hand, Hon. Arbitrator granted the respondents accrued leave which was to mean the leave granted was not paid in the year (s) back before the dispute and the respondents did not claim for it within statutory time, such assertion by the Hon. Arbitrator was wrong being tainted with illegalities and the same had no any legal basis.

With regard the ground that the award is unlawful as the respondents were allowed to change their claims in CMA. F1 after the failure of mediation, Ms. Amulike submitted by elaborating that the common procedure is that complaints or disputes before CMA are initiated by a form known as CMA. F1 and soon after other party served with the

said form, the CMA set a date for mediation or combined mediation and arbitration. And if the mediation fails, the dispute or complain may be referred to arbitration in accordance with **rule 22 (2) (b) and Rule 24 (1) of Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007**, she said the Arbitrator illegally ordered and allowed the respondents to amend their CMA.F1 claim forms and introduced new claims which were not introduced earlier in their application before the Commission without accord a chance to hear from the applicants.

Ms. Amulike further submitted that on 14/ 02/ 2019 the respondents differently filed their CMA. F1 before the Commission and served jointly the copies to the applicants after failure of mediation on 15/ 03/ 2019 7 respondents to wit: Emmanuel Dotto Ibrahim, Hussein Daudi Talatal, Wanzala Tilihumula Mtundubala, Mussa Hassan Mussa, John Japhet Katabi, Emmanuel Evarist Kipawa and Fales Tyazo jointly filed an open statement. She added that without any reasons and without adherence to legal procedure on 30/ 03/ 2019 each respondent filed another CMA. F1 which adjust their initial claims before the Commission and on 28th June 2019 the respondents filed a joint open statement. In addition, she submitted that it is a principle in the civil suits that parties are bound by their own pleadings, to cement her position she cited the case of **Nkulabo versus Kibirige**

**[1973] E.A 102**, the same position was adopted in the Court of Appeal case of **Astepro Investment Co. Ltd. Versus Jawinga Co. Ltd, Civil Appeal No. 8 of 2015**, DSM, unreported, where the court held that;

> "The proceedings in a civil suit and the decision thereof have to come from what has been pleaded."

Ms. Amulike further insisted that the respondents were bound by their earlier pleadings and the arbitrator ought to use their earlier pleadings which were submitted when they instituted a suit, or else they could pray for amendment by following due procedures.

Lastly, Ms. Amulike submitted that the action of the Commission to allow and entertain the CMA. F1 and open statement which was not properly brought before it was illegal and the same had occasioned injustice to the applicants. Hence she prayed for the award be revised and set aside.

In reply Mr. William Mambo a person representative for the respondents prayed for this Court to adopt the counter-affidavit sworn by himself to form part of his submission.

With regard the first ground, Mr. Mambo submitted that it is undisputable fact that a person may conduct, represent or address himself in the court or the CMA either orally or in writing. In Tanzania, it is a

settled law that whoever allege must prove. He said the position has been stated clearly by this Court in the case of **SECURITY GROUP (T) LIMITED VERSUS LIVINGSTONE MICHAEL LYANGA, LABOUR REVISION NO. 56 OF 2017, HIGH COURT (LABOUR DIVISION) AT MBEYA, NGWEMBE, J** (Unreported) **at page 5** as hereunder he quoted;

> "It is a cardinal principle of fair hearing that who alleges must prove the allegations by producing evidence proving the same. This principle is founded under section 110 and 111 of the Law of Evidence Act [Cap 6 R. E 2002]...Mere allegations ... without proof will remain allegations..."

Mr. Mambo further submitted that there is no oral or written fact to which the respondents' personal representative addressed himself as advocate. He argued that all documents drafted by him and being filed to the CMA and served to the applicants' bears the title of "representative" and nothing else. He invited this court to visit the hand written record of the CMA especially the first pages of the hearing date which contains the lists of the attendants at the CMA, in which, most of the time the representatives were given the attendance paper/sheet to fill in their names and titles, excluding all other hand written pages/ records of the CMA which are written by the Hon. Arbitrator himself, and Mr. William

Mambo with his own hand filled/used the words "for complainants" to mean he was there to represent the complainants. Mr. Mambo submitted that nowhere he wrote his title in the CMA attendance page/sheet (hand written CMA proceedings) as an advocate. Advocate title appears only in the CMA written proceedings which are CMA typing or otherwise mistakes.

Lastly, He asked himself as to whether does the words "representative" or "for complainant" meant an advocate?, he said not at all, and that is why even the representative for the applicants he wrote/used the word "for respondents" (as per page 13 of the written CMA proceeding as believed to be copied from the CMA hand written proceeding to which Mr. William Kipenye for respondents at CMA wrote by his hand in the attendance list page). It is obvious that Mr. William Kipenye used the words/title "For Respondents" to mean that he was there to represent the respondents at CMA as its speaks by itself, and it does not mean he used those words to mean or to represent himself as an advocate of the respondents at the CMA. The word "advocate" may bear a resemblance to the word "Counsel" which the same has never been used by the respondents' representative.

Mr. Mambo added that the counsel for the applicants challenged and questioned the *locus* of representation of one **William Mambo** as

representative in the CMA. The Counsel submitted generally that the party may be represented by the member or personnel of the Trade Union or the advocate. According to learned advocate, the personal representatives are only allowed to represent the parties in the Labour Courts as per different provisions of law cited by the counsel. It is his humble submission that may be the learned advocate is not aware of the existing provisions since 2006 which gives *locus* to the personal representative to represent the parties in mediation and arbitration at the CMA.

Mr. Mambo further submitted that the *locus* of personal representative to appear before the CMA over the aforesaid dispute's stages are provided for under **the Third Column of the Written Laws (Miscellaneous Amendment Act), Act No. 8 of 2006** (hereinafter referred to as the Amendment Act No. 8 of 2006) (at page 16 and 17 of the Amendment Act No. 8 of 2006). **The Act has amended section 86 (6) (b) of the Employment and Labour Relation Act, Act No. 6 of 2004** by adding paragraph **(c)** to the said section of the said Act to which introduces the "Personal Representative of the Party's Own Choice" to appear before the CMA as hereunder he quoted;

**"(b) subsection (6) of section 86 by-**

**(i) Deleting the full stop after the word "Advocate" appearing in paragraph (b) and substituting it for "semicolon";**

**(ii) Adding paragraph (c) as follows-**

**"(c) a personal representative of the party's own choice"..."**

Also, he said the said Amendment Act No. 8 of 2006 has amended **section 88 (7) of the Employment and Labour Relation Act, Act No. 6 of 2004** to allow the same person to represent the party in arbitration as hereunder quoted;

**"(c) in section 88:**

**(i) N/A**

**(ii) subsection (7)(b), by deleting full stop appearing after the words "advocate" and substituting for it a "semi-colon";**

**(iii) by adding immediately after paragraph (b) of subsection 7 the new paragraph (c) as follows:**

**"(c) a personal representative of the party's own choice"**

By virtue of the quoted provisions, Mr. Mambo submitted that it is apparent that the Personal Representative of the party's own choice ("the Representative" in short as Mr. William Mambo addressed himself in the CMA and in the documents he drafted) is legally allowed (has locus) to represent a party in both, mediation and arbitration at the CMA.

Mr. Mambo further submitted that the learned advocate used the Advocate Act Cap 341, and the case of **Edson Osward Mbogoro Vs Dr. Emmanuel John Nchimbi and Attorney General, Civil Appeal No. 140 2006, Court of Appeal of Tanzania, at Dar es Salaam [Unreported] at page 13** to back up his position. He is of the view that all the exhibits and the laws used by the learned advocate for the applicants to cement that the CMA illegally accorded the chance to personal representative of the respondent to appear before it has no water to fetch as she was not aware of the aforementioned provisions giving the locus/empower the personal representative to represent a person to the CMA. If the learned counsel could be aware of the Amendment Act No. 8 of 2006 she could neither bother herself to go for TAMS since it does not contains the lists of the personal representative, a title of one **William Mambo,** nor submitting the case of **Edson Osward (supra)** and Advocate Act because Mr. William Mambo is not an advocate and there is no issue of unqualified personal representative in labour laws of Tanzania.

Also, he argued that although the cited case of **Edson Osward** is a case from the superior court which binds this Court he humbly prayed for this Court to distinguish it and not to use it since its facts are very different from the case at hand. As earlier submitted that William Mambo did not

present himself as an advocate, and actually he is not, while on other hand the applicants' advocate did not prove her allegation in which the court could need to find out if Mr. William Mambo has a practicing Certificate or not. Therefore, that case is distinguishable and irrelevant to the case at hand because their facts differ since Mr. William Mambo is not and did not represented as an advocate anywhere, whether orally or in writing. He argued that all the error or mistake of writing one William Mambo as advocate or other mistakes in the Award and the CMA written proceedings is purely emanated or done by the CMA itself. As he earlier explained, Mr. William Mambo, the complainants' representative at the CMA addressed himself orally and in writing as personal representative ("the representative"). The CMA award in which the applicants' advocate has formed her claims has been written by the Hon. Arbitrator. The advocate for applicants knows that there is no any mechanism or legal procedure which needed the respondents (complainants at the CMA) side to peruse or correct the award or CMA written proceedings before they have been published so that the respondents could be blamed for any technical or clerical error/mistake in the Award or said written proceedings. In fact, the respondents' side was not aware upon the said clerical errors until being served with the application for revision on 19th March, 2020.

Submitting further Mr. Mambo said the applicants had a duty to perform against the clerical or technical error they challenged. Since all respondents' (complainants) documents drafted by one William Mambo and being served to the applicants showed his title as representative, and the fact that they noticed the error in the award, then, they were supposed to apply **section 90 of the Employment and Labour Relations Act, Act No. 6 of 2004** for the Commission to correct the mistake within 14 days as provided for under **Rule 30 (1) of the Labour Institutions (Mediation and Arbitration) Rules of 2007, GN No. 64 of 2007**. He argued that the act of not performing their legal duty after noticing the mistake in the award and waiting it to use as a ground for revision is intolerable practice, hence he said they cannot benefit from their own negligence and violation of the cited provisions.

In addition, Mr. Mambo argued that it is not lawful, just and reasonable to punish the respondents' side for the wrong, mistake or the error done by the CMA itself. As he earlier explained the award and the CMA written proceedings have been written or prepared by the CMA and no way could the respondents notice what it has been written before it reached to the applicants, while the respondents' representative did not address himself at the CMA as advocate.

Submitting further Mr. Mambo said it is the trite law of the land that the respondents shall not lose their substantive right by the clerical mistakes, errors or mere technicalities done by the CMA or the court to which did not prejudice any party. He said the position has been stated in the case of **AI OUTDOOR TANZANIA LIMITED AND ANOTHER V ALLIANCE MEDIA TANZANIA LIMITED, CIVIL APPLICATION NO. 178 OF 2008, COURT OF APPEAL OF TANZANIA, AT DAR ES SALAAM, [UNREPORTED] at Page 5** as hereunder he quoted;

> "The court is partly to blame for issuing wrongly dated decrees and orders, or issuing wrongly signed judgments, decrees and orders to parties ... In this regard, the parties should not lose their rights on mere technicalities ..."

In the light of the above case, which its decisions binds this court regardless of its correctness as stated in **(ii) of the case of JUMUIYA YA WAFANYAKAZI TANZANIA VS KIWANDA CHA UCHAPISHAJI CHA TAIFA [1988] TLR 146,** as quoted herein that **"all courts and tribunals below the Court of Appeal are bound by its decisions of the Court regardless of their correctness ...",** and on the fact that **IA OUTDOOR TANZANIA's Case (supra)** is relevant case to the case at hand because the mistake was done by the CMA itself, therefore, he

prayed for this Court to adopt the Court of Appeal position in the **IA OUTDOOR TANZANIA LIMITED case (supra)** to consider the respondents' submission that the mistake and error of writing one William Mambo as an advocate is the CMA mistake and has nothing to do with the respondents side or representative. And thereafter the Court to disregard and to dismiss this ground number one of applicants entirely.

With regard the second ground, Mr. Mambo said it is well understood to lawyers that the application before the court or the CMA may be brought orally or in writing. The learned advocate for the applicant on page 5 of her submission in chief stated that all applications before the CMA must be on the written form as the she cited **Rule 29 (2) and (3) of the Labour Institutions (Mediation and Arbitration) Rules of 2007**. He argued that even though the learned counsel did not cite the GN No. of the cited provisions, but it is to be assumed to be the GN No. 64 of 2007 as being the only labour law GN talks about application and what the Counsel purported to be the application requirement.

He continued by saying that what has been submitted by the learned counsel is total misconception of the said **Rule 29 (2) of GN No. 64**. The word of the Sub rule 2 are very open and there is no any word which

signifies the mandatory requirement of all applications to the CMA to be in writing. The said **Sub Rule 2** provides, and hereunder we quoted;

> "29 (2) an application shall be brought by notice to all persons who have an interest in the application".

Mr. Mambo argued that the words of the above cited Sub Rule 2 does not contain any word which provides mandatory requirement of written application form as contended by the advocate for applicants. Hence, he added that the application may be in written or oral form as that is undisputable fact to all lawyers, especially the practicing advocates and lawyers. Also, the giving of notice to the other party requirement as adduced by the counsel for the applicants via Sub Rule 3 of the same Rule 29 of GN No. 64 of 2007 is misinterpretation of that provision because it applies when the application is in written form. Since the respondents' representative (complainants at the CMA) application was brought by the way of oral form, then, the said Sub Rule 3 of Rule 29 could not been applied anymore.

Mr. Mambo submitted further that the CMA legally allowed the respondents' representative oral applications because was legally brought under **Rule 29 (1) (c) and (11) of the Labour Institutions (Mediation and Arbitration) Rules of 2007, GN No. 64 of 2007**. He

said that has been stated too at last paragraph of page 5 of the CMA written proceedings. That was before submitting the main oral applications as hereunder he quoted;

**"TAREHE 29/03/2019**

**ARBITRATION**

**Mbele yangu O. Ngaruka**

**Corom**

**Mlalamikaji -- Yupo**

**Mlalamikiwa -- Hayupo**

**1. William Mambo --- for complainants**

**...**

**Upande uliofika ni mmoja tuu mlalamikiwa ameshindwa kufika barua ya kutoka kwa mtendaji wa kijiji ikionyesha kwamba amegoma kupokea wito wa Tume**

**Mlalamikaji:**

**Maombi Rule 29(1) (c)(11) of GN. 64 wametuma summons kwa mlalamikiwa lakini amegoma kupokea, ... tunaomba kutoa maombi ya kusikilizwa toka upande mmoja tuu..." (*Emphasis is mine*)**

Basing on the quoted words and by virtue of **Rule 29(1)(c) and (11) of GN 64 of 2007** as legal authority used by the respondents representative in the CMA for ex-parte hearing prayer and other

application, therefore, the CMA correctly entertained and allowed the respondents applications.

In addition, Mr. Mambo submitted that the advocate for the applicants challenged the oral application for joining the parties, consolidation of cases and amending the CMA F1. It is his submission that, after oral application for ex-parte hearing brought under **Rule 29(1 c) and (11) of GN 64 of 2007** being allowed following the applicants (respondents at CMA) non-appearance and refusal to be served with summons, the respondents' representative proceeded with applying orally and submitting to the CMA the application on three issues mentioned, namely; to amend/substitute all the CMA F1. of the complainants as per **Rule 18 (1)** and **(2), 29(1)(a)(b) and (11) of GN 64 of 2007,** to join/add the 2nd respondent as per **Rule 24 (1)(2)** and **(3)(b), (5), (6)(a), (7)** and **(8) of GN 64 of 2007,** and to consolidate the cases by using **Rule 26,** and **29(1)(c)** and **(11) of GN 64 of 2007.** He said the applications are provided in page 6 and 7 of the CMA written proceedings. Subsequent to the applications, the CMA made its ruling and it actually allowed the applications basing on the reasons adduced by complainants' representative as shown under page 7 and 8 of the CMA written proceedings. He said the case of **Tanzania One Mining Ltd V Andre**

**Ventre, Labour Revision No. 276 of 2009 HC. Labour Division, Dar es Salaam (Unreported)** used by the Counsel for the applicant to back up this ground two is distinguishable and irrelevant. It is so because in that case there was an illegality while in the case at hand there was no even a single illegality as he demonstrated clearly herein above. The ex-parte application hearing was allowed due to non-appearance and denial of summons by the applicants even if the Village Executive Officer intervened (page 5 of the CMA written proceedings shows). Further said the refusal to accept the CMA summons by the applicants not only been illegal act which validity the ex-parte hearing, but also it is the disrespectful and intolerable act which must be condemned by this Court as it was done by this Court in the case of **CHINA COMMUNICATION CONSTRUCTION COMPANY LIMITED Versus SIMON MANFRED, LABOUR REVISION NO. 8 OF 2014, HIGH COURT LABOUR DIVISION, MBEYA, (UNREPORTED) at page 8** as herein under he quoted;

> "Summons was properly issued and served as evidenced by the Village Executive Officer who wrote a letter to CMA as rightly submitted by the counsel. There is no court in this country which will tolerate such attitude of applicant"

For what he has discussed above, Mr. Mambo prayed for the court to dismiss this ground because the representative of the complainants at the CMA and the CMA itself followed all legal procedure required upon the said applications. And after dealing with the three application, the summons was issued and served to the applicants to proceed with the main dispute in inter parties. The mediation was conducted again to mediate the new claims in substituted CMA Forms No. 1.

With regard to the third ground, Mr. Mambo submitted that it is true that the Employment and Labour Relations Act, Act No. 6 of 2004 requires that the claims out of termination to be claimed within 60 days otherwise the party have to seek a condonation. However, it is undeniable that the sources for labour law are not only the statutes but also the precedents play the important role source in the land. For that matter, he said there are many labour issues which are provided for in the case laws, either as an explanation to the statutory provision, exception or an additional to provision of law bearing in mind that the labour cases are the civil cases of its own kind. He cited the case of **SANGIJA JOSEPH MASAAGA Versus ULTIMATE SECURITY (T) LTD, LABOUR REVISION NO. 566 OF 2016, DAR ES SALAAM (UNREPORTED) at page 5** held that;

> "It has been the holding of this Court that after making a finding of unfair termination Hon. Arbitrator has to grant

the appropriate remedies according to the law even when not prayed by the applicant, see the case of Tanzania Revenue Authority Vs Godfrey Kajetani Dimoso, Revision No. 62 of 2015, HCLD at DSM, [Unreported] Mipawa, J (as he then was) at pages 12 -13, where the court held and emphasized that CMA form No. 1 cannot be taken to be like a plaint in normal civil cases, that the arbitrator cannot be confined to only grant what is in CMA Form No.1 ... Therefore, the arbitrator has power to grant reliefs even not pleaded for, when he makes a finding of unfair termination ...

However, the applicant did not adduce evidence at CMA on payment for annual leave for Hon. Arbitrator could not in any manner know whether the employee had accrued leave or not and whether out of time or not. ..."

Mr. Mambo humbly invited this Court to adopt the above quoted case and to find that the Hon. Arbitrator was correct to award the said accrued leave. Out of being relevant, he prayed to adopt this case because of following reasons: - **one;** the applicants did not object the said accrued leave anyhow in the CMA to which the Arbitrator could address himself to decide whether to grant or not, **two;** the said accrued leave are the right of the respondents and the applicants wishes them to be granted together with all other remedies thus why they did not objected at CMA. Objecting it

at a revision level is an afterthought. **Three;** the Hon. Arbitrator found that termination by the applicants was substantively and procedural unfair as in the cited case, the finding which is also accepted even by the applicants, thus why they did not object the arbitrator finding as stated in the above case, and **four;** the respondents pleaded it in CMA F1 and therefore the Hon. Arbitrator would acted illegally if he could not granted it. It would be noted that the Arbitrator have amended the CMA F1 impliedly by denying to grant what has been pleaded in CMA F1 while the other side did not challenge it and arbitrator is not allowed to amend CMA F1. *suo moto.*

In the light of the above explanation, he prayed for this court to dismiss the applicants ground three for lack of merit, and that the arbitrator legally granted the accrued leave in extent explained above.

With regard the last ground, Mr. Mambo submitted that the applicants' Advocate has either been misinformed by her clients or the Counsel did not peruse or read thoroughly the CMA file or written proceedings. He said apart from the fact that it is a well settled legal position that the CMA F1. can be substituted/amended, the applicants' Advocate herself at paragraph 5 of page 4 of her written submission in chief expressly provided the provision for substitution application, as hereunder quoted;

"Your Lordship, It is true that Labour laws allow different application before the Commission ..., for instance Rule 29 of Labour Institutions (Mediation and Arbitration, Rules 2007 allow application such as ..., joinder, substitution, and other application.)"

Basing on the quoted applicants' advocate written submission part which confirms the legality on substitution and other applications and on the CMA written proceedings, reasonably the Advocate for the applicants was not supposed to labour this Court with this ground. Since the law allows to amend/substitute the CMA F1, the Hon. Arbitrator was legally correct to allow the substitution/amendment of the respondents CMA F1 because they applied legally. The respondents applied substitution under **Rule 24 (8), and 29(1) (a) (c)** and **(11) of GN No. 64 of 2007.**

Submitting further he said after the applicants refused to appear and to be served with the summons as shown at page 5 and 6 of the CMA written proceedings, the CMA allowed ex-parte hearing of the applications on 29/03/2019. The respondents' representative orally (as earlier explained) applied for the substitution/amendment of all respondents' CMA F1 and other application. The CMA allowed the application basing on law and arguments submitted before it as indicated at page 5 to page 9 of the

CMA written proceedings. After ruling, on 28/06/2019 the matter went through mediation again as requirement of the law since the substituted/amended CMA F1 have new claims which have to be mediated again. The parties failed to mediate and agreed to go for arbitration (page 12 and 13 of CMA written proceedings provides). Thereafter, both parties were ordered to bring new opening statements before 17/07/2019 following new CMA Forms No. 1 since the first forms filed to the CMA and served to the applicants were taken away by event of substitution/amendment of the said CMA F1 followed by the mediation. Both parties honoured the CMA order. Succeeding to opening statements, both parties before the CMA agreed on the issues to be confined in or used in determination of dispute to its finality, and participated in hearing of the dispute under arbitration started on 26/07/2019. The applicants were the first to testify followed by the respondents as required by the law (page 13 to 16 of CMA written proceedings provides so).

Mr. Mambo was of the view that what the Advocate for applicants submitted upon this ground in the line of Rule 22(1), 22(2)(b), and 24(1) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 is misconception of legal procedure. It is true that all these provisions the learned Counsel submitted are provisions relating to stages in mediation

and arbitration, and that the parties went through the stated stages. On other hand, the Counsel for the Applicants failed to understand (what the applicants' counsel wanted to know) that all stages she narrated that they took place were taken away by event after the respondents (complainants in CMA) successful being granted a leave to substitute/amend the CMA F1 as earlier explained. That is why the same procedure enumerated by the Counsel for the applicants were exactly been followed again like they have not been conducted previous. He said the legal mandatory procedure requires the mediation, filing of opening statement and framing of issues to be conducted again after the substitution/amendment of the CMA F1 for purpose of accommodating the new changes in CMA F1 if any. Pages 13-16 CMA written proceedings provides the compliance of the said procedure. Some other documents previously served to the applicants were not served again in the second round after substitution of the CMA F1 because the substitution would not affected them as pleaded before the CMA via **Rule 24 (8) of GN No. 64 of 2007** (first paragraph of page 7 of the CMA written proceedings provide so)

In addition, he argued that the dates of 14/02/2019 and 15/03/2019 mentioned by the Counsel for the applicants are the dates before substitution/amendment of the CMA F1. The new stages/steps pursuant to

the Rules provided by the Applicants' Advocate were started on 29/03/2019 after the application been allowed. Therefore, from there nothing should be noted from all what happened or taken before the substitution of the CMA F1. On **Annexture KAT 3** as submitted by the Applicants' Advocate was the opening statement of the respondents (complainants at CMA) which gave up the ghost of amending the CMA Forms No. 1. He said the opening statement together with the claims therein was later complained by the respondents to contain some serious errors on reliefs and others. Hence, they wished to amend the CMA f1., also the law requires the opening statement to be changed too. Currently, the annexture has nothing to fetch as it has been replaced by **Annexture KAT 2 (**the new opening statement which indicates even the second applicant compared to annexture KAT 3 which did not have 2nd applicant).

On the other hand, Mr. Mambo argued that the Case of **Astepro Investment Co. Ltd Vs Jawanga Co. Ltd, Civil Appeal No. 08 of 2015 CAT, Dar es Salaam (Unreported) at page 17** cited by the applicants' Counsel is distinguishable and irrelevant to challenge what has been done by the Hon. Arbitrator. That is because the facts in the said case is very different from the facts of this case at hand. In that case of **Astepro Investment Co. (supra)** particularly at page 14, the court

states that there was variance between the cause of action as contained in the plaint lodged by the respondent, and what continued in the proceedings in the court and the evidence which led to establish the case. That is quite different from this case at hand because there is no difference between the cause of action, unfair termination, the CMA F1 (regarded as plaint) and evidence tendered and available in the CMA written proceedings. Under page 17 of judgment of **Astepro Investment Co. (supra)** the court held that decision has to come from what pleaded in proceedings and that party shall not been surprised due to the differences appeared in that case as he said earlier. It is contrary to this case at hand because the substituted CMA F1 were served to the applicants as the file of the CMA would shows the served copies of substituted CMA F1, and that the case started to move on inter parties from to the new/substituted CMA F1 by filing opening statement, framing of issues and giving evidence by both parties to the new CMA F1 and later on decision and the remedies granted basing on said substituted forms. Hence, the **Astepro Investment Co. (supra)** is obviously distinguishable case to the case at hand. Therefore he prayed for this Court to dismiss this ground four since is baseless and founded on untrue and overtaken facts by event of upon the leave to substitute CMA F1.

In the end, he wished to submit generally that every case before the Court of law contains two issues/rights/aspects, and those are substantive justice or right/issue/aspect and the procedural right or technical/technicalities/issue or aspect. It has been a long time legal position of the Court of Tanzania to take or consider the substantive justice/right in its decisions over procedural or technicalities. The Court takes this legal position to embrace what has been insisted in the Constitution of Tanzania and other laws of the land. For example, **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 as amended** provides as hereunder we quote;

> **"(2)(e) <u>In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles,</u> that is to say-**
>
> **(e) <u>to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice</u>" *[he emphasized by underline]***

In the light of the above provisions, he submitted that this Court is required not to be tied up by technicalities, rather, to deal with cases

justly, and to have regard to substantive justice as against procedural justice/right or technicalities. The cited Article of the Constitution has moved the Parliament to enact the prevailing law which provides the overriding objective principle in which the Court of Tanzania stands with it. The said principle guiding the current dispensation of justice has been stated or decided in the number of cases by the Court of Appeal of Tanzania whose decision binds this Court and by this Court too. One of the current cases of CAT providing for the said principle is the case of **YAKOBO MAGOIGA GICHERE VS PENINAH YUSUPH, CIVIL APPEAL NO. 55 OF 2017, COURT OF APPEAL OF TANZANIA, AT MWANZA (UNREPORTED) at page 13** and **15**, as hereunder he quoted;

> In page 13 - **"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2018 [Act No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice...to cut back on over-reliance on procedural technicalities..."**
>
> In page 15 - **"In the upshot, failure to identify the member who presided over the proceedings of the**

**ward tribunal when the Chairman was absent, did not occasion any failure of justice to the appellant"**

The court of appeal in the above cited case stressed on the departure from over-reliance of procedural technicalities and to regards to substantive justice. The case is relevant because all applicants' advocate grounds for revision are based on mere procedural technicalities or justice. As earlier submitted, no single revision grounds or explanation of any ground which the applicants tried to challenge the substantive justice which is whether there was unfair termination substantively and procedural or not, and whether the remedies granted were legally or not (save for accrued leave).

All what have been submitted by the applicants are mere procedural technicalities or justice because they neither goes to the root of the case nor defeat any parties' justice since the accrued leave remedy has been legally defended by the respondent. The applicants' advocate is centered or stressed only upon the errors which have been done by the CMA (whether been in award or in the CMA written proceedings). And that is Mr. William Mambo, the respondents' representative to be written as an Advocate, the act or title which is stranger even to Mr. William because he did not mentioned it anywhere. Also, the issue of joinder of party,

consolidation and amendment of CMA F1 applications which he submitted and defended it well to be legally is still being a procedural issue.

The respondents have been terminated unlawful by the applicants contrary to **section 37(1)** and **(2)(a),(b),(c)** and **39 of the Employment and Labour Relations Act, Act No. 6 of 2004** and **Rule 12(1)(a), (b), (i - v), (2), (4)(a), (b),** and **13(1), (2), (3), (4), (5), (7),** and **(8) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007** and other labour laws. And deliberately the applicants never challenged it in her application for revision.

The two of the respondents have been recruited far away from Mpanda where they have been terminated. One Mr. Wanzala Tiluhumula from Mwanza and Mr. Hussein Daudi Tatala from Tanga. This may show how these people and their families are severe suffering in the strange environment away from home on the reasons known to the applicants. The applicants never contested the unfair termination but they decided deliberately not to pay the remedies (like returning the two to their home place) in accordance with **section 40, 41, 42, 43,** and **44 of the Employment and Labour Relations Act, Act No. 6 of 2004.**

Basing on the explanation above, he humbly prayed for this Court to adopt its decision in case of **HUMPHREY NGALAWA VS COCA COLA KWANZA LIMITED, LABOUR REVISION NO. 18 OF 2017, HIGH COURT MBEYA (UNREPORTED) at page 6** where this Court stated that; as hereunder he quoted;

> **"To my view labour disputes are of their own nature, they affect the parties to dispute as well as those who depended on the employment as a means of their livelihood.**
>
> **To my view the spirit of extending jurisdiction to all judges is that labour disputes be disposed expediently and timely. ... to my view does not prejudice justice to the other parties rather it serves time to both parties and ensures speed determination of the dispute ..."**

And therefore, to disregard the mere, baseless, and nonexistence procedural technicalities claims on part of the respondents as adduced by the applicants but the CMA own mistake, hence, to dismiss all grounds of revision by the applicants and upheld the CMA Award.

With the relevant provisions of laws and the authoritative cases, it is his humble submission to this Court to dismiss entirely all four grounds for revision and prayers thereof as adduced by the Applicants' Advocate and to uphold the CMA Award entirely and to grant any other remedies this Court deems fit to grant.

In rejoinder, learned counsel for the applicants reiterated what she has submitted in her submission in chief and emphasized that the respondents submission hold no water as to the particulars of the illegalities revealed by his revision and his supporting submission thereto.

Starting with the submission that applicants concurred that there was substantive and procedural unfairness in the respondents termination Ms. Amulike argued that such assertion is wrong being tainted with misdirection and applicants truly revealed here that there was no anywhere in the Commission of Mediation and Arbitration of Katavi proceedings where the applicants said so, and if such was the case the matter couldn't even reach at the arbitration stage.

With regard to the first ground, Ms. Amulike submitted that it is vivid that the respondents' representative has agreed with his submission in chief that he was **not an advocate** as he was conducting himself, although he tried to shift the burden to the Commission that it was the one

who titled him as an advocate. The applicants wished to reiterate that the Commission was misled by the respondents representative after conducting himself as such, and even after the award was released on 24/04/2020 by the Commission of Mediation and Arbitration of Katavi the respondents were first to pick it and **section 90 of the Employment and Labour Relations Act, 2004** cited by the Respondents representative is not applicable in this scenario as the aforementioned section talks labour error of ***accidental slip*** or ***omission*** but the issue of addressing for the respondent an advocate goes to the root of the dispute causing injustice and cannot be treated as accidental error or omission, more over **Rule 30(1) of the Labour Institutions (Mediation and Arbitration) Rules of 2007 GN NO. 64 of 2007** talks about application to correct or set aside award, applicant wished to aver that said rule is inapplicable in these circumstances for the reason advanced and explained above. The act of respondents representative to shift the burden of this illegality to the Commission is wrong and intolerable, but also the cited case of AI OUTDOOR TANZANIA LIMITED AND ANOTHER V ALLIANCE MEDIA TANZANIA LIMITED, CIVIL APPLICATION NO. 178 OF 2008 CAT, DAR ES SALAAM (UNREPORTED) this case is highly distinguishable in the circumstance and this case has already been overruled by the number of

Court of Appeal recent decisions which now imposes a duty on a party who goes to correct the issued decrees and judgment to check them diligently if there are errors or mistakes, hence the court cannot be blamed thereafter or such party cannot try to benefit thereafter under the umbrella court error.

On the second ground, Ms. Amulike submitted that there is nothing crucial submitted by the respondents' representative regarding this point, instead he tried to fault the citation of the rules she made in her submission in chief. With due respect respondents representative has mislead himself and she wished to direct him to the Legal method course which is always taught at first year of study of Bachelor of Laws (LLB) that the proper way of citing a particular law is always found on preliminary provisions of such particular law which always bears this words **"This Rules May be cited as ....."** or **"This law may be cited as ....."**. So what she cited in her submission in chief is in accordance with what the citation part of particular law provides and not otherwise. There is no anywhere in the laws applicable in the Commission of Mediation and Arbitration where oral applications are allowed as the respondents representative tried to mislead this court, the manner of bringing the applications is as she submitted in her submission in chief and

since the rules cited explaining this ground in her submission in chief uses rules are Mandatory and suffice to say that the Commission erred in law to allow such illegal procedure of allowing oral applications by the respondents representative.

On the third ground, Ms. Amulike argued that the respondent representative has agreed with her submission in chief that the claims out of termination are mandatorily required to be filed within 60 days, impliedly means he is agreeing that it was illegal for commission of mediation and arbitration to grant "accrued leave" to some of the respondents hence making the award procured thereto illegal. The case of SANGIJA JOSEPH MASAAGA versus ULTIMATE SECURITY (T) LTD, LABOUR REVISION NO. 566 OF 2016, DAR ES SALAAM (UNREPORTED) is distinguishable in the present circumstances for two reasons, first the holding is of the High court of Tanzania Labour Division and the same cannot be used to supersede number of precedents landmarked by the court of appeal of Tanzania to cement the previous stated position. But secondly the case is irrelevant as it only talks about the power of the arbitrator to grant the other reliefs **"not pleaded."** Ms Amulike further submitted that to set the records clear for the benefit of this court and justice in general, the reliefs which are out of statutory time. The law is clear in that aspect and must be adhered.

With regard the last ground, Ms. Amulike submitted that there was illegality in the substitution of the respondents CMA.F1 as the procedure was not adhered, apart from agreeing that the prayers for amendment of CMA.F1 was done orally which was illegal again the respondent representative make it even worse when stating that **mediation was conducted two times** this leaves this court with a crucial question that such acts was done under what law or procedure? The answer is negative. There is no any labour law, or rule which allows such illegality.

Ms. Amulike submitted that rules of procedure are maiden of justice and the same helps parties litigating in judicial or quasi-judicial bodies to achieve a fair justice, Article 107 A 2(e) of the Constitution of the United Republic of Tanzania of 1977 as amended cited by the respondents representative cannot be used to justify illegalities and non-observance of the mandatory requirements of the law done by the Commission of Mediation and Arbitration and the respondents. Also, the case of YAKOBO MAGOIGA GICHERE VS. PENINAH YUSUPH, CIVIL APPEAL NO. 55 OF 2017, CAT MWANZA (UNREPORTED) cited by the respondents representative on overriding objective is of no use in the circumstance at hand, because there is plethora of recent landmark decisions from the Court of Appeal of Tanzania which explains that **overriding objective cannot be used to**

**defeat the mandatory procedures of the law,** although she won't reproduce those cases here as she didn't refer them in her submission in chief. The representative of the respondents is trying hard to seek sympathy of this court by stating that the respondents are suffering, this argumentation is baseless because what is before this court is the revision stating why the applicants are dissatisfied with the award of the commission of mediation and arbitration and not how someone is suffering.

She argued that even the representative for the respondent has agreed that there was apparent errors and mistakes in the CMA award in his submission at page 17, 4th paragraph groom the first line and she beged to quote ***"Besides, all the mistakes or errors done by CMA do not go to the root of the case ....."*** ***[Emphasis italicized and bolded supplied].*** This reduced the burden of this court not to labour much on the illegalities pointed out by her application for revision and its supporting submissions thereto and accordingly grant her application for revision and set aside the commission of Mediation and arbitration award.

In concluding, Ms. Amulike said regarding the strength of her above adduced submission and her previous submission in chief supporting the applicants grounds for revision, it is her humble prayer to this court that

the Award issued by commission for Mediation and Arbitration at Katavi in Labour Dispute No. KTV/CMA/03/2019 be revised and be set aside.

I have carefully perused this records of revision to this Court and the CMA records, and duly considered the submissions of both parties in this revision. The issues to be determined by the court are that; firstly, whether or not the personal representative of the respondents had *locus stand* to represent the respondents before the Commission for Mediation and Arbitration (CMA); secondly, whether Hon. Arbitrator erred to entertain oral applications during the hearing of the dispute; thirdly, whether the granting of accrued leave to the respondents were proper without application for condonation; and lastly whether it was proper for the respondents to change their claims in CMA after the failure of mediation.

As regard the first issue, it is undisputed that **Written Laws (Miscellaneous Amendment Act) No. 8 of 2006** as amended several laws Labour Laws being inclusive. The Employment and Labour Relations Act, No. 6 of 2004 was amended by the above Act in its section 86 subsection 6 by adding paragraph (c) which reads: a personal representative of the party's own choice. That means apart from a member, or an official of that party's trade union or employers' association, or advocate, a party to a labour dispute may choose to be represented by

a personal representative of his/her choice. The said Act also amended section 88 (6) to add paragraph (c) – a personal representative of the party's own choice. As rightly argued by Mr. William Mambo, a personal representative of the respondents in his submission, his representation of the respondents before the Commission for Mediation and Arbitration for Katavi at Mpanda was proper in the eyes of the law as cited above. Therefore, this ground of revision falls short of merit in this application.

As regard the second issue, my thorough reading of the entire **Rule 29 of the Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2007**, it is without doubt that the rule is applicable to all applications regarding the issue of condonation, matters of joinder, substitution, variation, setting aside of an award, also matters of jurisdiction dispute and other applications relating to the rule in question. My further reading of Rule 29 sub rule 1 – 10 may suggest that the requirement of the application to be in written form is mandatorily, however on reading sub rule 11 of the rule it appears there is an exception to the general rule. The sub rule reads thus;

> 11. **Notwithstanding this rule, the Commission may determine an application in any manner it deems proper.**

A personal representative for the respondents made oral applications before the Commission under the above sub rule 11 which to my consideration gives discretion to the Commission as to the manner of dealing with the applications other than in written form.

Therefore, the oral applications made by the personal representative for the respondents with regard the joining of disputes, joining of parties and amendment of claim forms were without doubt proper one.

As regard the third issue, that some of the respondents were granted accrued leave without application for condonation. First let me subscribe the position as raised by the respondents that after making a finding of unfair termination Hon. Arbitrator or Commission has a duty bound to grant remedies according to the laws even when not prayed by the applicant. In this dispute at hand, the respondents in their schedule of claims attached to their CMA.F1 Forms have listed an item of accrued leave to be one of their claims. However, it is at the discretion of arbitrator to give award that is considered just and fair depending on circumstances of each case, although is restricted to comply by what is or are indicated in CMA.F1. The position was decided in the case of Power Roads (T) **versus Haji Omary Ngomero, Revision No. 36 of 2007** as approved by Aboud, J in the case of **Tanzania Revenue Authority versus Andrew**

**Mapunda, Revision No. 104 of 2014**. It is a principle in labour laws that once the termination of employment is adjudged unfair, among the remedy / entitlements to be provided includes allowances, overtime, leave, notice, severance pay, gratuity and others depending on the parties agreement. See section 40 and 43 of the Employment and Labour Relations Act, No. 6 of 2004. In this case, Hon. Arbitrator ordered payment of the accrued leave to the respondents, in other words the arbitrator exercised his discretionary powers vested to him by law.

As regard the fourth issue, it is a spirit of the labour laws that once mediation fails, the dispute is referred to the stage of arbitration. The amendment or substitution of CMA. F1 is allowed under labour laws, under Rule 29 (1) (a) of the Labour Institutions and the CMA accepted the prayer at a stage where *ex-parte* hearing was granted of the dispute following no-appearance of the applicants on the set date for hearing. The record of the CMA proceedings shows that the Commission opted to conduct a combined Mediation and Arbitration proceedings after the amendment of the CMA-F1 forms, however the mediation failed and the matter proceeded into arbitration stage. The applicants were involved in the mediation after they had entered an appearance with the amended CMA. F1 forms. The substitution could have occasioned injustices on the part of the applicants

if they could not have participated in the mediation process after the amendment or substitution of the claim forms. But the record shows that the applicant did participate in the process.

The Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 provides for such substitution, or variation. The respondents prayed for the CMA. F1 forms to be substituted, and the prayer was granted by the Hon. Arbitrator, but subject to the notice of the other party, otherwise the amendment done becomes improper. Learned advocate for the applicants asserted that Hon. Arbitrator allowed the respondents to make amendments to their CMA. F1 claims to introduce new claims without accord a chance to the applicants of the said amendments. However as hinted earlier upon the applicants did participate in the mediation with regard the new claims added.

I now turn to the merit of the dispute, I join hands with the decision of the Commission for Mediation and Arbitration, that the applicants contravened **section 37 (1) (2) (a) (b) (I) (II) (C) of the Employment and Labour Relations Act No. 6 of 2004 read together with Rule 13 (1) (2) (3) (4) (5) (7) (9) of the Employment and Labour Relations ( Code of Good Practice ) Rules**

**GN. No. 42 of 2007** as the applicants did not prove a valid reason for termination and as well did not follow a fair procedure for termination.

It is a principle of law in fair hearing that he who alleges must prove the allegations by producing evidence to prove the same as per **section 110 and 111 of the Law of Evidence Act, Cap 6 RE 2002**. In Labour Laws as per **section 37** above, employer is duty bound to prove that a termination of employment is fair termination with regard to the two aspects, one the reason for the termination is valid and a fair reason and two, the termination is according to the fair procedure.

The applicants alleged that the respondents absconded from work for the five consecutive days which attracted disciplinary action. However, before the Commission the applicants did not prove the allegation to the satisfaction of the Commission, thus the allegation remain a mere allegations. The same to the disciplinary action taken, the applicants did not conduct investigation nor prepared a formal charge against the respondents as per the Rule 13 above regarding to the fairness of the procedure.

Having so said, in concluding I may say the termination of the respondents was against the spirit of the Labour Laws as discussed herein, both substantially and procedurally, the rest of the award of the

Commission for Mediation and Arbitration for Katavi at Mpanda is upheld, in the end, this application is without merit, the same is dismissed with costs.

It is so ordered.


**D. E. MRANGO**

**JUDGE**

**24. 08. 2020**

| | | |
|---|---|---|
| Date | - | 24.08.2020 |
| Coram | - | Hon. D.E. Mrango – J. |
| 1st Applicant | | Ms. Sekela Amulike – Adv. |
| 2nd Applicant | | |
| 1st Respondent | | |
| 2nd Respondent | | |
| 3rd Respondent | | |
| 4th Respondent | | |
| 5th Respondent | | Ms. Sekela Amulike for |
| 6th Respondent | | Mr. William Mambo – personal representative |
| 7th Respondent | | |
| 8th Respondent | | |
| 9th Respondent | | |
| B/C | | Mr. A.K. Sichilima – SRMA |

**COURT**: Typed Judgment delivered today the 24th day of August, 2020 in Presence of Ms. Sekela Amulike – Learned Advocate for the Applicant and hold briefs for Mr. William Mambo – Personal representative for the Respondents.

Right of appeal explained.


**D.E. MRANGO**

**JUDGE**

**24.08.2020**