IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT DAR-ES-SALAAM

LABOUR REVISION NO.263 OF 2019

(Originating from Labour Dispute CMA/DSM/ILA/R.794/17/855)

NELSON P. SHOO.....1st APPLICANT

HERIETH A MFINANGA .....2nd APPLICANT

VERSUS

AKIBA COMMERCIAL BANK.....RESPONDENT

JUDGMENT

Date of Last Order: 07/08/2020
Date of Judgement: 16/10/2020

NANGELA, J.:

In this instant revision case, the 1st and 2nd Applicants are contesting an award dated 19th February, 2019, which blessed a decision to have them terminated from employment. Such termination took effect on 29th May 2017, following conclusion of a disciplinary hearing of allegations of forgery and breach of banking procedures and policies, which were levelled against the Applicants. Following their termination, they referred a dispute to the Commission for Mediation and Arbitration (CMA) but lost their case in favour of the Respondent.

The Applicants have now moved to this Court by way of an Application for Revision, seeking to challenge the arbitral award on the various grounds as they still consider that their termination was unfair. The Applicants have filed this revision case under section 91(1) (a), (b), and 91(2) (a), (b), 91(4) (a), (b) and 94 (1) (b) (i) of the Employment and Labour

Relations Act, No. 6 of 2004 (as amended by the Written Laws (Miscellaneous Amendments) Act, No.3 of 2010 and Rules 24 (1), (2) (a), (b), (c), (d), (e), and (f) and 24 (3) (a), (b), (c), (d) and 28 (1) (c), (d) and (e) of the Labour Court Rules, G.N.No.106 of 2007.

The Application was brought by way of Notice of Application and a Chamber Summons supported a jointly sworn affidavit of Nelson P. Shoo and Herieth A. Mfinanga. In the Notice and Chamber Application the Applicants are seeking for the following orders of this Court:

1. The honourable Court be pleased to revise and set aside the Arbitration proceedings and award issued by Hon.Grace Wilbard Masawe (Arbitrator) in Commission for Mediation and Arbitration on 1st February 2019 in Dispute No.CMA/DSM/ILA/R.794/17/855, which was delivered by applicants on 19th February, 2019.
2. The Honourable Court be pleased to set aside the Arbitration Proceedings and Award determined the dispute in the manner it considers appropriate.
3. Any other relief that the Court may deem fit to grant.

In the affidavit in support of the application paragraph 4 contain seven grounds:

1. That the Arbitrator erred in law and facts for finding that the Applicants have been fairly terminated.
2. The Arbitrator erred in law and fact to admit and relied on the *cctv footage* which was not properly tendered.
3. The Arbitrator erred in law and fact by failure to analyse evidence correctly.
4. That, the evidence of the Applicants was not properly recorded.
5. That, the Arbitrator erred in law and in facts by failing to summarize, evaluate, and record key issues presented by parties.
6. That, the Arbitrator erred in law and in facts for not giving reasons for his decision as required by law.
7. That, the Arbitrator erred in law and in facts for determining arbitration which she had no jurisdiction.

On 04th July 2019, the Respondent filed a Notice of Opposition as required under Rule 24 (4) (a) and (b) of the Labour Court Rules, G.N.No.106 of 2007. The Notice of opposition was accompanied by a counter affidavit filed on the same day.

In its Notice of Opposition, the Respondent prayed for the dismissal of the Application for lack of merits and any other orders which the Court may deem fit to grant. On the 7th August 2020 when this case was called on for hearing the Applicants enjoyed the services of Mr. Mnyira Abdallah, learned Advocate while the Respondent was represented Mr. Lige James, learned advocate. The matter proceeded by way of oral submissions.

Commencing his submission, Mr. Abdallah sought the leave of the Court and adopted the Applicants' joint affidavit in support of the application. He referred this Court to paragraph 4 of the said affidavit which sets out the grounds for upon which the Application is based. He submitted that, looking at the facts and the evidence adduced by the Respondent, the case against the Applicants was not properly proved. He contended that, PW1 who served as a bank teller cannot be accused of forgery and occasioning loss of TZS 27,000,000/= because the Respondent's operations are governed by the systems of authorization.

Mr. Abdallah contended further that, it was therefore wrong to hold that the 1st Applicant forged and was able to withdraw TZS 27,000,000/= from client's accounts without authorization. He submitted further that, during the CMA hearing it was proved from the testimony received and *Exh.A8* which was tendered before the CMA, that, one of the Accounts tempered with was a dormant account. He contended that, according to DW1, Stella Sinamtwa, a dormant account cannot be operated by way of withdrawal before being activated.

In his further submission, the learned counsel for the Applicants submitted that, in view of the above, the person who activated the account was the Manager DW1, Ms. Stella Sinamtwa, and, for that matter, it was totally wrong to hold that the 1st Applicant was the one who activated the accounts and withdrew there-form TZS 27million, while *Exh.A8* proves that it was a dormant account which could only be activated by DW1. Mr Abdallah further contended that, Dw1 who activated the accounts was at the same time the complainant in the Disciplinary Committee and appeared as DW1 before the CMA. He contended that, she had a duty of take due diligence to ensure that the documents brought before her for activation of the dormant accounts were proper documents.

Mr Abdallah argued further that, a bank slip which was alleged to have been used to deposit TZS 500,000/ to activate one of the dormant accounts was not tendered into evidence. He queried, if the accounts were dormant and were thereafter activated by a bank slip of TZS 500,000/, - was it not proper to tender it to ascertain who used it to activate the accounts? Was it the 1st Applicant or the client/account holder? He argued that, instead of tendering the relevant bank slip the Respondent tendered several withdrawal slips which were marked as *Exh.A4* which were claimed to have been used to withdraw funds from the accounts.

Mr Abdallah further asked why there wasn't a police forensic report to verify the signatures if they were of the first Applicant or otherwise? He contended that DW1's evidence was a pure hearsay because she was not an expert, a fact she admitted. He submitted that, there was no cogent evidence since, the matter having been based on allegation of forgery or fraud, the standard of proof cannot be the normal one on balance of probability but a bit higher. He argued that, the Court should also look at whether those who alleged that their accounts were tempered were

properly examined to prove that the exhibits tendered regarding the withdrawals from the account were not filled by themselves.

Mr Abdallah contended that, those victims, Mr. Hussein Muya and Felista Mfinanga, did not testify, although they were the ones who complained that their accounts were tempered. He contended that they never appeared before the disciplinary committee or the CMA and no statement given regarding their non-appearance to testify. He further submitted that, in one of the accounts, it was stated by DW1 that the holder had used two different identity cards with different names- Hussen Rajab Khatibu, Hussein R. Khatibu and Hussein Muya. It was a further submission of Mr Abdallah that, for an institution like a bank which must be careful of its staffing and clients, the mere fact that this client had different names, care should have been taken. He argued that Mr. Muya did not even submit an affidavit to verify his different names and, that; such an anomaly was the negligence of the Respondent.

Mr Abdallah submitted further that, Exh.A8 was a report of an internal auditor of the Respondent's team constituted of Ms Kafanabo and Mr. Costa as investigators. He submitted that, these did not appear before the CMA or even before the disciplinary committee to explain how they prepared their investigation report. Besides, he submitted that, although the Charges filed before the Disciplinary Committed were for loss of TZS 27 million, the Investigation Report and the CCTV Camera noted only a withdrawal of TZS 1 million and that, on the same day the CCTVs were not working properly. On that regards, he submitted that the evidence was contradictory and the CMA should not have relied on such evidence to bless termination of the Applicants.

Referring to section 39 of Cap.366 [R.E 2019], he submitted that it is the duty of the Employer to prove unfair termination. He argued that the

evidence against the 1st Applicant was not watertight or proved to the required standards. In a further submission, he sought support from the case of **Issack Sultan v North Mara Mine Ltd, Consolidated Labour Rev.No.16 & 17 of 2018** where the Court stated that allegations of fraud or forgery ought to be proved on a higher standard.

As regard the 2nd Applicant, Mr. Abdallah submitted that, the evidence against her was also wanting and the same submissions made in respect of the 1st Applicant apply also to the 2nd Applicant. He argued that, although the CMA relied on the CCTV footage, and claimed that the 2nd Applicant was seen viewing the Account of Mr Hussein Muya, and was later seen in the cubic chamber of the 1st Applicant, the Applicants objected to the tendering of that evidence on three grounds, namely, that:

1. It was an exhibit tendered by a security officer, DW2 who was not an IT expert.
2. There was an issue of chain of custody of that exhibit since section 18 of the Electronic Transaction Act, 2015 was not adhered to.
3. That, the device used to keep it was a flash disk which was DW2 own property.

He submitted that, since the integrity of the Exhibit (CCTV footage) was questionable, its admissibility was against section 18 (2) of the ETA, 2015, Referring this Court to the case of **Nassoro Salum@ White v R, Crim. Appeal No.349 of 2019**, the Court held that an electronic evidence must comply with section 18 of ETA, 2015. It was therefore submitted that, although the CMA was satisfied that the CCTV evidence was sufficient, the same was unreliable and could not properly identify the 2nd Applicant. He further submitted that the only reason the CMA was satisfied that the 2nd Applicant viewed the account of Mr. Muya although no corroborative evidence was tendered.

It was further submitted that, even if the 2nd Applicant viewed the account, as a bank-customer relations desk officer, she was, in her position, entitled to do so as part of her daily duty. As such, it was submitted that, it was wrong for the CMA to accept such a weak evidence of viewing the account as by itself sufficient to be relied on to terminate the 2nd Applicant from her job. The learned counsel for the 2nd Applicant contended that, much as there was an allegation of theft of 27,000,000/-, the CCTV footage and the Investigation Report established that there was a withdrawal of TZS 1million and no evidence was established to prove that the 2nd Applicant was the one who withdrew the amount.

As regards the CMA's reliance on Exh.A5 (a letter purported to have been written by the 2nd Applicant confessing that she took TZS 1million from the client's account) to confirm termination of the 2nd Applicant from her employment, Mr. Abdallah challenged such reliance as being erroneous. He submitted that, the 2nd Applicant was forced by DW1 to write the letter so as to clear the mistakes committed by DW1of activating the dormant account. He submitted that the 2nd Applicant was the case after the 1st Applicant was held in detention up to 11.00pm, despite the fact that she had a suckling baby at home. He contended that, DW1 ought to have been one of the accused person and for that matter; she was playing the blame-shifting game, a fact which makes the purported confession useless given the position of DW1.

In view of what was submitted, Mr Abdallah submitted that the termination of the 1st and 2nd Applicant was substantively and procedurally unfair and the allegations were not proved to the required standards.

For his part, when Mr Lige, the learned counsel for the Respondent, took the floor to address this court, he first adopted the counter affidavit filed in this Court. He submitted that, the termination of the Applicants

was in conformity with section 37(2) of Cap.366 [R.E 2019]. He submitted that the true case which the 1st Applicant was facing was the case of withdrawing funds from clients' account. The second offence was breach of bank procedures and policies on falsification of banking documents. He conceded that, it is indeed true that the banking operations are run by banking systems but also this takes into coconut other rules and policies. He contended that, one of the rules which governed the 1st Applicant as a cashier or bank teller was that, before a client/customer withdraws amounts from the bank physically, he/she must sign a withdrawal slip in the presence of a bank teller.

He submitted that all these procedures were not followed in regard to the two accounts from which money was illegally withdrawn on 17th May 2017 and 18th May 2017. He contended that, it is on record that the person who odd so was the 1st Applicant since DW1 testified that the ID used to withdraw the funds was that of the 1st Applicant which he normally uses to log-in into the bank system as a bank teller in discharge of his functions. Mr Lige submitted further that, a bank teller can withdraw funds from a bank account even without the approval of a bank Manager because he/she has access to the accounts and that being the duties of a bank teller, provided that all procedures are adhered to. He argued, however, that, in the instant case, the 1st Applicant did not observe the procedures which, require that he ought to first see the customer physically if he is in the bank premises, and the customer must sign the withdrawal slip and sign it before the teller. He submitted that, the breach of these procedures was a sufficient ground to terminate the 1st Applicant because that was not his first offence.

As regard the dormant account of Mr Muya, it was submitted that the same was indeed dormant and, that, according to DW1, the 1st

Applicant tempered with the account of Ms Mfinanga and the account of Mr Muya and was able to activate it. As regards the 2nd Applicant, ii was Mr Lige's submissions that, as a customer care officer with duties of updating customer's account. He contended, therefore, that, the 2nd Applicant collaborated with the 1st Applicant and made it possible for the withdrawal of funds from the accounts of the affected customers.

He submitted further that, the pay-in slips which were not tendered in court were withheld in police for purposes of investigation of the offence of forgery which had been reported to the police and, thus, their originals could not be made available to the CMA as *Exh.A5* indicated. He contended that, there was no need to call the account holders to testify before the Disciplinary Committee since they were not employees of the Bank and their letters of complaint, *Exh-A6* had been received by the Respondent.

However, Mr Lige conceded that, it is true that one of the account holders, Mr. Muya, had different IDs, noting, however that, that was the duty of the 2nd Applicant who was employed to verify the customer's files and update the same. Consequently, it was contended that she ought to have rectified that anomaly but she did not, thus the court should make a finding that she failed to discharge her duty and thus occasioned loss to her employer. Furthermore, Mr Lige conceded that, indeed it is true that the Internal Auditors of the Respondent did carry out an investigation and issued a Report as it is the duty of that unit to carry out investigation. He pleaded to the Court to make a finding that the Report was accurate as it was done by competent personnel trained to detect banking fraud.

As regard the amount claimed to have been illegally withdrawn, Mr Lige submitted that there are two accounts which were involved, whereby, in the first account TZS 4,850,000/- while the second account TZS 23,000,000 were withdrawn and the charge sheet was based on that and not

just TZS 1million as submitted. He submitted, concerning the *CCTV footage*, that, the investigation report was clear that on the 18th May 2017 the *CCTV* was on and perfectly working and that; on that day, loss of TZS 4,850,000 was reported. He also submitted that, at page 7 of *Exh.A8*, (item 4) the CCTV was able to track all withdrawals except that of TZS 1million. He contended, therefore, that, the applicants herein were collaborators in the scheme of forgery.

To further strengthen his submission, it was contended that, the CCTV footage shows the 2nd Applicant being on her desk filling a bank slip and trying to copy the customer's signature and, then moving to the cubic chamber of the 1st Applicant where she gave him the Bank slip and thereafter she went ahead and withdrew a total of TZS 1,000, 000/- and returned to her desk. Mr Lige submitted that, that evidence was fully corroborated by the Investigation Report, *Exh.A-5*.

He concluded, therefore, that, the 2nd Applicant was in breach of the banking procedures together with her employment contract which required her to work and discharge her functions diligently and faithfully. Consequently, he urged the court to find that there was a genuine cause for her termination from her employment. In his submission, Mr. Lige denounced the submissions that it was DW1 who was the culprit in the fraud. He submitted that, the 2nd Applicant as a customer desk officer was responsible for the updating of bank accounts and was thus having full access to those accounts and the Manger comes in only to approve what has already been done by the desk officer.

As regards the submission that the branch Manager was made a complainant in the disciplinary committee's hearing, Mr Lige submitted that, she ought to have appeared as a complainant because she was the overseer of the branch where the fraudulent/forgery incident took place

and was the one who reported it. Citing rule 9 (5) of GN 42 of 2007, he contended that the disciplinary proceedings are not stopped by the fact that there are on-going criminal proceedings. He insisted that this Court should see to it that there was a need to have the Applicants terminated and that they were terminated fairly.

To further buttress his arguments, he referred to this Court the decision of the Court in the Case **of Nixon Alex; Labour Revision No.22 of 2014 (unreported),** arguing that in that case, an admission of misappropriation f monies was held to be sufficient to terminate an employee even if no disciplinary hearing was conducted. As such, he submitted that the 2nd Applicant did admit and promised to repay the amount, hence there were valid reasons for her termination

In a brief rejoinder, Mr Abdallah reiterated his earlier submission in chief and stated that, the letter by the 2nd Applicant was not total confession. He contended that, it was a statement made before DW1 who ought to have been a suspect as well, and for that matter is could not have been made freely. He submitted further that, the duties of DW1 were beyond those of mere approval of what the 2nd Applicant used to do. It was contended that, DW1 admitted that her duty included those of approving customers' information. As such, it was contended that, she ought to have been made part of the accused and one should not expect that she would have judged the Applicants fairly. Overall, Mr Abdallah asked this Court to uphold the Applicants' prayers and set aside the award.

I have carefully examined the record and considered the submissions made by the learned counsels for the parties herein. As a matter of principle what seems to be challenged here is the evidence relied upon to establish that the Applicants were guilty of fraudulent acts or acts of forgery occasioning loss to the Respondent and, hence, liable for termination from

their employment. It is a trite law that, he who alleges must prove. Section 110 (1) and (2) of the Evidence Act, is clear to that effect. It provides that:

> 110 (1)- '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'.
>
> (2) 'when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person'.

It is also clear, according to 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,* that, the burden of proof in labour disputes is on balance of probabilities and it is shouldered by the Employer and not the employee. 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."* Nonetheless, despite the clarity of the above provision, it is trite law that, when an allegation regarding forgery or fraud is made in a civil case, the degree or threshold of proof cannot remain in its normalcy. It will be a bit raised above the normal standard required in civil cases. The case in point for our reference is that of **Omari Yusuf v Rahma Ahmed Abduikadir (1987) TLR 169**. 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."

A similar view was made in the case of **R.G. Patel vs Lai Makanji [1957] E.A 314**, where the Court stated 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. (See also the cases of **Issack Sultan v North Mara Mine Ltd,**

Consolidated Labour Rev.No.16 & 17 of 2018 (unreported); 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 v Kapesa Benedicto Mberesero, Comm Case No.176 of 2017) [2019] TZHCComD 131; [04 April 2019 TANZLII]).**

In this instant case, the 1st and 2nd Applicants have challenged the decision of the CMA arbitrator on seven grounds sent out in paragraph 4 of the joint affidavit. Basically, while the Applicants raised such seven grounds as the basis upon which they anchor their application, it is only grounds 1 to 4 were relied upon and together expounded at length by their learned counsel for the Applicants.

Grounds 5 (that, the Arbitrator erred in law and in facts by failing to summarize, evaluate, and record key issues presented by parties), ground six (that, the Arbitrator erred in law and in facts for not giving reasons for his decision as required by law) and ground seven (that, the Arbitrator erred in law and in facts for determining arbitration which she had no jurisdiction), seem to have been abandoned.

One would have expected the seventh ground, which was touching on jurisdiction of the CMA, would have been the first to be considered by the learned counsel for the Applicants, but, as I said, he choose not to say a word on it, and, this Court considers that silence to mean that the last three grounds upon which this revision case was premised were abandoned by the Applicants. We shall therefore consider the remaining grounds, which, in my view, may be condensed into one basic ground, that is to say:

> *'the Applicants' termination was unfair as the offences for which they were charged and found guilty were not properly proved to the required standards'.*

From the above condensed ground, therefore, the key issue which this Court is called upon to address is:

> *'whether the allegations leading to their dismissal or termination from employment were validly proved to the required standard and, if not, whether the learned arbitrator erred in law when he blessed their termination'.*

It is worth noting, before I address the issues set out hereinabove, that, this Court is warranted to evaluate the evidence submitted in the CMA and come out with its own findings. A support for that view is available from the case of **Dotto s/o Ikongo v R, Criminal Appeal No.6 of 2006, (unreported)** and **Selle & Another v Associated Motor Boat Co. Ltd & Another *(1968) EA 123, and* Dinkerrai Ramkrishna Pandya v. R (1957) EA 336).** I will therefore proceed in analysing the evidence on the basis of the above principle.

As it might be noted in this case, the important piece of evidence relied upon by the CMA was the *CCTV footage* and the *Investigation Report (Exhibit A-8)* as well as the *Exhibit A-5* (an alleged agreement by 2nd Applicant to refund monies withdrawn from one of the Accounts affected and her purported letter confessing the offence). According to the award, the arbitrator made a finding (**see page 7**) that the 2nd Applicant admitted to have withdrawn TZS 1,000,000/ from the customer's account. The Arbitrator linked that purported admission with the *CCTV footage* which showed the 2nd Applicant in her cubic chamber viewing the account particulars of unknown customer in the absence of any customer in particular, and that, the 2nd Applicant then moved to 1st Applicant's cubic chamber for unknown reasons.

Further that, the TZS 1000,000 withdrawn was posted by the 1st Applicant as per *Exhibit A-8 and* the evidence of the *CCTV footage.* The Arbitrator further reasoned that, both Applicants failed to render

explanation regarding what was going on between the two as per the CCTV footage. The Arbitrator, thus, drew an inference of collusion and found them culpable of the offences for which they were terminated.

However, as Mr Abdallah, the learned counsel for the Applicants, he indicated in his submission, he is vehemently opposed to the evidence relied upon by the Arbitrator which he considers to be unreliable and, arguing, for that matter, that, even the entire findings were erroneous. Looking at the record of what transpired in the CMA, I tend to agree with the submissions made by the learned counsel for the Applicants that the case facing the Appellants was not proved to the required standards. I will demonstrate that.

As I stated earlier herein, where there is an allegation of fraud or forgery the threshold of standard of proof relied upon is a bit raised above normal. In this case, the evidence of the *CCTV footage*, which no doubt falls under the category of electronic evidence and hence admissible under section 64A (1) of the Evidence Act, Ca.6 [R.E 2019], is being challenged on the ground that it did not meet the standards required of by section 18 (2) of the Electronic Evidence Act, 2015 (ETA).

Basically, though electronic evidence is in law admissible such admissibility is gauged under section 18(2) of TEA. The evidence must be sieved through before the Court or tribunal proceeds to rely on it. Section 18(2) of ETA provides as here below:

> "18 (2) In determining admissibility and evidential weight of a data message, the following shall be considered: (a) The reliability of the manner in which the data message was generated, stored or communicated; (b) The reliability of the manner in which the integrity of the data message was maintained; (c) The manner in which its originator was identified; and (d) Any other factor that may be relevant in assessing the weight of evidence."

In my entire reading of the arbitrator's award, nowhere a discussion of the applicability of section 18 (2) of ETA was carried out when she was considering the *CCTV footage*. It seems that the arbitrator did not address her mind to that law at all. In my view that was a serious omission. Wherever evidence in the nature of electronic form is introduced in any case, the Court or tribunal must take into account the safeguards which have now been introduced to assist in determining its admissibility, failure of which may lead to a serious miscarriage of justice.

Section 18 (2) of ETA provides guidance on two points- namely, a determination of admissibility of the particular e-evidence and the issue of evidential weight to be attached to it. This is a section which considers the aspects of reliability and authenticity of electronic evidence. Consequently, in the course of establishing the two, a Court or tribunal must consider the manner in which the particular e-evidence was *generated, stored* or *communicated,* as well as the *integrity, of such evidence* (i.e., looking at how the particular e-evidence maintained (it chain of custody, etc) . There is also the question of considering any other factor that may be relevant in assessing the weight of evidence.

In the instant case, the learned counsel for the Applicants has contended that the *CCTV footage* relied upon was unreliable for not having been treated in accordance with the requirements of section 18(2) of the ETA. Indeed, as I stated herein above, having looked at the record of the CMA, nowhere was the evidence of *CCTV footage* subjected to the test requirements of section 18 (2) of TEA. At page 18 of the proceedings, the Arbitrator stated the following, when an issue arose concerning secondary evidence, though not discussion in relation to section 18 of TEA was made:

> "Ni kweli kuwa secondary evidence lazima kuwe na notice, na as per electronic evidence/Amendment ila kwa kuwa ushahidi huu umetolewa bila kuzingatia utaratibu husika; Tume itapokea

> kielelezo hiko na kukiangalia but with "CAUTION" as the said date has been transferred from banking system to the CD and there is likelihood of being amended/altered/played."

As it may be observed from the above portion quoted from the proceedings, it cannot be said that the *"caution"* so taken by the Arbitrator when he admitted the *CCTV footage* was sufficient to displace the requirements of section 18(2) of TEA. I hold so because, in the first place, the Arbitrator was also doubtful of its integrity and reliability. Secondly, as submitted by the learned counsel for the Applicants, DW2, the person who tendered it into evidence, was not an IT expert to provide credible testimony of how it was retrieved from the Respondent's systems and how was it handled to preserve its integrity.

In **Nassoro Salum@ White v R, Crim. Appeal No.349 of 2019,** my learned brother Judge Maige, J, correctly held that the requirements set out in section 18(2) of ETA are a sine quo non for admissibility of an electronic evidential material of whatever sort and they are essentially meant to ensure that electronic evidence produced in Court for use is *prima facie* reliable and worth of been accepted as evidence by the Court. In that decision, the Court had the following to say:

> "the authenticating witness has to adduce demonstrative evidence about the process by which the electronically generated document was created, acquired and preserved without alteration or any change."

If the above position is considered in the context of the current case at hand, it is clear that the admissibility of the *CCTV footage* did not meet the standard requirements and it was entirely unreliable evidence. The person who tendered it was also unable to given satisfactory or demonstrable proof regarding its process of retrieval, storage and preservation.

The other piece of evidence relied upon was the investigation report of an Investigation Team of Internal Auditors of the Respondent Bank. It

was part of *Exh.A8*. The person who gave explanations about it albeit at some length was DW3. However, he was not one of its authors to establish the circumstances under which the Report was created, how the investigation was carried out and how the Applicants were fully involved. This is particularly so notwithstanding the fact that, at page 24 (line No.5) of the proceedings, DW3 stated that the Complainants (Applicants herein) were involved.

In Kiswahili it says: "**-A8 walieleza walalamikaji walihusika.**" It is not clear what aspect were the Complainants involved. Was it in the course of the investigation or in the forgery? Moreover, **as page 28 of the CMA proceedings indicates**, the 2nd Applicant testified to have gone through the Investigation Report but it was for *the first time* she saw it at the CMA. It is not said anywhere whether during the Disciplinary Proceedings she was given time to read the report and prepare her defence.

In **Severo Mutegiki & Rehema Mwasandube v Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No.343 of 2019, CAT, (Dodoma)**, the Court of Appeal of Tanzania considered an audit report which formed the basis of termination of the appellants. The Court 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.

On the other hand, *Exh.A8* indicates that more than TZS 67,000,000 had been withdrawn from various customer accounts and named various other employees who were implicated in various irregular conducts. That fact was captured by the Arbitrator in page 10 of Award. However, the arbitrator dismissed it. I think that revelation in *Exh.A-8* ought not to be dismissed lightly because it casts doubt in the Respondent's case in the

sense that, there was a possibility, in the absence of strong evidence, that, other employees could have committed the wrong doing and not necessarily the Applicants. I will come to this point again herein below.

All in all, view of the above decision of the Court Appeal in **Severo's case (supra)** I find that *Exh.A8* (**the Audit Report**) cannot solely be relied upon to establish the case as it leaves behind doubtful questions which ought to have been cleared by the persons who authored it and who were not called to testify.

The other piece of evidence tendered and relied upon against the 2nd Applicant was *Exhibit A-5* (an alleged agreement by 2nd Applicant to refund monies withdrawn from one of the Accounts affected and her purported letter confessing the offence). I have carefully examined this evidence. It reads:

> *Harieth Mfinanga,*
> *DSM*
> *17/05/17*
>
> *MENEJA WA TAWI*
> *BUGURUNI*
> *DSM.*
>
> ***YAH: KUTOA PESA KWENYE ACCOUNT KIASI CHA 1,000,000/= A/c No.*** [redacted].
>
> ***Mimi Harieth naahidi kuirudisha hii pesa kwenye akaunti ya mteja siku ya Ijumaa.***
>
> ***Nashukuru kwa ushirikiano***
> ***Wako***
> ***Sign***
> ***17/05/17***

There was also an *Note* authored by the same Harieth Mafinanga (2nd Applicant) to the effect that he was ready to leave behind her Motor Vehicle under the custody of the Branch Manager and sort out the matter the following day. The said Note reads as follows:

> Harieth Mfinanga,
> DSM
> 17/05/2017

NAOMBA KUACHA GARI YANGU NO.T195 DAH HAPA BENKI NA UFUNGUO NAUACHA KWA MENEJA KUTOKANA NA ISHU ILIYOTOKEA HAPA KAZINI YA UPUNGUFU WA HELA NA KESHO TUTAFIKIA MUAFAKA (UOUNGUFU WA PESA KWENYE AKAUNTI YA MR. HUSSEN MUYA).

SGD.
17/05/17

It is clear that, on the basis of the above, the Arbitrator made a finding that the 2nd Applicant had admitted to the wrongdoing, i.e., that she withdrew monies from the client's account. (**See page 6 of the Award**). In my view, however, much as the above letter indicates an admission to return the **TZS 1,000, 000/-** into Mr. Muya's account, that admission alone was not sufficient or conclusive evidence to hold that the 2nd Applicant was a culprit. I have reasons for that.

First, it is clear that it is not stated **categorically** that the 2nd Applicant was the one who was involved in the withdrawal of the alleged amount. In her testimony as **PW1**, the 2nd Applicant was explained (*at page 28 of the proceedings- lines 17-20 and page 31-lines 5-10*), that, she was forced under pressure of time (as she was not allowed to go home to see her suckling baby whom she was informed was sick and it was already approaching mid-night) and wrongly assuming that the loss of TZS 100000 was a normal "shortage" which could be repaid she committed herself to pay it.

Second, it is essentially a trite law that, an **admission must be clear** if it is to be used against the person making them. This is due to the fact that, admissions are substantive evidence in themselves by virtue of section 19 and 23 of the Evidence Act, Cap.6 [R.E. 2019], even if they are not a conclusive proof. In other words, in law, for a statement to constitute an admission of an alleged fact, it should, on the face of it, be unequivocal and categorical. I find that, much as the above documents authored by the 2nd

Applicant constitutes formal admissions such admissions are not a direct or unequivocally or precise acknowledgement of the fact in issue. This is to say, they are not precisely about the alleged wrong doing. For that reason, they could only be relied upon to support other evidence if such was available. In other words, *Exh.A-5* cannot, therefore, be a standalone evidence to support termination.

The other finally point to consider is the issue of the Bank Slips alleged to have been filled in by the Applicants to withdraw funds from the accounts. These were received as *Exh.A4*. I think I need not be detained by this piece of evidence because it was also far wanting because, one would have expected a proof of a handwriting expert to substantiate the claim that it was the Applicants or one of them who filled the Bank Slips. In the absence of that, it becomes weak evidence given that *Exh.A-8* had indicated that there were several other employees who could have tempered with the bank's procedures or exploited loopholes which were yet to be fixed. In view of that, the finger pointing could not just be on the two Applicants having laid flat the rest of pieces of evidence which the Respondent was relying on.

Perhaps it is wise to state that banks and financial institutions should be keen when investigating matters of fraud or forgery to ensure that the evidence they collect to establish their cases are water tight. This is important because, the threshold standard of proof in employment related cases involving fraud or forgery, as I stated earlier herein, is a bit raised compared to normal misconducts leading to ones' termination.

Overall, I find in this case that the evidence relied upon by the Arbitrator was not sufficient to warrant termination of the two Applicants herein. In other words, their termination was unfair for want of sufficient evidence to prove all three allegations which they faced before the

Disciplinary Committee. The issue, which I raised earlier on herein above, is, therefore, responded to in the negative and, it is the finding of this Court that the arbitrator erred when he blessed their termination without their being sufficient evidence to prove their allegations. In view of that, the award issued on 1st February 2019 and all its orders is hereby set aside.

In the end, there is yet one question regarding the appropriate remedy which they Applicants are entitled to. Section 40 of Cap.366 [R.E.2019] provides for what should be done in case this Court makes a finding that termination of an employee was unfair. The section provides as follows:

> "40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –
>
> (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
>
> (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or
>
> (c) to pay compensation to the employee of not less than twelve months remuneration.
>
> (2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.
>
> (3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

As the record shows, the Applicants were terminated from their employment on 29th May 2017. Up to the time when the CMA issued its award on 1st February 2019, the period lost was almost one year and nine months. In view of what section 40 (1) and (3) of Cap.366 [R.E.2019] provides, this Court hereby orders as follows, that:

(1) the Revision Application by the Applicants is merited and the termination of the Applicants was unfair;

(2) the CMA's Award with in dispute reference No.CMA/DSM/ILA/R.794/17/855, dated 1st February 2019, which was delivered by applicants on 19th February, 2019 is hereby quashed and set aside;

(3) the Respondent is hereby ordered to reinstate the Applicants into their rightful positions of employment without loss of remunerations during the entire period of their absence from work due to the unfair termination.

Order accordingly

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

Right of Appeal Explained.

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