IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 976 OF 2019

(From Labour Dispute No. CMA. DSM/ILALA/R.1099/16/1027)

BETWEEN

DIRECTOR GENERAL, PCCB----------APPLICANT

VERSUS

GEORGE MAGOTI----------RESPONDENT

JUDGMENT

Date of Last Order: 25.06.2021
Date of Judgement: 30/07/2021

M. MNYUKWA, J.

Dissatisfied by the award of the Commission for Mediation and Arbitration (hereafter to be referred as CMA) which was delivered on 21st November 2019, in the Labour Dispute No. CMA. DSM/ILALA/R.1099/16/1027, the applicant herein preferred this revision under the Notice of Application made under sections 91(1)(a), 91(2)(a)(b) and 94(1)(b),(1) of the Employment and Labour

Relations Act, (No. 06 of 2004), [Cap. 366 R. E. 2019] (henceforth to be referred as ELRA and Rules 24(1)(2)(a)(b)(c)(d)(e)and (f), Rule 24(3)(a)(b)(c)and(d) and Rule 28 (1) (c)(d) and (e) of the Labour Court Rules, GN No.106 of 2007. The applicant's application was accompanied by the affidavit deponed by one, Tumaini Mwenisongole and the respondent opposed the application by the way of counter affidavit deponed by George Maqoti, the respondent.

The background of the dispute in brief is that, on 1st November, 2016 the respondent was terminated from his employment by his employer PCCB for the charges levied against him of receiving bribery at a tune of Tshs. 100,0000/= from Wilson Vyaboze Luzabila so as to assist the accused persons namely, Neema Charles Pesambili and Pezina Bindi Kabange in Criminal Cases Number 187 of 2015 and 163 of 2014 respectively. He was also terminated from employment for failure to disclose a conflict of interest by drawing legal documents in favor of Kalebo Petro who was alleged to be under investigation by the PCCB. He was found guilty in the disciplinary committee on those charges hence terminated from employment. Dissatisfied with the outcome

of the disciplinary committee, he referred the matter to the CMA which upon hearing, CMA found that the respondent was unfairly terminated both substantively and procedurally and entered the award in favor of the respondent. Aggrieved by the decision of the CMA, the applicant filed this revision to challenge the decision. The applicant is praying for the following orders: -

1. *That this honorable court be pleased to call for and examine, revise the CMA arbitration award with reference No. CMA/DSM/ILALA/R.1099/16/1027) before Hon. Alfred Massay, Arbitrator, dated 21st November 2019 and satisfy itself as to the correctness, legality and propriety of the award.*
2. *That upon examining and revising the records in the said award, this honorable court be pleased to set aside the same and issue any directive, order and /or relief it deems fit to grant.*

The matter was conducted by way of oral submissions where the applicant vide notice of representation filed on 31.12.2019 was represented by Lilian Wiliam Kafiti, learned advocate and the respondent afforded the service of Philemon Msegu, learned advocate.

During the hearing the applicant's learned counsel prayed to adopt the affidavit deponed by Tumaini Mwenisongole to form part of her submissions. She submitted that on 21st November 2019 the arbitrator decided that there were no justifiable reasons to terminate the respondent and the procedures for termination were not followed.

Submitting in regarding to the procedure, she refers to paragraphs 9, 11 and 12 of the affidavit. She stated that the termination of the respondent employment was proper and all required procedures were followed. She referred this court to regulations 37, 38, 40 and 41 of the Preventing and Combating of Corruption Regulations, GN No. 300 of 2009 (herein after to be referred as PCCB Regulations) and exhibit D - D5 tendered before the CMA and the testimonies of D-1, D-2 and D-3 signifies that the procedure was followed. She also referred to pages 5 up to 7 of the applicant's written submission filed at CMA dated 18th May, 2018 which explains in detail how the applicant followed the procedure. She disputed the argument raised by the arbitrator on page 12 of the arbitral award that the procedure were not followed since the respondent was

denied with a certificate as provided under Regulation 34 of the PCCB Regulation.

She went on to state that, going to the records, the certificate claimed to have not been issued to the respondent was annexed to the charge sheet. She avers that the essence of issuing the certificate per regulation 37(2) of PCCB Regulations is to ensure that the accused person certified to have received the notice and on 28.07.2018 the respondent acknowledged to have received the notice. She insisted that the issue of absence of the certificate was misconceived as the arbitrator failed to interpret the applicability of the PCCB Regulations.

Submitting on the issue of investigation report as it was raised by the arbitrator that the respondent was not given the said report to enable him to prepare his defence. Looking at the arbitral award on page 13, the arbitrator referring to the cases of **Tanzania Telecommunication Ltd vs Nkayira Moshi,** Labour Revision No. 2016 and **Ezekies Samuel Ndehaki vs Tanzanite one,** Labour Revision No. 59 of 2011 to support his argument. The applicant's counsel insisted that the cases referred were not relevant to the case at hand as the

investigation was conducted to certify regulation 37(2) of the PCCB Regulation and Rule 13(1) of the Employment and Labour Relation Code of Good Practice Rules GN No 42 of 2007 and also Rule 10 of the Public Service Disciplinary Code of Good Practice, GN No. 53 of 2007. She enlightens that the aim of conducting the preliminary investigation is to ascertain whether there was a ground for a hearing to be held and to establish facts about the offence in which an employee is alleged to have committed for the disciplinary authority to establish if there is a need for disciplinary hearing.

She went on to submit that the disciplinary authority certified that there was enough allegation to institute proceedings against the respondent and on 28.07.2018 the proceedings were instituted against him vide a charge and a notice requiring him to make his defense within 14 days on the charge levied against him.

Highlighting on the other issue of procedural requirement, she disputed the argument of the arbitrator that the respondent was supposed to be issued with the investigation report was misconceived since the applicant duly complied with procedures in terminating the

respondent and prays this court to find that the respondent was fairly terminated in terms of procedure.

Submitting on the issue of whether the employer has good reasons for termination of the respondent employment, she disputed the arbitrator findings that the applicant has no good reasons to terminate the respondent. She submitted that, the arbitrator did not consider the testimony of DW1, DW2 and DW3 and exhibit D, D1, D2, D3, D4 and D5 which explains the causes of the respondent termination and prays this court to refers to applicant's submissions on pages 2-5 dated 18.05.2018 and the testimonies and exhibits tendered before the CMA to find that the respondent was fairly terminated.

Referring to paragraph 13 of the applicant affidavit she submitted further that the tribunal erred in awarding the respondent compensation at a tune of Tsh. 75,081,600/= as remunerations, 11,280,330/= as an amount for notice, leave and repatriation and severance pay without giving a piece of evidence to support the same. She insisted that, the power given to the arbitrator under

section 40 of ELRA 2006 must be exercised judiciously. Referring to page 15 of the award, she claimed that the arbitrator erred in awarding remuneration of 27 months salaries and at the same time a compensation of 24 months salaries without giving evidence and if at all there was unfair termination the arbitrator was required to opt for one remedy in terms of section 40 (1) (a-c) of the ELRA. Supporting his argument, she cited the case of **Elias Kashile & 17 Others vs Institute of Social Work,** Civil Application No. 187/18 of 2018 referring at page 16 that, the arbitrator must exercise his powers judiciously. She went on to submit that, the arbitrator did not give reasons for awarding the respondent a leave pay at a rate of Tshs. 2,780,800/=, notice pay at the rate of Tshs. 2.780.800/= and repatriation costs of Tshs. 1,040,000/= from Dar es salaam to Musoma without evidence that the place of recruitment was at Musoma.

On the other aspect, she submitted that the arbitrator delayed giving the arbitral award without giving a justifiable reason. She avers that, the arbitrator delayed for almost 552 days from when the proceedings ended on 18.05.2018 as against the legal requirement of

30 days as provided for under section 88(9) of ELRA and all the delayed days were included to the compensation by the arbitrator.

Finally, she prays this court to revise the decision of the arbitral tribunal and set aside the arbitral award and declare that the applicant termination was fairly in terms of reasons and procedures.

Responding to the applicants' submissions Mr. Philemon Msegu learned counsel for the respondent started by challenging the submissions of the applicant that are misconceived and have no leg to stand. He avers that he went through the affidavit deponed by one Tumaini Mwamisongole and could not find any statement of clear legal issues worth for revision. He avers that it is the requirement of law that affidavit in support of revision must contain a clear statements of legal issues that arises from the material facts and the reliefs sought.

On the issue of the procedures, he submitted that the respondent was not issued with the certificate as required under regulation 37(4)(b) of the PCCB Regulation rather he was served with charge sheet and notice only. He submitted that the applicant failed to adhere with procedural requirement of the 3rd schedule of the

PCCB Regulation which require a respondent to be served with a notice and certificate. In this matter the respondent was served with a notice and a charge. He insisted that, for that reason the arbitrator decision cannot be faulted.

Responding on the claim that the respondent was not served with the preliminary investigation and that the arbitrator was misguided he claims that, the applicant did not cite any law or legal authority that prohibits the respondent to be served with preliminary investigation. The counsel submitted that the cases cited at page 13 in the award insisted the investigation report to be served to the respondent.

He went on to avers that, the applicant's learned counsel submitted that the cases referred by the arbitrator were irrelevant without giving reasons thereto, therefore the arbitrator decision cannot be faulted.

On the issue of reasons for termination of the respondent's employment, he submitted that, the CMA considered two reasons for terminating the employment of the respondent one being receiving a bribe of Tshs. 100,000/= and secondly, failure to declare conflict of

interest. He avers that the evidence was clearly analyzed by the arbitrator on page 8 and 9 of the arbitral award. He insisted that at a time when the respondent offered legal services to one Kalebo Petro there was no any investigation conducted by the PCCB. Insisting, he avers that, the alleged corrupt allegation to one Kalebo Petro was reported to PCCB office at Kibondo District on 18/1/2016 and the legal service was offered on 07.01.2016. He asserted that the respondent's duty station was at Kigoma regional office and Kalebo Petro worked at Kibondo, the respondent could not be in a position to know that there was investigation against Kalebo Petro because investigation is a confidential process and therefore no interest worth to be declared. He emphasized that for this reason the arbitral award cannot be faulted.

Responding as to the allegation by the applicant that the arbitrator failed to give reasons for the amount awarded as compensation, he avers that the applicant cited no law that forbids the arbitrator to award compensation and renumeration. he avers that in the case of **Elias & Another vs Institute of Social Work** (supra) at page 16, the law gave the arbitrator discretion to decide which

remedy or reliefs fits for circumstances. He went on by citing section 40(2) of the ELRA that, the arbitral tribunal was right to award 27 months remuneration which makes a total of 75,081,800/= and the arbitral tribunal could not be faulted.

In regard to the place of recruitment, he insisted that there is evidence in the file that shows the place of recruitment of the respondent and the applicant did not contest at the CMA.

On the last point that the award was delayed for 552 days, he referred this court to page 15 of the award and stated that the arbitrator gave reasons that the delay was due to the workload and that could not fault the arbitral award. He therefore prayed this court to find that this revision is demerit and therefore be dismissed.

In a brief rejoinder, the counsel for the applicant's submitted that, the learned counsel for the respondent claims that the applicant affidavit did not contain legal issues and relief sought, he insisted that the application is in line with Rule 24 (3) of the Labour Court Rules, 2007 GN. No 106.

On the issue of certificate, the applicant's learned counsel prayed to reiterate her submissions in chief. On the issue of preliminary investigation, he also reiterates her submissions in chief and disputed the contention that there was no provision cited to prohibit serving the respondent with the said document. She claims that the case cited is distinguishable from the issue at hand.

On the issue of reasons for termination, she reiterated her submissions in chief as reflected in paragraphs 1 - 5 of the written submissions filed at the CMA and went on to aver that, the witnesses testified in favor of the applicant were believable. Referring to the case of **Patrick Sanga vs Republic** (supra) she insisted that every witness is entitled to credence of his or her evidence and the applicant proved that the respondent committed the offences leveled against him.

In regard to compensation, she reiterated her submission in chief and added that the award was in contravention ot section 40 of the ELRA that gives the arbitrator power to opt for one remedy if there is

unfair termination. She insisted that there is no formular as to how the arbitrator arrived at that amount.

On the fact that the award was delayed for 552 days contrary to the required 30 days, she insisted that the reasons given were not sufficient for the 6 months' delay.

Finally, she prays this court to grant the prayers provided for in the chamber application and declare that the termination was valid and the procedures were followed.

Before determining the merit of the Revision, it is worth to con on the respondent's submission that there is no clear statem legal issues and the reliefs sought in the applicant's application. looking at the chamber summons and affidavit deponed by Tu Mwenisongole I find the application is in line with Rule 24(3) Labour Court Rules. GN No. 106 of 2007 and the respondent wa to prepare his reply as he did. Therefore, I find it justifiable to pro with determining the revision on merit.

After hearing the submissions from both parties, going through the available record, relevant labour laws and practices, I find the issues for determination are as hereunder;

(i) Whether there was valid reasons for termination of respondent's employment

(ii) Whether the procedure for termination was followed

(iii) Whether the relief provided by the CMA is justified

Under section 39 of the ELRA, the employer owes a burden of proof on whether the termination of the respondent's employment was fairly done. The said section provides that: -

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the Arbitrator found that there was no valid reason for termination of the respondent employment.

It is the established principle that for termination of employment to be considered fair, it should base on valid reasons and fair procedure. The employer will terminate the employee only when there is a valid reason for termination and when the procedures are followed. In other words, there must be substantive fairness and procedural fairness of termination of employment.

The ELRA under section 37 (2) provides that: -

> *''37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) That the reason for the termination is valid;*
>
> *(b) That the reason is a fair reason-*
>
> *(i) Related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) Based on the operational requirements of the employer, and*

(c) That the employment was terminated in accordance with a fair procedure."

Guided by the above provision of the law, it is clear that the employer is duty bound to ensure that the termination of the employee is fair in terms of substantive and procedure. In other words, the termination of the employment should not base on the wishes of the employer. This is also the image of International Labour Organization **158 of 1984** as cited in the case of **Ezekia Samwel Ndehaki vs Tanzanite One Mining Ltd,** Labour Revision No 59 of 2013 whereas under Article 4 provides that: -

"The employment of a worker shall not be terminated unless there is a valid reason for which termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service."

In this application, the applicant had submitted that there was sufficient and justifiable reasons to terminate the respondent from employment. She submitted that the respondent was terminated from the employment for two reasons. First, for receiving a bribe of Tshs 100,000/= from Wilson Vyaboze Luzibila so as to assist the accused

persons in criminal cases. The applicant claims that the disciplinary authority found the respondent guilt of that charges as evidenced in the testimony of DW1, DW2, DW3 and Exhibit D1, D2, D3, D4, and D5.

Mr. Philemon Msegu, learned advocate for the respondent submitted that the evidence in records especially at page 8 and 9 of the arbitral award shows that the respondent received that money from Wilson Byaboze Rubizila being professional fee for legal services offered by the respondent. Mr. Philemon Msegu added that the respondent received money from the same person in two instalments that is Tshs 100,000 and Tshs 50,000 on 14th July 2015 and 17th July 2015, respectively. The respondent counsel was of the view that the findings by the arbitral tribunal was right to hold that the disciplinary authority could not prove that the money claimed were ill received as bribe.

I have had time to go through the records to find whether the arbitrator properly evaluated the evidence on record that there were material evidence to show that the respondent received money from Wilson Byaboze Rubizila as bribe. The applicant's records shows that the respondent received that money as bribe with intent to assist his

wife Pezina Bindi who was charged in a criminal case No 163/2014 and to assist Neema Charles who was charged in another criminal case No/187 of 2015 which the respondent was prosecuting those cases.

Looking at the proceedings in those criminal cases, it is undisputed that the respondent was prosecuting those criminal cases. In the proceedings of criminal case No. 163/2014 dated on 28th May 2015 at page 49, the accused Pezina Bindi stated that *"I will defend myself on oath and one Wilson Luzibila."* The records show that on the day fixed for defence hearing, the matter was adjourned up to 14th July 2015 because the presiding magistrate was on official duty then the matter was further adjourned until 23rd August 2015. It is my considered views that in -normal circumstances and the nature of the work, that is, prosecuting criminal cases, of which the respondent met different people, it was very difficult for him to know spouses of accused persons. In the instant case, the respondent did not remember that one of the parties in the case was the wife of Wilson Byaboza Rubizila.

In regards to the criminal case No 187/2015 which was filed on 8th June 2015 the respondent was also a public prosecutor and one of the accused in that case was Neema Charles who is alleged to be also the wife of Wilson Byaboze Ruzibila. Even though the applicant in Exhibit D2 '' Taarifa ya Shauri la Uchunguzi dhidi ya Bw. George Magoti, Afisa Uchunguzi Mwandamizi'' shows there was alleged negligence on prosecuting criminal case No. 187/2015 which resulted the applicant to lose the case, but still the applicant in his testimony at CMA through the testimony of DWI, DW2 and DW3 failed to prove that the money received by the respondent was the money for bribe.

In the present case it is undisputed that the respondent received from Wilson Byaboze Ruzibila (PW2 at CMA) Tshs. 100,000/= on 14.07.2015 and 50,000/= on 17.07.2015 respectively. The respondent acknowledged to receive from PW2 the stated amount as payment for legal services of drawing a legal notice dated 13th July 2015 to PW2. That exhibit was tendered before the CMA and was not objected to by the applicant and therefore admitted as part of the exhibit as it is clearly shown in the CMA proceedings at page 20. The respondent's testimony was collaborated with the evidence of PW2

who testified that the money sent to the respondent was in consideration to the payment of legal services rendered to him form the law firm namely G Raphael Advocates of which the respondent was a sole proprietor.

Moreover, what is on record, shows that there was telephone communication between the respondent and PW2, yet it is very difficult to establish the words in the conversations between the two whether the same concerned bribe and not provision of legal services. The records also show that there were mobile money transactions made by the PW2 to the respondent of Tshs. 100,000/= and Tshs. 50,000/=. The applicant alleged that Tshs. 100,000/= was bribe. In this regard, apart from the testimony given out by the respondent and PW2, I find no other evidence on record that established and proved that the said amount of Tshs. 100,000/= sent to the respondent was meant to be bribe. I am accord with the arbitrator that the investigation conducted find out that there was Tshs 100,000/= and Tshs. 50,000/= sent from PW2 to the respondent respectively, but the disciplinary authority managed to establish that

the said Tshs.100,000/= was a bribe and did not enlighten on the Tshs. 50,000/= transaction.

It is quite clear that the evidence available on record is shaky and leaves a lot of questions as to whether the respondent received that money as a bribe. For this reason, I am of the considered views that the disciplinary committee failed to prove the charge of receiving bribe on the balance of probabilities. Therefore, I agree with the arbitrator findings that the applicant who is the employer failed to prove that the money sent was specifically bribe since the evidence on record shows that the money was received being professional fee for legal service rendered to Wilson Byaboze Ruzibila.

The second reason for termination of employment found by the disciplinary authority is failure by the respondent to declare the conflict of interest. I find in records that the respondent was allowed to engage into legal affairs which were not in conflict with his employer. Therefore, he was engaged by Petro Kalebo to draw pleadings to be filed before the District Land and Housing Tribunal for Kigoma on 07. 01.2016. Exhibit P4 shows that the respondent drew the

notice of intention to sue on 7th January 2016, drew the chamber summons and affidavit on 11th January 2016 and was properly filed in the District Land and Housing tribunal for Kigoma on 13th January 2016. Going through the records particularly exhibit D1 (E 23), the corrupt allegation to Kalebo Petro was reported and recorded on 18.01.2016 at PCCB Kibondo District office.

It is clear that the service rendered by the respondent was done 11days after issuing the notice of the intention to sue and 5 days after drawing a chamber summons and affidavit before the allegation of corruption were reported.

In the **Black's Law Dictionary, Bryan Garner** 19th Edition, page 339 conflict of interest is defined to mean; -

> *"a real or seeming incompatibility between one's private interests and one's public or fiduciary duties."*

On the other hand, regulation 29(1) of the PCCB Regulation requires an employee to declare a conflict of interest. The Regulation provides that: -

> *"Every officer shall ensure that the conflict of interest arises or appears to arise between the public duty and private interests, nor shall he engage in any business, transaction,*

or professional activity or incur any obligation of any nature which is in conflict with his official discharge of his public duty."

In my view, the above PCCB Regulation does provide clear procedures on how the employees were to conduct due diligence prior to performing allowable legal engagements. It does not impose procedure as to how and at which level the employee was to ascertain by conducting a search and obtain clearance before engaging such an activity - might result into a conflict of interest. It was expected that the employer could have issued a staff circular which could guide the employee to conduct such ascertainment and obtaining of clearance on conflict of interest from either his immediate supervisor or the Director of the PCCB or authorized officer prior to engaging into the concerned activity which might result in conflict of interest. In the absence of such clearly stated procedures , it is very difficult to hold an employee accountable for conflict of interest especially if that conflict might have arisen after performing a duty which the employee is allowed to perform.

I am therefore accord with the respondent learned counsel that when the service was rendered, there was neither allegation of corrupt practices nor investigation against Kalebo Petro. Therefore, no conflict of interest was established between the respondent and the applicant as concluded by the applicant disciplinary authority.

The first issue is therefore answered in affirmative that the applicant had no fair and valid reasons to terminate the employment of the respondent as provided for under section 37 of ELRA.

On the second issue on whether the procedure for termination was followed, the Hon. Arbitrator found that the procedure for termination was not adhered since the applicant breached its own procedural requirement by denying the respondent with certificate as provided for under Regulation 37(4)(b) of the PCCB Regulation. The arbitrator also found that the respondent was not served with the investigation report prior to the hearing in the disciplinary committee for the purpose of fair hearing.

On this issue the applicant submitted that all the legal requirement for terminating the respondent were followed. She

submitted that the certificate alleged to have been denied to the respondent was affixed to the charge and the issuance of certificate is to ensure the accused person certified receipt of the Notice in which the respondent herein acknowledged receipt of the same.

On the issue of failure to serve the investigation report to the respondent prior to the hearing in the disciplinary committee, she submitted that the investigation report was conducted mainly to ascertain whether there were grounds for a hearing to be held and to establish facts about the offence which an employee is alleged to have committed. In contest, the respondent submitted that the procedure for termination was not followed because the respondent was not served with the certificate and investigation report prior to the hearing in the disciplinary committee.

On the issue of certificate let me refer to Regulation 37(4) of the PCCB Regulation which provides that:

> *"A charge shall be accompanied by notice and certificate which shall be in the form specified in Part B of the Third schedule to these Regulations:*

(a) The notice shall be addressed to the officer inviting him to state in writing, within such period as may be specified in the notice, the grounds upon which he relies for defence or to exculpate himself from blame;

(b) The certificate shall be addressed to the accused person to certify the receiving of the notice.

Through the purposive approach of the statutory interpretation which seeks to look for the purpose of the legislature before interpreting the words, I am convinced to hold that this court is required to apply the purposive approach to the above cited provision to give an interpretation in line with the purpose of the maker.

The evidence available in the records, Exhibit D3 shows that the respondent was given notice as prescribed in Part B of the Third Schedule of the PCCB Regulation and therein affixed with a certificate.

Since the purpose of the certificate is to certify the receiving of the notice by the accused person, in which the available records shows that the respondent herein certified receipt of the notice on 28th July 2016 by endorsing his signature and the date, I am of the

considered views that in this aspect the procedure for termination was followed. Therefore, in this aspect I fault the arbitrator's findings that the respondent was not given a certificate.

The other issue on the procedure which has the competing arguments from both parties is the question of serving the investigation report to the respondent before hearing in the disciplinary committee was conducted. In this aspect, the applicant's counsel submitted that preliminary investigation referred at page 12 of the Award was conducted mainly to certify Regulation 37(2) of the PCCB Regulation, and Rule 13(1) of the Employment and Labour Relations Code of Good Practices Rules of 2007, GN No,42 and Rule 10 of the Public Service Disciplinary Code of Good Practice GN No 52 of 2007. She went on to state that preliminary investigation is to ascertain whether there were grounds for a hearing to be held and to establish the facts about the offence which an employee is alleged to have been committed. In contest, the respondent's counsel submitted that the applicant has not cited any provision of the law. Regulations or staff circular which prohibit the respondent to be served with the copy of the preliminary investigation.

In regards to this issue, I have gone through different laws cited by the applicant and I wish to reproduce it for easy of reference. Starting with the PCCB Regulation, Regulation 37(2) provides that:

> *''The charge shall be prepared by the disciplinary authority after the conclusion of the Preliminary Investigation,''*

On the other hand, Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No, 42 of 2007 provides that:

> *''The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.''*

Furthermore, Rule 10 of the Public Service Disciplinary Code of Good Practice, GN No. 53 of 2007 provides that;

> *''(10.2) Preliminary investigation is conducted in order to establish the facts about the offence which an employee is alleged to have committed*
>
> *(10.3) The disciplinary authority shall establish if there are any or enough allegations to institute a disciplinary proceeding against an employee*

(10.4) The disciplinary authority shall weigh those allegations in order to determine whether they constitute a disciplinary offence.

(10.5) If the disciplinary action is established, then the disciplinary authority shall embark in instituting either summary or formal proceedings.''

From the above provisions of different Rules and Regulations, the emphasis is based on the duty of the employer to conduct preliminary investigation in order to ascertain if there is a justifiable reason to prefer a charge against an employee before the disciplinary committee. In the case at hand the records show that the employer conducted preliminary investigation before the matter was heard and determined by the disciplinary committee. This can be evidenced from the records in the CMA file of which Exhibit D2 which is the report of the preliminary investigation.

In the present case, the evidence available show that preliminary investigation did not form part of the exhibit tendered during the hearing in the disciplinary committee. This can be proved by Exhibit D1 (E 28) which describes the list of exhibits intended to be used in the

disciplinary committee and the same were supplied to the respondent to enable him to prepare his defence before the hearing.

Based on the above analysis, I agree with the applicant's counsel that the two cases referred by the arbitrator are distinguishable in our case at hand because the preliminary investigation was conducted and the same was not tendered as part of exhibits in the disciplinary hearing. Therefore, it is clear that the investigation report was mainly conducted in order to help the employer to ascertain whether there is a ground for the hearing to be conducted as provided in the above cited Rules and Regulations.

Therefore, it is my finding that the applicant employer followed the procedure by conducting preliminary investigation and that in the circumstance of our case at hand, the same was prepared purposely for the applicant employer. Consequently, in this aspect, I fault the arbitrator's findings.

On the third issue on whether the relief provided by the CMA is justified.

The applicant claimed the tribunal erred in awarding the respondent compensation of Tshs. 66,739,200, remunerations of Tshs. 75,081,600/= and 2,780,800/= as an amount for notice, Tsh 2,780,800 as leave pay, Tsh 4, 679,230 being severance pay and Tshs. 1,040,00/= being repatriation costs from Dar es salaam to Musoma without any justifiable reason or documentary evidence. She insisted that, the arbitrator was required to opt for one remedy in terms of section 40 (1) (a-c) of ELRA. In contention the respondent submitted that the law gives the arbitrator a discretion to decide which remedy or reliefs fit in a certain circumstance. He submitted that the arbitrator awarded 27 months remuneration being outstanding remuneration to cover the months in which the respondent was out of service. With regards to repatriation costs, he avers that there is ample evidence in the file which show the place of recruitment of the respondent. In regards to leave pays, severance and notice the respondent contended that there is no way to fault arbitrator award.

In this issue it is clear that section 40 of the ELRA gives the discretion to the arbitrator and labour court when awarding remedies for unfair termination but that discretion should be exercised judiciously. The

Mediation and Arbitration Guidelines Rules, GN No 67 of 2007 under Rule 32(5) gives the discretionary power to the arbitrator to award compensation based on the circumstances of each case. The Rules provides that:

> *''Subject to sub rule 2, an arbitrator may make an award of appropriate compensation based on circumstances of each case considering the following factors:*
>
> *(a) Any prescribed minima or maxima compensation.*
> *(b) The extent to which the termination was unfair.*
> *(c) The consequences of the unfair termination for the parties, including the extent to which the employee was able to secure alternative work or employment.*
> *(d) The amount of employee's remuneration.*
> *(e) The amount of compensation granted in previous similar cases.*
> *(f) The parties' conduct during the proceedings, and any other relevant factors.''*

While the above Rule provides the circumstances in which the arbitrator may use the discretionary power, the ELRA under section 40 provides the remedies which the arbitrator may award based on the discretion provided in that section. The section provides that:

> *''If an employer or labour court finds a termination is unfair, the arbitrator or court may order the employer: -*

(a) *To reinstate the employee from the date 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) *Tto pay compensation to the employee of not less twelve months remuneration*

My understanding in the above provision is that, the arbitrator may have discretion to award either of the remedies provided in the above cited section. As it was rightly submitted by the applicant's counsel that arbitrator could have opted for one remedy if he claims the termination is unfair. This is also the position of the court of appeal in the case of **Elia Kasalile and 17 others vs Institute of Social Work,** Civil Appeal No 187 of 2018, CAT at Dar es salaam in which the court

discretion to decide which remedy or reliefs fits certain circumstances. There must. However, be justification for the reason to be made."

In the case at hand the arbitrator awarded 24 months' salaries compensation and remuneration of 27 months salaries being outstanding remuneration as he was out of service. He backed up his decision by referring to section 40(2). In my understanding that is not correct, the amount of remuneration for being out of service can be paid if the arbitrator could have opted reinstatement. Based on the position of the Court of Appeal in the cited case, it is my considered view that it was not proper for the arbitrator to order two remedies that is compensation and remuneration.

In regards to the compensation of 24 months salaries, the arbitrator based on the fact that the respondent did not secure an alternative employment from the date of termination which resulted consequence of life hardship. In this regard, since the ELRA provides the discretionary power to the arbitrator to award compensation of not less than 12 months, I find this remedy is proper and therefore I will not interfere the discretionary power of the arbitrator. This was also

noted in the case of **Leopard Tours Ltd vs Rashid Juma and Abdallah Shabani,** Revision No 55 of 2013 which cited Revision No 17 of 2012 between **Juma Kanuwa vs Eckenforde Tanga University,** in which Wambura J held that: -

> *"I would find the compensation of 24 months' salary to be proper as it is the discretion of the arbitrator depending on the circumstances of each case."*

The other remedy which is contested between the parties is the repatriation costs. The ELRA under section 43(1) requires the employer to pay the employee transport to place of recruitment. The section provides that: -

> *"Where an employee contract of employment is terminated at a place other than where the employee was recruited, the employer shall either "*
>
> *(a) Transport of the employee and his personal effects to the place of recruitments*
>
> *(b) Pay for the transportation to the employee to the place of recruitment or*

(c) *Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.*

From the above provision, it is clear that repatriation cost is required to be paid to place of recruitment and not otherwise. This is also the position in the case of **Higher Education Student's Loan Board vs George Nyatega,** Labour Revision No 846 of 2018 in which the court stated that: -

> *"On the basis of the above position of the law, it is very clear that determinant factor on payment of transport allowance or repatriation allowance and substance allowance for any employee including public servant is a place of recruitment and not place of domicile"*

According to the available records it is not shown anywhere that the respondent was recruited at Musoma. The evidence on records, starting with the CMA proceedings at page 21, the respondent among other prayers, pray to be paid repatriation to the place of

recruitment, but he did not state his place of recruitment. Also in the so called ''Maelezo ya Awali ya Mlalamikaji dated 9th February 2017 which were received at CMA on 9th February 2017, the respondent at paragraph 12 (iii) pray to be paid transportation costs from Dar es salaam where he was recruited up to his place of domicile Musoma. Again, Exhibit D3 which is the proceedings of the Disciplinary Committee at page 2 the respondent admitted the testimony of the first witness, Ms. Anna Kilunga who is a human resource officer who identify the respondent as an employee of PCCB in which among other things she stated that the respondent is the employee of the applicant and that his first duty station was at Tabora and he was terminated from employment at Dar es salaam. The respondent replied by stated that *"Mwenyekiti maelezo aliyoeleza Afisa Utumishi Bi. Anna kuhusu mimi ni sahihi"*. From the above evidence it shows that the respondent was recruited at Dar es salaam where the head office of the PCCB was located at that time. As it was rightly stated by the applicant's counsel that there was no any evidence which justify the arbitrator to award the respondent recruitment costs from Dar es salaam to Musoma since Musoma was not a place of recruitment. It

was expected in this case for the respondent to adduce evidence to show that he was recruited at Musoma and therefore he is entitled to be transported from Dar es Salaam to Musoma. As it was rightly stated in the case of Higher Education Student's Loan Board (cited supra) the court stated that: -

> *"With due respect to the arbitrator, place of domicile is different from a place of recruitment. It is very irrational to believe that respondent was recruited from his home place, something which is contrary to the public service employment policy as well as its governing law including the labour laws of the land."*

Being that is the case, it is my considered view that the respondent is not entitled to be given repatriation allowance because he failed to prove the same. In this aspect, I fault with the arbitral finding that the respondent was recruited at his place of domicile that is Musoma.

The arbitrator also awarded payment of notice of Tsh 2.780,800, payment of Tsh 2.780.800 being leave pay and Tsh 4,679,230 being severance pay in terms of section 44(1) of the ELRA. In this aspect I

uphold the arbitral findings that, the respondent be paid leave if any, notice and severance pay as awarded by the arbitrator.

In the event, the award of the CMA is hereby revised and the present application have partly succeeded. The award of compensation of 24 months' salary, leave pay if any, severance pay, and notice to the respondent are upheld as rightly awarded by the arbitrator. Other award such as renumeration of 27 months' salary and repatriation costs are hereby revised and set aside.

No order as to costs.

It is so ordered.

M. MNYUKWA
JUDGE
30/7/2021