IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR-ES-SALAAM

REVISION NO.256 OF 2019

(Originating from CMA/IR/MAF/35/2018)

UNILEVER TEA TANZANIA LTD.....APPLICANT

VERSUS

THOMAS OKELLO ATITO.....RESPONDENT

JUDGEMENT

Date of Last Order: 07/08/2020
Date of this Ruling: .16/10/2020

NANGELA, J.:

This is application for revision was filed by the Applicant to challenge the Award/decision of the Commission for Mediation and Arbitration (to be referred hereafter as the **"CMA"**) dated 8th February 2019. The award resulted from a dispute referred to the CMA by the Respondent, (Mr Thomas Okello Atito, a Kenyan national, who was an employee of the Applicant). Mr. Atito was employed as a "Code and Legal Counsel" of the Applicant. Having heard both parties, the CMA decided in favour of the Respondent and ordered the Respondent be reinstated without loss of remuneration or else be paid a sum of TZS 89,699,529.94/- .

Aggrieved by the CMA's award, the Applicant filed this application for revision on 26th March 2019. The Application was made by way of a

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Notice of Application and Chamber Summons under section 91(1) (a) and 2 (c); Section 94 (1) (b) (i) of the *Employment and Labour Relations Act No.6 of 2004 (as amended),* Rule 24 (1), (2) (a), (b),(c), (d),(e) and (f) and Rule 28 (1) (c), (d) and (e) of the *Labour Institutions (Labour Courts) Rules, G.N. No.106 of 2007.* The Chamber Summons is supported by an affidavit of **Johnson Mhavile** sworn at Dar-Es-Salaam on the 25th March 2019. The same was presented for filing in this Court on the 26th March 2019.

In both, the Notice of Application and the Chamber Summons, the Applicant seeks for the following orders:

1. That, this Court be pleased to call for records and proceedings of Commission for Mediation and Arbitration in dispute *No. CMA/IR/MAF/35/2018 between Thoms Okello Atito v Unilever Tea Tanzania Ltd,* revise and set aside the Award dated 8th February 2019 (Hon. Fortunata Muzee, Arbitrator), served to the Applicant on 12th February 2019 on grounds that:
    (a) The erred in law by finding that an offence of forgery to be proved at a different standard of proof while she admitted that burden of proof in relation to employment matters is on balance of probabilities.
    (b) The Arbitrator erred in law and fact by finding that the Respondent was not found guilty of forgery while it was clearly stipulated under Exh.DW1 F that the Respondent was found guilty of the 1st Count which was expressly stated as Forgery. The Arbitrator failed to appreciate that the chairperson only considered major breach of trust when considering termination and the fact that being found culpable of the offence of forgery has an overall implication on the trust between the Respondent and the Applicant and the fact that the misconduct was so serious that it made a continued employment relationship intolerable.
    (c) The Arbitrator erred in law and in fact by failing to take into consideration her findings that the Respondent failed to follow laid down procedures

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in relation to leave application when determining whether there was valid, fair and substantial reason for termination and, without prejudice to the foregoing, failed to factor this when determining the award of compensation, if any.

(d) In the alternative, and without prejudice to ground (c) above, the Arbitrator erred in law and in fact by applying double standards in determining the issues.

(e) The Arbitrator erred in fact by finding that there was a formal Investigation Report when there was none.

(f) In the alternative and without prejudice to ground (e) above, the Arbitrator erred in law by finding that there is a requirement to prepare a formal investigation to ascertain whether the grounds for a disciplinary hearing to be held.

(g) The Arbitrator erred in law and fact by finding that the Respondent was not availed with information for purposes of the hearing while there was evidence on record to show that the finding of the investigations were shared with the Respondent before the hearing.

(h) The Arbitrator erred in law and in fact by finding that there was a need to call as witness to the disciplinary hearing the person who assisted in the investigation which has the effects of changing the balance of proof in relation to the disciplinary hearing from the standard of a balance of probability to that of beyond reasonable doubt.

(i) The Arbitrator erred in law and in fact by finding that there is a need to have physical presence of witnesses during disciplinary hearing when the requirement of the law is for the employee to be given an opportunity to question the witnesses without requiring the witness's physical presence.

(j) The Arbitrator erred in law by failing to analyse and take into consideration the legal arguments that were put forward by the Applicant' Counsel in the closing submissions.

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(k) The Arbitrator erred in law by taking into consideration the legal arguments made by the Respondent's counsel in the closing submissions while they were filed out of time.

(l) The Arbitrator erred in law by ordering reinstatement of t he Respondent without taking into consideration the circumstances surrounding the termination which made continued employment relationship to be intolerable.

(m) The Arbitrator erred in law by awarding payment of severance pay where termination was fair on grounds of misconduct.

2. Any other reliefs in favour of the Applicant that the Honourable Court may deem fit and just to grant.

On 14th May 2019, the Respondent filed his counter affidavit in opposition to this revision. Essentially, he disputed all averments made in Mr. Mhavile's affidavit.

On the 07th day of August 2020, the parties appeared before me for the hearing of this Revision case. On the material date, the Applicant enjoyed the services of Ms Samah Salah, learned Advocate, and Mr. Jacktone O. Koyugi, learned Advocate represented the Respondent. It was agreed that this revision application be heard by way of filing written submissions. The parties adhered to the schedule of filing issued by this Court. I will summarize and later consider the submission made by each party before arriving at the findings conclusion of this revision.

Ms Salah submitted on the 1st and the 2nd ground of revision (the issue of forgery) by combining both grounds. These related to a Permit Application Letter, dated January 2015 (*Exh.PW1-C*). In her submission, she noted that, in coming to her conclusion regarding whether there was valid and fair reason for terminating Mr. Atito, the arbitrator made a finding, in page 10 of the award, that Mr. Atito was not found guilty of the offence of forgery but the offence of breach of trust and, that, forgery and

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mistrust have separate ingredients of legal proof. Ms Salah challenged the Arbitrator's findings that Mr. Atito was not found guilty of the offence of forgery.

She contended that, on part 3 of the 1st page of the Hearing Form, *Exh.PW1-F*, that, it is clear, Mr. Atito was charged of two counts: (i) forgery and (ii) failure to follow procedures in leave application process. She submitted that, at paragraph 10 of the document, the Manager was clear that Mr. Atito was found guilty of the first and second counts, and, at part 12 of the Hearing Form, *Exh.PW1-F*, the Manager recommended for termination on ground that the trust was breached.

She submitted that, according to *Exh.PW1-F*, (*Hearing Form & the minutes of the Disciplinary Proceedings*) which was tendered before the CMA, Mr. Atito did acknowledge that he was the one who lodged his application for permit. It was submitted further, that, although at page 17 of the proceedings before the CMA Mr. Atito admits to have used a different letter in his application for permit, he never submitted it at the Disciplinary Hearing or before the hearing and, that, even the person who he alleged to have assisted him denied that fact. On the basis of that, Ms Salah contended that, the Hearing Committee of the Applicant was satisfied that Mr. Atito committed an offence of forgery as he could not provide explanations regarding the origin of the disputed letter.

In view of that, Ms Salah contended that it is erroneous to state that Mr. Atito terminated for other than the offence for which he was charged with and found guilty by the arbitrator. Citing Rule 12(2) of *Rules of 2007, GN No. 42 of 2007*, Ms Salah submitted, that, when considering termination for first offenders, employers are required to consider if the misconduct alleged is serious to make a continued relationship intolerable.

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Ms Salah also submitted that, since the burden of proof in labour disputes is on balance of probabilities, it does not matter what offence an employee is charged with, be it forgery, breach of trust or otherwise.

In view of the above, it was contended that, the Manager of the Applicant was complying with the requirement of the law by taking into account the consideration of the effect of the misconduct to the relationship when recommending termination. She referred this Court to the case of **Vedastus S. Ntulanyeka & 6 Others v Mohamed Trans Ltd, Revision No. 04 of 2014 (HC, Lab. Div. at Shinyanga, (unreported)** in which, the Court, while referring to the South African Case of **Council of Scientific and Industrial Research v Fijen (1996) 17 ILJ 18 (A) at 26 D-E** held that, the relationship between employer and employee is in essence one of trust and confidence. She contended, therefore, that, if trust has been breached the employer is allowed to proceed with termination of employment.

This Court has been further referred to the case of **Rapoo v Metropolitn Botswana (Pty) Ltd [2006] (1) BLR 186 (IC)** where in the Court, while referring to Le Roux and Van Nierkerk *"The South Africa Law of Dismissal" (1994)* held a view that, dishonesty in the employment context can take various forms, including theft, fraud and other forms of devious conduct such as providing false information, non-disclosure of information, and pilfering. The Court went ahead as held that:

> "Dishonesty is a generic term which embraces all forms of conduct involving deception on part of the employees and fiduciary duty owed by an employee to the employer generally renders any dishonesty conduct a material breach of the employment contract, justifying summary dismissal."

It was further argued, on the basis of the decision of this Court in the case of **Nassoro Khatau Yahya v Toyota Tanzania Ltd, Revision**

No.192 of 2016 (unreported) that, in common law, the employee is required to act in good faith towards the employer and that, an employee who is guilty of a misconduct breaches the common law duty to act in good faith towards the employer. Ms Salah contended that, in all three cases referred to herein above; the Court was emphatic that once there is breach of trust, the only option viable is termination. As such, she submitted that it was important and rightful for the Applicant to have considered whether there was breach of trust in the circumstances of the case before proceeding with termination. Consequently, she concluded that, the Arbitrator erred in her finding that the Respondent (Mr. Atito) was terminated for an offence other than what he was charged.

As regards the 3rd and the 4th ground of revision (which were alternating) Ms Salah argued them together as well. These were about the failure on the part of the Arbitrator to take into consideration the finding in relation to act of the Respondent to proceed on leave without permission, thus amounting to a double standard in determining issues. Ms Salah was of the view that the arbitrator erred on those grounds. She contended that, since the arbitrator confirmed that Mr. Atito was guilty of the offence of failure to follow procedure and that he had been absent without permission as it could be gathered from page 11 paragraph 3 of the award, the Arbitrator failed to factor such a finding into his consideration when determining the validity of the termination.

She submitted that, under the Schedule to the Code (*Rules of 2007, GN No. 42 of 2007*), being absent from work without permission for more than 5 days amounts to a serious misconduct and justifies termination. It was Ms Salah's submission that, because it was established in the proceedings that Mr. Atito had proceeded on leave without permission

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from 4th December 2017 to 8th January 2018, the arbitrator ought to have found, therefore, that, there was justifiable reason for termination and dismiss the claim of unfair termination. She contended that, the failure to do so, made the arbitrator to reward the same person who was found to have proceeded on leave without permission. This, she concluded, amounted to a double standard in determining issues contrary to rule 5(a) and (b) of the *Code of Ethics* which requires arbitrator to act impartially.

Ms Salah submitted further that, the arbitrator's findings are contrary to the evidence on record. She referred this Court to pages 3 and 4 of the Hearing Minutes (part of PW1-F) noting that, Mr. Atito had requested to be availed with communication between the Applicant and its lawyers in relation to discovery of the Permit Application Letter.

As regards the 5th, 6th and 7th the grounds of this revision (the 6th ground being argued as an alternative to the 5th); Ms Salah submitted that, nowhere in the record of the disciplinary hearing was it said that there was an Investigation report. Instead what was shared with the Respondent was the Permit Application Letter. As such, she argued that the Arbitrator's findings that the Applicant refused to share the report with the Respondent was unfounded. She argued that, what was available was communication between the Applicant and DLA Piper which was confidential.

Reference to that effect was made to section 137 of the Evidence Act which provides that no person shall be compelled to disclose to a court of law any confidential communication that took place between the person and his advocate unless the person offers himself as a witness in Court. In view of all such submissions, the learned counsel for the Applicant asserted that, the arbitrator was not only wrong to find that the Applicant refused to share an investigation report but was also wrong to imply that there was

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an investigation report. She contended that, the arbitrator was also wrong in her finding that the communication between the Applicant and its lawyers ought to have been disclosed to Mr. Atito during the Disciplinary Hearing. She argued further that, the Permit Application Letter, which was the evidence in support of the allegation of forgery, was shared to Mr. Atito before the Disciplinary Hearing.

Concerning **the 8th and 9th grounds of revision**, Ms Salah submitted that on page 12 from paragraphs 3 to 6 of the Award, the arbitrator made findings that there was a need to call for the lawyers who assisted to obtain the Permit Application Letter as witnesses at the Disciplinary Hearing for them to testify how they came up with the conclusion of forgery. It was submitted further that the arbitrator made a finding that there was also a need to have physical presence of witnesses during the Disciplinary Hearing. As regard to such findings, Ms Salah submitted that, the arbitrator misunderstood the role of DLA & Piper in the issue giving rise to the disciplinary hearing.

In a further elaboration, she submitted that, the role of the DLA & Piper was restricted to obtaining the Permit Application Letter from the relevant authorities and to provide legal advice to the Applicant on the respective issue, which legal advice was part of privileged communication. As such, she contended that DLA & Piper had nothing to do with the Disciplinary Hearing as they could not be compelled to disclose the confidential communication between them and the Applicant. Referring to Rule 9(3) of the Code (*Rules of 2007, GN No. 42 of 2007*), she submitted that what the Applicant was only required to be satisfied, on the balance of probability, Mr. Atito had forged the Permit Application Letter. It was

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submitted that Mr. Atito failed to render explanations regarding how he got the letter and who the signatory was.

As regards the need to have physical presence of witnesses at the Disciplinary Hearing, Ms Salah submitted that the labour laws do not make a requirement that witnesses should physically attend Disciplinary Hearings. She contended that, the only requirement is to give an opportunity to the employee to cross-examine the witness per Rule 13 (5) of the Code (*Rules of 2007, GN No. 42 of 2007*).

Ms Salah further submitted that, the calling of witness by phone was agreed upon by the parties at the *Disciplinary Hearing as per Exh.PW1-F*, (page 6) and, that although the witness was asked questions by the Applicant; Mr. Atito elected not to ask the witness questions. She contended further that, in a world of technology, insisting on physical presence of witnesses in tantamount to regressing development and creating unnecessary procedural hurdles at a time when Courts are conducting proceedings via virtual hearings. On that basis she invited this Court to make a finding that the arbitrator was wrong to conclude that witnesses must appear physically before the hearing committee and require the attendance of the legal advisers as witnesses.

Concerning the **10th ground of revision**, the Applicant's learned counsel submitted that, the arbitrator erred when he took into consideration submissions which were filed out of time. Referring to paragraph 19 of the affidavit, parties were ordered to file their submissions on or before 14th December 2018. However, Paragraph 21 of the Respondent's counter affidavit avers that the Respondent was by way of a phone call allowed to file it in mid- January 2019. Citing Rule 5(h) of the *G.N. No. 42 of 2007*), any communication with the parties in relation to

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arranging dates for meetings and hearings, must be notified to both parties. She submitted that, the Applicant was not aware of the said communication and it was never reflected in the proceedings. Referring to the case of **Seti Tete v Mwanjelwa Saccos, Misc. Civil Appl. No.22 of 2018 (unreported)**, she argued that failure to comply with the order of filing submissions is equivalent to failure to appear.

Submitting on the 11th ground of this revision, Ms Salah contended that, the arbitrator's order of reinstatement was wrong since he had confirmed the guilty verdict on the offence of failure to follow procedures and held that Mr. Atito's absence was without permission. She contended that, according to Section 40(1) of Cap. 366 [R.E 2019], the reliefs listed are only available where termination is unfair termination. She submitted, relying on the case of **Nassoro Khatau Yahya v Toyota Tanzania Ltd No.192 of 2016 (unreported)** and **Tredcor Tanzania Ltd and William Green, Revision No.28 of 2016**.

Ms Salah submitted further that, the Arbitrator failed to take into account Rule 32(2) (b) and (c) of the Mediation and Arbitration Rules before ordering reinstatement. Finally, Ms Salah submitted on the last ground of revision arguing that in terms of section 42(3) of Cap.366 [R.E.2019], severance pay is not payable to where termination was fair on grounds of misconduct. She contended, therefore, that, in terms of section 41 (3) of Cap.366 [R.E.2019], it was wrong for the Arbitrator to order payment of severance pay in this case. On the basis of the learned counsel for the Applicant invited this Court to set aside the award.

In a rebuttal submission, Mr. Koyungi, the learned counsel for the Respondent submitted, as regards the 1st and 2nd ground of revision, that, the charges, as set out in the *Notice of Hearing Form and in the Minutes of*

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Disciplinary Hearing, were tainted with discrepancy or differences. He further submitted that even the reasons for termination as per the letter of termination are at variance with the charges, thereby rendering termination of Mr. Atito's employment substantively and procedurally unfair. To further elaborate his submission, Mr Koyugi contended that, while on page 14 of the Minutes of the Disciplinary Hearing (*Annex T-2 of the Counter Affidavit*) the Chairman expressly found the Employer guilty of breach of trust and recommended termination of employment as the course to be taken, in the notice of hearing Form dated 13th March 2018 (*Annex T-3 to the Counter Affidavit*), Mr Atito faced two counts: (i) forgery and (ii) failure to follow laid down procedure for processing leave application.

It was Mr Koyugi's further submission that, the termination letter (*Annex.T-4 to the Counter Affidavit*) stated, generally, that, Mr Atito was guilty of misconduct, an offence he was not charged with in the first place. He referred to this Court the case of **National Bank of Commerce Ltd v Mwinishehe Mussa, Revision No.393 Of 2019 (unreported)** wherein, the Respondent was facing a charge of gross negligence and the disciplinary committee made a finding that he was not guilty of gross negligence and called upon the Respondent to respond to the charge of being dishonesty. In that case, Madam Justice Muruke, J., made a finding that the Respondent was not validly terminated.

Mr Koyugi submitted that this Court should make a finding in a similar way since Mr Atito was face with different charges, *i.e.*, the Disciplinary Committee found him guilty of breach of trust for which he was not charged, and, that, the employer terminated him generally for misconduct; again for which he was not charged in the first place. In view of this, he urged this Court, on the basis of the authority in **National Bank**

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of Commerce Ltd v Mwinishehe Mussa (supra), to rule that there was failure of fair hearing thereby rendering termination of employment unfair.

In a further submission, Mr. Koyugi contended that, in the Disciplinary Code and the Procedure Manual of the Applicant, there is no offence of forgery or offence of failure to follow procedures laid down for processing annual leave applications. He maintained that overall, Mr. Atito was charged of an offence which was unknown to the Applicant's Disciplinary Code as there is no provision that states forgery and breach of trust are employment offences under the code. He also doubted the veracity of the alleged forged Permit Application Letter.

Concerning the 3rd, 4th and 5th grounds of revision, Mr. Koyungi submitted that, the Applicant's claim that Mr Atito failed to follow laid down procedures of processing annual leave application is unmeritorious as there was no such an offence. He contended that the Applicant failed to produce in evidence the HR Manual or Leave Policy to establish the Charge. It was submitted further that, Mr. Atito was not charged with the offence of absenteeism from work without permit and, the submission that he had absconded from duty for more than 5 days was an afterthought. He refereed this Court to page 8 and 9 of the Minutes of Disciplinary Hearing (*Annex T-2 to the Counter Affidavit*). He submitted, therefore, that, the Arbitrator erred when he intimated at page 11 of the award that Mr. Atito did not obtain permission for taking annual leave.

Alternatively, it was Mr. Koyugi's submission that, even if it were to be said that Mr. Atito had left without permission, still that would not have justified his termination since that would have attracted a warning only as per the Applicant's Disciplinary Code and Procedure Manual of 2011, rule 17. Overall, he denounced the Applicant's submission that the Arbitrator

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did not consider the finding that Mr. Atito took annual leave without permission as being misleading and not factual, arguing that she did so on pages 10 and 11 of the Award.

As regards the Applicant submissions about the 5th, 6th and 7th the grounds of this revision's on refusal to share an Investigation Report, Mr Koyugi was of the view that rule 13(1) of the *GN No. 42 of 2007* is couched in mandatory term to the effect that employers have to carry out investigation to ascertain whether there are grounds of hearing. He argued that the import on this is that at the end of the day there will be a report. He referred to this Court the case of **Severo Mutegiki & Rehema Mwasandube v Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No.343 of 2019, CAT, (Dodoma).** In that case, the Court of Appeal of Tanzania considered an audit report was formed the basis of termination of the appellants and stated that, their non-involvement and subsequent conviction based on the report was irregular because they could not adequately prepare for the hearing before the hearing committee of the employer.

As for the instant case at hand, Mr Koyugi contended that lack of the investigation report robbed the employer any compelling basis for the hearing, be it legal or factual. He argued that the Applicant was under a duty to share investigation report which lead to the unearthing of the so-called forged Permit Application Letter. While acknowledging that Rule 13(1) of *GN No. 42 of 2007*) does not compel employers to share privileged legal opinion, he maintained that it does require them to share investigation reports and the Applicant cannot hide under the cover of privileged communication to deprive Mr Atito of his right to the investigation report.

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Concerning the issue of production of witnesses during disciplinary hearing, Mr Koyugi submitted that, the general rule is that he who alleges must prove. Citing Rule 13 (5) of GN No. 42 of 2007, he maintained that, the employee has the right to question witnesses called. He argued that during the disciplinary hearing no witness appear physically. He argued, on the basis of Rule 13(5) of GN No. 42 of 2007, that, as a matter of law, witnesses have to appear physically. He cited the case of **Tarcis Kakwesigho v North Mara Gold Mine Ltd, Labour Digest, 2014, Part I, No.27** (at page 66) where this Court observed as follows, that:

> "It was not proper for the employer to establish a case against the employee in the absence of calling ... the investigator from MIG who could be cross-examined rather than rely on statements which in terms of the Law of Evidence are not direct evidence and stood to be challenged."

Situating that case in the present dispute, Mr Koyugi argued that the Investigators form DLA & Piper were not summoned and the Applicant sought to rely on hearsay evidence introduced through phone call between Doris Shitamanwa and Alson Kariuki. He contended, therefore, that, Mr. Atito was denied the rightful opportunity to effectively cross-examine Mrs Shitamwa and the Committee could not observe her demeanor. He denied that Mr. Atito ever consented to the hearing of the witness by way of a phone calling. In my view I need not be detained by this submission. The record shows that Mr. Atito had the opportunity to ask questions to the witnesses and there be not issue of procedural unfairness in that regard.

As regards the submission that the Respondent's submissions were received outside the time limit set by the CMA, Mr Koyugi submitted that the Arbitrator did not take such submissions into account. He thus

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dismissed the submission by the Applicant in that point as lacking merits. Furthermore, Mr. Koyugi submitted, in regard to the wrongfulness of the order of reinstatement that, the order was justifiable as one of the reliefs under section 40(1) of ELRA, Cap.366 [R.E.2019]. He denounced as an afterthought, the submission by the Applicant's counsel that the relationship between the Applicant and the Respondent had become incompatible. He argued that, the Respondent has the right to work and to protection against unemployment. He urged the Court to consider and follow its decision in the case **National Bank of Commerce Ltd v Mwinishehe Mussa (supra).**

As regards the payment of severance pay, Mr Koyugi maintained that the same was lawfully awarded since there was no proven misconduct warranting the termination of Mr. Atito was alleged. In that premise, he urged this Court to dismiss the revision application and uphold the CMA's verdict that Mr. Atito was unfairly terminated, and uphold the relief of reinstatement ordered by the CMA or else, should the Applicant refuse to reinstate Mr Atito without loss of remuneration from the date of his unlawful, termination, then the Applicant be ordered, in addition to payment of 12 months salaries, in terms of section 40(3) of ELRA, Cap.366 [R.E. 2019], in addition to payment of salary arrears payable by reason of order of reinstatement.

In her rejoinder submission, Ms Salah rejoined by stating that he termination letter needs to be read together with the documents forming part of the Disciplinary Hearing. She contended that, the word "misconduct" does not mean that Mr. Atito was terminated for a different offence other than what he was charged with as alleged. She maintained that, when read with the termination letter and *Exh DW-1 F*, the

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misconduct being referred to in the letter was the forgery and failure to follow procedure in leave application process and hence there was no new charge added to the letter of termination.

She rejoined further, in reference to the contract of employment, that, in terms of *clause 18(b) of Exh.PW1-A*, any termination arising out of dishonesty and absence without leave, among others, are termed as misconduct. For that, matter, it was argued that, the termination letter was drafted in line with the requirement of the employment contract and the *Applicant's Disciplinary Code and Procedure Manual, Exh. PW-1 B*, (page 21 paragraph 13). She wholly distinguished the case of **National Bank of Commerce Ltd v Mwinishehe Mussa (supra)** as inapplicable to the facts of this case.

Ms Salah also rejoined that the Arbitrator correctly made a finding on page 11 of the Award that, Mr. Atito did not follow the procedure and went on leave without permission and that such a finding ought to have gone onto his final consideration regarding the fairness of the termination of Mr Atito. She rejoined that, the Counsel for the Respondent had misinterpreted the provision of Rule 17(a) to (c) of the Applicant's Disciplinary Code and Procedure Manual, which do not deal with the offence of absenteeism for more than 5 days which is subject to termination. She also distinguished the case of **Severo Mutegiki & Rehema Mwasandube v Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA) (supra)**. She reiterated her submission in chief that Mr Atito was given right to be heard as documents which were relied upon at the Disciplinary Hearing were availed to him before the hearing was conducted.

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As regards the issue of veracity of the Permit Application Letter, Ms Salah rejoined by referring to section 2 of the Evidence Act, arguing that the Act applies to judicial proceedings, other than those in primary courts. As such she concluded that the argument was misconceived as the Respondent failed to justify which he regards the Disciplinary Proceedings as judicial proceedings. She also distinguished the case of **Tarcis Kakwesigho v North Mara Gold Mine Ltd (supra)** and reiterated here submission in chief that there is no requirement that witnesses must be present physically and that the arbitrator was wrong when he ordered reinstatement.

As regards the prayer by the learned counsel for the Respondent to revise the reliefs granted by the CMA, Ms Salah rejoined that, such prayers are untenable as Mr. Atito is trying to use a back door to file an application which is non-existent. She contended that since there has been no revision filed by him he is barred from challenging the reliefs granted. She further argued that, according t section 40(1) (a) of the ELRA, Cap.366 [R.E 2019], the order for payment of remuneration is from the date of termination to the date when the CMA issues an award of unfair termination. She finally reiterated her submission regarding the erroneous nature of the order of payment of severance pay to Mr Atito and invited the Court to consider the earlier prayers by the Applicant.

Having summarized the submissions by the rival parties let me now turn to the merits of this revision. I have given my thoughtful consideration to the arguments advanced by the learned counsel for the parties and have perused the record. As it might be noted, the revision case at hand has been pegged on a number of grounds upon which rival submissions were made by the learned counsel for the parties. The main

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issue to be addressed, in my view, **is whether the Arbitrator's decision was correct in the circumstances of the case.** This main issue, however, has a number of ancillary issues connected to it, which, if proved, will culminate into an answer to the main issue. One of such ancillary issues is set out hereunder on the basis of the first ground relating to the allegation of forgery. It reads as follows:

> *Whether the Arbitrator erred in law and fact by finding that the Respondent was not found guilty of forgery and, if so, whether the alleged offence of forgery was to be proved at a different standard of proof other than on balance of probabilities.*

Before I address this set of issues, let me state that, as a matter of principle, this Court is warranted to evaluate the evidence submitted in the CMA. That trite position of the law was authoritatively espoused in the Court of Appeal case of **Dotto s/o Ikongo v R, Criminal Appeal No.6 of 2006, (unreported).** In that case the Court stated that, a first appellate court has a duty to approach the whole of the evidence on record from a fresh perspective and with an open mind. One may as well see the cases of **Selle & Another v Associated Motor Boat Co. Ltd & Another *(1968) EA 123, and* Dinkerrai Ramkrishna Pandya v. R (1957) EA 336).**

Consequently, I have a duty to evaluate and re-examine the evidence adduced before the CMA in order to reach a finding. I am alive, as well, to the fact that, this Court had no opportunity of hearing or seeing the parties or their witnesses when they testified before the CMA, and, for that matter, cannot easily interfere with the findings of facts. In the **Alfeo Valentino v Republic, Crim. Appeal No. 92 of 2006- CAT (Unreported)**, the Court of Appeal was of the view that:

> "An appellate court can only interfere with a finding of fact by a trial court where it is "satisfied that the trial court has misapprehended the evidence in such a manner as to make

> it clear that its conclusions are based on incorrect premises": See **Salum Bugu v Mariam Kibwana**, Civil Appeal No. 29 of 1992 (unreported)."

As regards the first issues set our herein above, it is clear to me that the crux of the matter is the Arbitrator's findings the Disciplinary Hearing Committee did not found Mr. Atito guilty of the offence of forgery but rather was guilty of the offence of breach of trust, which, in her views, the two have separate ingredients of legal proof. The learned counsel for the Applicant has challenged this arguing that the Disciplinary Hearing Committee made a made clear finding that Mr. Atito, the Respondent, was guilty of forgery. She has made it clear that the forgery case against Mr Atito was mounted and proved on the basis of the fact that he secured his work permit on the strength of forged or fabricated document, a Permit Application Letter, dated January 2015 (*Exh.PW1-C*). The Applicant's position on that is not only stated in paragraphs 14 of the supporting affidavit, but also strongly emphasized in the submissions made by the Applicant's learned counsel. In view of the rival arguments on that point, there is a need to clear the hanging clouds of doubt, and, to do so, one has to revisit the record of the proceedings of the Disciplinary Committee which was tendered before the CMA as *Exh.PW1-F*.

As submitted by the learned counsel for the Applicant, it clear to me as I look at the record, that, in the 3rd paragraph part 10 of the Hearing Form, a finding was made during the hearing before the Disciplinary Committee that Mr. Atito was guilty of the first count (which was forgery). Consequently, the CMA's findings that Mr. Atito was not found guilty on the first count as charged is erroneous. I also find it erroneous to state that Mr Atito was convicted of an offence of breach of trust (mistrust).

However, having established that the Arbitrator erred when she ruled that the Disciplinary Committee did not find the Respondent guilty of forgery, in my view, what may be necessary to consider is whether the allegations of forgery were proved and to what extent should such an allegation be proved in an employment-related case. Forgery, as defined in **Black's Law Dictionary 7th Edition Bryan E. Garner at page 661**, as the act of making a false document or altering a real one to be used as if genuine. The Applicant has alleged that the Permit Application Letter, dated January 2015 (*Exh.PW1-C*) was a forged document and that it was the making of the Responent (Mr. Atito).

In law, according to Section 110 (1) of the Evidence Act, it is clear that '*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'*. Section 110 (2) of the same Act provides that '*when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*'. Further still, as per the section 39 of EAL, Cap.366 [R.E 2019] and Rule 9(3) of the *Employment and Labour Relations (Code of Conduct of Good Practice) Rules of 2007, GN No. 42 of 2007*, the burden of proof in labour disputes is on balance of probabilities. Section 39 of Cap.366 [R.E 2019] provides that: *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

The above provisions, therefore, place the burden on the employer to establish on the balance of probability that the termination of the employee was fair. However, considered in the context of the allegation of forgery which constituted the first count for which Mr Atito was charged with, it is trite law that when an allegation regarding forgery or fraud is floated around in a civil case, the expectation is that the degree or threshold of

proof will be a bit raised above the normal standard required in civil cases. The case **Omari Yusuf vs Rahma Ahmed Abduikadir (1987) TLR 169** is illustrative on that point. In that case, the Court of Appeal made it clear that:

> "[W]hen the question whether someone has committed a crime is raised in civil proceedings, that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."

An earlier case which provides for a similar view is the case of **R.G. Patel vs Lai Makanji [1957] E.A 314**, where it was made clear that when there are allegations of fraud or forgery, such allegations must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance o f probabilities.

The above two holdings by the Court of Appeal of Tanzania clearly respond to the submission which were made by the learned counsel for the Applicant when she contended that since the arbitrator had held that the burden of proof in labour disputes is on balance of probabilities, it does not matter what offence an employee is charged with, be it forgery, breach of trust or otherwise. In my view, it matters a lot as it raises the threshold of proof beyond that which is normally maintained in civil litigations. See also the cases of **Alex Msama v Moses David Mabula and Paulo Meenda Mushi, Land case No.355 of 2014, [2018] TZHCLandD 548; [17 August 2018 TANZLII]**; and **The Registered Trustees of Alli Mberesero Foundation vKapesa Benedicto Mberesero, Comm Case No.176 of 2017) [2019] TZHCComD 131; [04 April 2019 TANZLII].**

With all that in mind, I therefore pose here to ask: was the allegation of forgery for which Mr Atito was convicted of sufficiently proved above

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the normal standard of proof in civil cases? According to the record at hand, the only evidence which the Disciplinary Hearing Committee of the Applicant relied on was a Permit Application Letter, dated January 2015 (*Exh.PW1-C*). It was stated, at page 13, paragraph 3 of *Exh.PW1-F*, (*Hearing Form & the minutes of the Disciplinary Proceedings*) that:

> "the fact that Thomas failed to explain the anomalies and signatory used in the letter and failed to produce the true copy according to his claims, but being able to submit all other documents used in the process shows that there is forgery that has been done in the process."

However, the above finding of the Committee fell short of stating whether it was Mr Thomas Atito who perpetrated it or someone else. Consequently, such evidence fell short of being water tight in the manner envisaged in the cases of **Omari Yusuf v Rahma Ahmed Abduikadir** (supra) or **R.G. Patel v Lai Makanji** (supra). Consequently, since there was no other evidence relied on other than the Permit Application Letter, dated January 2015 (*Exh.PW1-C*), and whose procurement and authenticity was subjected to challenge (see page 5-7 of *Exh.PW1-F*, (*Hearing Form & the minutes of the Disciplinary Proceedings*), I find that the offence of forgery was not fully established and, even if the Applicant argues that Mr Atito was found guilty if it, such findings were not supported by sufficient evidence given that proof of an allegation of that nature require a bit higher standard above normal. In my view, such a standard could not be fully established by the Applicant, not only before the Disciplinary Hearing Committee but also before the CMA.

In view of the above conclusion, I see no reason why I should address the issue of discrepancies in the charge in relation to the first count as contended by the counsel for the Respondent. In my view, the first count was clear and constitutes a misconduct within a company which could have

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warranted a dismissal (termination) by the employer had it been sufficiently proved.

By and large, the first set of issues, about **whether the Arbitrator erred in law and fact by finding that the Respondent was not found guilty of forgery and, if so, whether the alleged offence of forgery was to be proved at a different standard of proof other than on balance of probabilities,** are responded to in the affirmative.

That is to say, *firstly*, that, indeed the arbitrator erred in finding that the Respondent was not found guilty of forgery and secondly, that, the alleged offence of forgery was to be proved at a standard different from (slightly higher that) that of 'on balance of probability'.

However, as it has been reasoned herein above, even if the CMA failed to taken into account the Disciplinary Hearing Committee's finding of guilty, the finding cannot stand as the allegation was not supported by sufficient evidence that meets the requisite standard of proof.

It is worth noting, however, that, the termination of Mr Atito (the Respondent) was not only based on the consideration of the first count. There was as well a second count based on his failure to follow laid down procedures in leave application process leading to overstatement of leave liability against the Applicant. As the record shows on paragraph 3 of page 11 of the Award, this second count the CMA Arbitrator was upheld. However, as correctly submitted by the learned counsel for the Applicant, despite of such a finding, the CMA Arbitrator did not factor it in her overall decision when determining whether there was valid, fair and substantial reason for termination. Having made a finding that the Mr. Atito failed to follow laid down procedures in relation to leave application and thus was away from his place of duty for over five days, one would have expected her

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to analyse the available evidence and factor this when determining fairness of his termination. As such the Arbitrator erred.

The next question to consider is whether the second count was a proper offence for which an employee could be held liable in case of breach. Mr Koyungi has submitted that, the Applicant's claim that Mr Atito failed to follow laid down procedures of processing annual leave application is unmeritorious as there was no such an offence and further that, the charge against Mr Atito on that count was not established. He also contended that Mr Atito was not charged with the offence of absenteeism from work without permit and the submission that he had absconded from duty for more than 5 days was an afterthought. He refereed this Court to page 8 and 9 of the Minutes of Disciplinary Hearing (*Annex. T-2 to the Counter Affidavit*) and proceeded to state that the Arbitrator erred in her findings that Mr. Atito had proceeded on leave without permission.

As Ms Salah correctly submitted, the Respondent cannot be allowed in the manner he has done to query the findings of the Arbitrator on the second count. If he wanted to do so he would have filed an application to have the CMA decision revised on that point. What is my observation is that the CMA Arbitrator was satisfied that the 2nd count was merited. However she did not factor that finding in the overall determination of whether the termination was fair. Looking at the record, it is not disputed that Mr Atito (the Respondent) went on leave and he did not even handover his duties to a caretaker. Pages 7, 8 and 9 of the *Exh.PW1-F*, (*Hearing Form & the minutes of the Disciplinary Proceedings*), contain information regarding this count. It is clear that he proceeded on leave without first obtaining an approval. It is trite that, a failure by an employee to submit or maintain

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accurate leave records may be grounds for corrective or disciplinary action, up to and including termination of an employee from his/her employment.

In his argument, Mr Koyugi has also argued that the offence for which the Respondent was charged with was not known to the law or even the Applicant's Disciplinary Code. He argued that, even if it was then it would have only attracted a warning. I am not convinced by this submission at all. Looking at paragraph 17 (a) to (c) of *Applicant's Disciplinary Code and Procedure Manual*, it is clear that it has listed such an offence and its punishment. Written warning could only be for an employee who absconds for less than 5 days. When the absence exceeds 5 days, the offence attracts a hefty punishment, including termination. Item 9 of the /Rule 11 of the *Employment and Labour Relations (Code of Good Relation) GN.42 of 2007* states clear that:- "Absence from work without permission or without acceptable reason for more than 5 days is considered an offence constituting serious misconduct justifying termination. "

In view of the above, I quite agree with the submission by the Applicant that, since the CMA had established that Mr. Atito had proceeded on leave without permission from 4th December 2017 to 8th January 2018, the Arbitrator ought to have made a finding that, there was justifiable reason for termination and dismiss the claim of unfair termination. The failure to do so, made the arbitrator to reward the same person whom she had found to have breached the law by proceeding on leave without permission. This, indeed, amounted to a double standard in determining issues as was against the well established principle that an arbitrator must act impartially.

Having made the above finding, I see no reasons why I should labour to address the rest of grounds or issues raised in this revision application.

Consequently, the Award made by the Arbitrator cannot stand but should be revised and be set aside.

In the upshot, this Court settles for the following orders:

1. THAT, since the Arbitrator had established that the Respondent had proceeded on leave without approval, she erred in law when she failed to factor that finding in her consideration regarding whether the termination of the Respondent on that ground was justified or not.
2. THAT, in the circumstances of the case and, given the findings that the Respondent had proceeded on leave without permission, his termination was justified on that ground. This revision application is therefore granted and the decision of the Arbitrator is hereby set aside.
3. I make no orders as to costs.

Order accordingly.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania (Labour Division)
16 / 10 /2020

Right of Appeal Explained.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania (Labour Division)

16/ 10 /2020

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