IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

CONSOLIDATED REVISION NO. 755 OF 2018 AND 858 OF 2018

BETWEEN

HIGHER EDUCATION STUDENT'S

LOANS BOARD ..... APPLICANT/RESPONDENT

VERSUS

YUSUFU M. KISARE ..... RESPONDENT/APPLICANT

JUDGEMENT

Date of Last Order: 11/03/2021

Date of Judgement: 16/04/2021

Aboud, J.

The present applications emanate from the following context. **YUSUFU M. KISARE** (herein referred as the employee) was employed by **HIGHER EDUCATION STUDENT'S LOANS BOARD** (herein the employer) on 10/09/2006 as a Chief Accountant. On 24/05/2016 the employee was terminated from service on the ground of sexual harassment after the disciplinary Committee had found him guilty of the mentioned misconduct. Aggrieved by the termination the employee filed a dispute of unfair termination at the Commission for Mediation and Arbitration (herein CMA). The dispute was registered as labour dispute no. CMA/DSM/ILALA/R.587/16/717. On his findings

Hon. Alfred Massay, Arbitrator delivered an award in favour of the employee. The Arbitrator found that the employee was unfairly terminated procedurally but there was substantive reason to terminate him from the employment. Upon such findings the Arbitrator ordered the employer to pay the employee at hand Tshs. 38,400,000/= as six months salaries compensation, repatriation and subsistence expenses, Tshs. 16,896,000/= as cost of transportation of personal, Tshs. 1,728,000/= being total air tickets price for himself, wife and four children as per fast jet quotation, subsistence allowances as per section 43 (1) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein the Act) as well as leave payment equal to Tshs. 6,400,000/=.

Both parties were aggrieved by the CMA's findings they thus, filed the present applications on the grounds which will be stated hereunder. Both applications were argued by way of written submissions. Ms. Pauline F. Mdendemi, Learned State Attorney was for employer while Ms. Blandina Harrieth Kihampa appeared for the employer.

In application No. 755 of 2018 filed by the employer, he moved the Court to determine the following grounds:-

a) That, the referral of the dispute to the Commission for Mediation and Arbitration was premature because the respondent has not exhausted internal disciplinary machinery which is appealing to the Appellate Authority.

b) That, the Commission for Mediation and Arbitration had no jurisdiction due to existence of a different statutory dispute resolution, vesting with jurisdiction to deal with disciplinary matters.

c) That, the Honourable Arbitrator erred in law and in fact in holding that, the termination of the respondent was procedurally unfair basing on ground that the respondent was not availed with the investigation report and that the Chairman of the Disciplinary hearing was not part of the applicant management.

d) That, the Honourable Arbitrator erred in law and in fact by awarding the respondent compensation, air ticket, repatriation expenses, subsistence expenses and leave pay.

Submitting in support of grounds (a) and (b) above Ms. Pauline Mdendemi, Learned State Attorney jointly submitted that, the referral of the dispute to the CMA was premature since the employee did not comply with the requirement imposed upon him to exhaust all available remedies under the Institutional disputes resolution mechanism provided by the law before resorting to the CMA. It was submitted that the employer is a corporate body established by Act No. 09 of 2004 and it has its Staff Manual of 2007 guiding on disciplinary procedures. She argued that, the dispute was referred to the CMA before exhausting available internal remedies provided under section 15 (1) of the Higher Education Student's Loans Board Act No. 09 of 2004 (herein Act No. 09 of 2004) which authorises the Minister to be the final appellate authority in relation to the Executive Director and other Directors.

It was argued that, since the Disciplinary Authority of the employee in question was the Board of Directors as admitted by himself at the CMA (see para 1 page 45 of the CMA's proceedings) then he was supposed to follow appeal procedures stipulated under section 15 (1) of Act No. 09 of 2004 as well as clause 9.5 of the Staff Service Manual, 2007. The Learned State Attorney submitted that, by

referring the matter to the CMA the subsequent award was procured from the matter which was prematurely filed. To support her submission she referred the Court to the cases of **Attorney General v. Maria Mselemu & others**, Lab Rev. No. 270 of 2008, **Medical Stores Department v. Amin Mapunda**, Rev. No. 183 of 2013 DSM (unreported) and the case of **Jonathan M. Mwamboza v. Bishop Dr. Stephen Munga & another**, Lab Rev No. 01 of 2011.

The Learned State Attorney submitted that, on the basis of the cited cases one cannot opt for general dispute resolution machinery provided by general law if there is machinery provided by specific law. She therefore, argued that the CMA determined the matter without having jurisdiction.

In regard to ground (c) it was submitted that, according to DW8 the employer conducted investigation in regard to the allegation against the employee. That, after the investigation the employee was served with the charges as per Exhibit D9 and responded to it as per Exhibit D10 and, thereafter the employee was summoned to appear before the disciplinary Committee as per Exhibit D8. It was further submitted that the hearing was conducted as per Exhibit D11 and after hearing the employee was terminated as per Exhibit D12. It was

argued that, the procedures for termination provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 (herein GN. No. 42 of 2007) were followed in terminating the employee in question.

The Learned State Attorney went on to submit that, the essence of investigation report is to help the employer to determine whether the accused employee has a case to answer then once it is established he/she is served with the charge showing his allegations. Thus, it was argued further that since the employee was served with a charge (Exhibit D9) and that during disciplinary proceeding evidence was given by the employer's witnesses and the employee had on opportunity to examine them then the investigation report was not necessary to be availed to them also. It was submitted that, giving the investigation report the one charged is not the requirement under Rule 13 of GN. No. 42 of 2007 so long as the employee had not been prejudiced in any way as he knew the charges against him and had a chance to respond to them.

The Learned State Attorney went on to submit that, Rule 13 (4) of GN. No. 42 of 2007 requires the hearing to be chaired by a senior management representative who shall not have been involved in the

circumstance giving rise to the case. She stated that, the chairman of the disciplinary hearing of the employee in question was a Senior Lecture from the University of Dar es Salaam and since the respondent was part of the employer's management it was prudent for the hearing to be chaired by an outsider so as to avoid biasness. She therefore wanted the Court to fault the Arbitrator's findings that the procedures for terminating the employee in question were not followed.

Regarding the payment of transport and subsistence allowances it was submitted that, the requirement for those payments is provided under section 43 (1) of the Act. It was argued that, the determining factor for payment of the relevant allowances is a place of recruitment and not a place of domicile. It was further submitted that, upon termination the employee in question was paid his terminal benefits as stated in paragraphs 3.14 and 3.15 of the employer's affidavit. Thus it was improper for the Arbitrator to award the current employee compensation, air tickets, leave pay, repatriation and subsistence allowances. Conclusively, the Learned State Attorney prayed for the CMA's award to be revised and set aside.

Responding to the application No. 755 of 2018 Ms. Blandina Kihampa for the employee submitted that, the allegation that the matter was prematurely filed at the CMA is erroneous and unsupported by both the law and the prevailing facts. The Learned Counsel strongly submitted that, section 15 (1) of Act No. 09 of 2004 do not apply to the circumstances of this case. She stated that in this case there is no record indicating that the employee at hand was a Director to warrant the application of the provision in question. The Learned Counsel submitted that, the accused employee was a Chief Accountant as evidenced by Exhibit D1 collectively and that he was terminated by the Board reflected in the termination letter (Exhibit D12). Therefore, there was no internal procedures to be followed by the employee at hand in accordance with the provision in question.

On the argument that, the employee admitted his Disciplinary Authority was the Board it was submitted that, such an admission does not override the requirement of the law that section 15 (1) of Act No. 09 of 2004 to apply Executive Director or a Director. As to the cases cited it was submitted that, they are distinguishable from the present case because in this case there was no internal machinery

that the applicant could persue, thus, the intervention by the CMA in the matter was appropriate and necessary.

Regarding the contention on investigation report it was submitted that, the employer failed to carry out an investigation into the allegations levelled against the employee in question despite being suspended to pave way for such an investigation. It was submitted that, though the employer insisted that he conducted investigation as testified by his witnesses but to date he had failed to tender such an investigation report neither to the CMA nor to the employee at hand. Furthermore, it was submitted that, the pillars for any charge against an employee is the investigation and the resultant investigation report. It was added that, without an investigation report an employer cannot ascertain whether there are sufficient grounds or charges to warrant a disciplinary hearing. The Learned Counsel went on to submit that, it is the investigation report which provides the material and factual findings upon which the charges are based and that the factual findings are what the employer will use to prove the misconduct and, those facts are the ones an employee is supposed to respond to. It was therefore argued that, Rule 13 (1) of

GN. No. 42 of 2007 contains a silent requirement of preparation and production of an investigation report.

It was strongly submitted that, in this case the employee was simply provided with a charge sheet but no investigation report was provided to him to be able to field a proper defence. It was stated that, the employee went into the disciplinary hearing blindly not knowing on what facts the allegation levelled against him were based and that he could not sufficiently prepare for his defence.

As to the allegation that the Chairman of the Disciplinary hearing was not part of the management it was submitted that, in the case at hand the chair person was not a Senior Management representative of the employer that he was a Lecture form the University of Dar es salaam whose organizational rank was also junior to that of the employee at hand. Also it was submitted that, the allegation that the said chair person was appointed to ensure that the nonbiased process was an afterthought because there were other senior members of the employer's management who were not involved in the circumstances giving rise to the case.

Regarding the award of compensation, air ticket costs, repatriation expenses and leave pay it was submitted that the same

were correctly awarded by the Arbitrator. It was argued that, during hearing at the CMA the employer did not dispute that the employee at hand was entitled to his terminal benefits and that he was not paid the same. The learned counsel submits that there was no any evidence tendered to prove terminal benefit payments. In respect to the computation of the transport allowance and subsistence allowances basing on the place of domicile it was submitted that the same was correct.

It was further submitted that, the rationale of section 43 (1) of the Act is to return an employee to the place where he would reside after he losses his job which is also an interpretation used world wide. It was stated that, it is absurd to return an employee to the place where he quitted his job as he cannot live there. It was contended that, in the case at hand the employee was recruited in Arusha where he was stationed for work, that the employee does not have a residence in Arusha so it would defeat the purpose of relevant provision to repatriate him back to the place of his former employer.

The Learned Counsel went on to argue that, it is the duty of the Court to interpret the law and issue orders that are both reasonable and executable. It was argued that, an order repatriating an

employee to the place of his recruitment will be cumbersomely executed because he cannot return to the place of his former employer. To strengthen her argument she cited the case of **Kamundi Ibrahim Shayo v. Tanzania Fertilizer Company Ltd. (TFC)** Lab. Dispute No. 1 of 2014 as cited in Consolidated Revision No. 137 and 151 of 2017 **Mantrac Tanzania Limited v. Joaquim P. Bonaventure** and the case of **Paul Yustus Nchia v. National Executive Secretary CCM & Another**, Civ. Appl. No. 85 of 2005 CAT, DSM (unreported).

As regards to the payment of compensation it was submitted that the same were awarded upon finding that the employee was unfairly terminated procedurally and that they are separate from the terminal benefits. In conclusion the Learned Counsel prayed for the dismissal of the application No. 755 of 2018.

In rejoinder the employer reiterated his submission in chief.

In application No. 858 of 2018 the grounds for revision were as follows:-

a) That the Arbitrator erred in law and fact in holding that the offence of sexually harassment levelled against the employee

was substantively proved without showing evidences to that effect.

b) That the Arbitrator erred in law and fact by holding that the offence of sexual harassment was proved as much as there is no reason behind the said staffs raising false accusation against the employee.

c) That, the Arbitrator misconducted himself in law and fact by failure to appreciate serious inconsistence/contradictions on the witnesses' testimonies both before the CMA and in the Disciplinary hearing committee.

d) That, the Arbitrator erred in law and fact in awarding the applicant compensation of six months' salary contrary to the provisions of the law.

e) That, the Arbitrator misconducted himself in law and fact by holding that I am not entitled to payment of one month's salary in lieu of termination notice.

Submitting in support of the first ground it was submitted, there was no evidence on record to prove on balance of probabilities that indeed the employee was guilty of the misconduct in question. It was submitted that, there was no investigation carried out to ascertain

whether the alleged offence really took place and to ascertain whether there were sufficient grounds to convene a disciplinary hearing. It was argued that the law under Rule 13 of GN. No. 42 of 2007 requires the employer to investigate to ascertain whether a disciplinary hearing should be conducted or not an act an act which was not done in this case.

It was further submitted that, without an investigation there is no basis for the guilty finding on the fabricated charges. It was stated that the allegations levelled to the employee at hand were serious which required to be investigated to set the grounds for disciplinary hearing and proof of the offence. It was therefore submitted that, the CMA erred in holding that, the offence in question was proved while there was no foundation for the charged offence.

As to the second ground it was submitted that, the basis of the CMA's finding of substantive fairness is on the assumption that "*there was no reason behind the said staffs raising false accusation against the complainant. That there is no element of bad blood or grievance/conflict between the said staffs and the complaints as motive behind the allegation.*" It was argued that the CMA was wrong to rely on such assumption as it was not based on strong

evidence and proof brought by the employer. The Learned Counsel added that, if it was a question of bad blood then it is crystal clear that, the employer is the one who had bad blood against the employee at hand because he failed to conduct thorough investigation of the misconduct in question.

As to the third ground it was submitted that, the CMA completely failed to note and address the inconsistencies found in the witness testimonies and choose to rely on the same. It was also submitted that, the respondents witnesses denied the acts cited in the charge sheet that were done to them. The Learned Counsel said, the charge sheet stated that the employee in question navigated his fingers into private parts of Rachel Makundi (DW-3). However, that witness denied such allegation.

The Learned Counsel went on to submit that, the third count states that the employee is accused of touching Paulina Songa (DW-4) buttocks, but the named victim denied such allegation during disciplinary hearing as evidenced at paragraph 2 page 16 of the exhibit D-1. It was further contended that, count four states that the employee was charged for forcing Lucy Kirigha (DW-5) to roll up her dress for him to see the colour of her underwear, similarly that

witness denied such allegation as reflected at paragraphs 6 and 1 of pages 7 and 8 respectively of exhibit D-11. The Learned Counsel argued that, the above mentioned discrepancies between the charge sheet and the witnesses' testimonies raised serious questions which would have sort out by an investigation report.

It was further submitted that, DW2 testified that DW4 reported the matter to RAAWU (Trade Union Leader) who later informed the management through the Assistant Director Human Resource one Nuru Sovela. However, DW4 denied to have reported that matter and she mentioned Prissila Mushi as the one who reported the matter. The Learned Counsel argued that, the mentioned inconsistences raised doubt on the credibility of those witnesses and the same would have been sort out by an investigation report.

The Learned Counsel went on to submit that, another noteworthy inconsistence can be depicted from the testimonies of DW-7 both before the disciplinary hearing and at the CMA. She stated that, during the disciplinary hearing as depicted from paragraph 2 page 12 of exhibit D-11 the witness testified that, the employee had admitted to the allegation levelled against him and promised to change. However, at the CMA as seen at page 2 of the proceedings

the same witness contradicted himself and stated that, the employee disputed the allegations levelled against him. The Learned Counsel was of the view that the CMA ought to have considered the serious inconsistencies because the alleged admission of the allegations was part of the basis of the decision by the disciplinary hearing committee.

Furthermore, it was submitted that, DW-7's inconsistency shows that the content of the email by the Executive Director to the Board of Directors regarding the employee admitting the allegations were erroneous and should have not been relied upon. So, it was strongly submitted that, a thorough consideration of the inconsistencies would have enabled the CMA to have found that the employee in question never admitted the allegations and had never committed the alleged offences. To buttress her submission the Learned Counsel cited the words in Nicholas "*Credibility of Witnesses*" (1985) 102 SALJ 32 at pages 35-41. On the basis of the above inconsistencies, it was submitted that the employer failed to discharge the onus of proof as regards to the allegations and therefore the finding that the allegations were proved is both erroneous and unsupported by evidence.

As to ground four it was submitted that, if a termination is procedurally unfair is still unfair termination, so thus the minimum compensation remains 12 months salaries as provided under section 40 (1) (c) of the Act. The Learned Counsel was of the view that, section 40 (1) (c) of the Act makes no distinction in the compensation to be awarded in the event the termination is unfair based on substantive or procedural reasons or both. The Learned Counsel therefore urged the Court to award the employee 12 months compensation for unfair termination.

On the last ground it was submitted that, the employee in question is entitled to payment of one month salary in lieu of notice as per contractual term (Exhibit P1) and secondly is in accordance with section 41 (7) of the Act. In the upshot it was strongly submitted that the award should be faulted for holding that, the allegations levelled against the applicant were proved on balance of probabilities while there was no proof. Thus, the Learned Counsel prayed for the employee to be reinstated, be paid 12 month's salaries as compensation for unfair termination and one month salary in lieu of notice.

Responding to application No. 858 of 2018 Ms. Pauline Mdendemi jointly submitted to ground (a) and (b) on record. She stated that the offence of sexually harassment against the employee at hand was proved through the testimony of DW1, DW2, DW4 and DW5 who testified at the CMA for being harassed by the employee. On the basis of the witness's testimonies, it was submitted that the CMA was correct to hold that there was valid reason for termination. The Learned State Attorney added that, the Arbitrator's award was based on the analysis of testimonies of witnesses and not assumptions as claimed by the Learned Counsel for the employer.

As to the issue of investigation it was submitted that, before the disciplinary hearing was carried out the employer conducted investigation to ascertain whether the disciplinary hearing should be conducted against the employee as testified by DW8 (reflected at page 39 to 41 of the CMA proceedings). It was added that, the employee in his testimony admitted that there was investigation conducted by the employer that is why he was interdicted to pave way for investigation as evidenced at paragraph 2 page 44 of the CMA proceedings. It was therefore submitted that, the employer

followed the procedures for termination as they are provided under Rule 13 of GN. No. 42 of 2007.

Regarding ground (c) it was submitted that, the fact that there was inconsistences between the charge sheet and the witnesses' testimonies does not mean that sexual harassment was not committed by the applicant. It was submitted that, although DW3 denied that the employee never navigated his fingers into her private parts she admitted to have been sexually harassed by the employee by touching her abdomen, place his hands around her body without her consent, touching her breasts and pull her closer to his body and touch her buttocks while uttering words to her in Kiswahili *"wewe ni mtoto mzuri"* as seen at paragraph 4 and 5 page 7 of Exhibit D11.

It was further submitted that though DW4 denied that the accused employee have never touched her buttocks she admitted to had been sexually harassed by him through touching her breasts and place his arms around her waist. It was added that the said witness testified that, the incidents were persistently committed by the accused employee as indicated at paragraph 1 of page 9 of Exhibit D11.

It was also submitted that, although DW5 denied that the accused employee had never forced her to roll up her dress for him to see the colour of her underwear, she admitted to had been persistently sexually harassed by him by touching several parts of her body especially breast and hips as indicated at paragraph 1 page 9 of Exhibit D11. The Learned State Attorney was of the view that, regardless the fact that there were alleged inconsistences there was enough evidence presented at the CMA which proves the allegation of sexual harassment.

As to ground (d) it was submitted that, section 40 (1) (c) of the Act quoted by the employee is couched in a discretionary manner. It was submitted that the Act uses the word *"may"* which its literally interpretation is that it is not in all cases where unfair termination is found the award of 12 months' salaries compensation will be granted. To lighten her submission the Learned State Attorney referred the case of **Sodetra (Sprl) Ltd. V. Njellu Mezza & another**, Lab. Rev. No. 207 of 2008 where the Arbitrator awarded six months compensation after finding of unfair termination on the procedural aspect only.

It was strongly submitted that the employer followed procedures for terminating the employee at hand as clearly testified by DW8. She added that, since the procedures were followed the employee is not even entitled to six months salaries compensation as awarded by the Arbitrator. She therefore prayed for the award to be revised.

Responding to the last ground (e) it was submitted that, the allegation of sexually harassment against the employee had been proved through testimonies of DW1, DW2, DW4 and DW5 thus he is not entitled to payment of one month salary in lieu of notice in terms of section 41 (7) (b) of the Act.

In the conclusion the Learned State Attorney submitted that, since the misconduct against the accused employee was proved and the procedures thereto were followed, the award should not to be faulted except for the award of six months salaries compensation which were erroneously awarded to such employee.

In rejoinder the Learned Counsel for the employee reiterated her submission in chief. She added that, the fact that the Board ordered an investigation by itself does not and is not a proof that actually investigation was carried out. She stated that the

investigation report was supposed to be tendered before the disciplinary hearing and at the CMA. It was strongly insisted that, there is no evidence to support the employer's contention that investigation was carried out thus she prayed for the court to hold affirmatively that indeed investigation never took place.

It was further submitted that the CMA did not analyse the testimonies in the award prior to reaching its finding. The Learned Counsel argued that, this Court cannot be asked to take on the task of analysing evidence at this stage. As to other grounds the Learned Counsel reiterated her submission in chief. She therefore prayed for the application to be granted.

Having considered parties submissions in both applications, Court records as well as relevant applicable labour laws and practice with eyes of caution, I find the key issues for determination in the applications are that; firstly is whether the dispute was prematurely filed at the CMA, whether the employer proved the misconduct leveled against the employee, whether the employer followed laid down procedures in terminating the employee at hand, and what reliefs are the parties entitled.

Starting with the first issue as to whether the dispute was prematurely filed at the CMA, the employer argued that the CMA had no jurisdiction to entertain the dispute at hand because the employee did not exhaust internal remedies to wit appealing to the Minister as provided under section 15 (1) of Act No. 09 of 2004. For easy of reference, I hereunder quote the provision in question:-

> *'S. 15. (1)- The Board shall be the disciplinary authority and the Minister shall be the final appellate authority in relation to the Executive Director and other Directors.*
> *(2) The Executive Director shall be the disciplinary authority and the Board shall be the final appellate authority in relation to the staff of the Board'.*

Director is also defined under section 3 of the same Act to mean:-

> *'Director means an officer of the Board appointed under section 13'.*

Again section 13 of the relevant Act provides as follows:-

> *'13. - (1) The Board shall appoint such number of Directors who shall assist the Executive Director in the performance of functions under this Act'.*

(2) The provisions of sections 10 and 11 shall apply mutatis mutandis to the respective affairs covered thereby in relation to Directors'.

From the wording of the provisions above a terminated employee who is required to appeal to the Minister should have been either the Executive Director or Director. The records in this case do not reveal that the employee in question was a Director appointed under section 13 of the provision above in the employer's organization as rightly disputed by the Learned Counsel for the employee neither was he the Executive Director. To the contrary the record indicates that the employee was the Chief Accountant as evidenced by the letter for Revised HESLB Schemes of Service, Job descriptions and Salary Structure (Exhibit P1).

Under such circumstances it is my view that, the employee was not supposed to exhaust any internal remedies as suggested by the employer counsel. I have noted the employer's submission that the accused employee admitted that his disciplinary authority was the Board. In this aspect I also join hands with the Learned Counsel for the employee's argument that, the employee's admission does not

override the stipulated requirement of the law which express clearly that for one to appeal to the Minister should be a either the Executive Director or the Director the positions which were not held by the employee as stated above. That the cases cited thereto Ms. Pauline Mdendemi have no merit.

Therefore, on the basis of the above discussion I have no hesitation to say that the matter was properly filed at the CMA and the CMA had jurisdiction to entertain the matter at hand. Thus, the first and second grounds of the employer's application No. 755 of 2018 have no merit.

Turning to the second issue as to whether the employer proved the misconduct levelled against the employee at hand. It should be noted that in any proceeding concerning unfair termination of an employee, the employer shall prove that the termination is fair, this is in accordance with section 39 of the Act. It is also a well-established principle that the standard of proof in civil suits, as it is on employment matters is on the balance of probabilities.

In the matter at hand the employee was terminated on the ground of sexual harassment. Sexual harassment can be simply defined as unwelcome behaviour of a sexual nature. It can be

written, verbal or physical. Sexual harassment can include someone touching, grabbing or making other physical contact with someone without his/her consent. The employee in this case was accused of harassing four different women who were under his supervision. The Learned Counsel for the employee strongly submitted that there is no evidence on record to prove on balance of probabilities that indeed the employee was guilty of the misconduct in question.

The Arbitrator on his findings he was of the view that the employer managed to prove the alleged misconduct on the basis that there was no reason behind the said staffs raising false accusation against the employee at hand. That there was no element of bad blood or grievance/conflict between the said staffs and the present employee as a motive behind the allegations.

I have careful examined the record particularly the disciplinary hearing form (Exhibit D11), all the victims were summoned to testify on the offences in question. Each of the victim narrated her story on how she was sexually harassed by the accused employee and their evidence were collaborated with one another. The nature of the sexual harassment on each of the victim involved body touching without their consent. The record shows that at the Disciplinary

hearing the employer tendered the written complaints of the victims reporting the matter to the relevant authorities and the anonymous email sent to the Board of Directors.

On the basis of the evidence tendered I am convinced that the employer managed to prove the misconduct in question. I am not in disregard of the employee's contention that there should have been tangible evidence such as recording to prove the alleged misconduct. However, the nature and the circumstances of the offences in question it was difficult for the victim to have recorded the incidents as the offences were committed at their surprises. All the victims testified that they went to the employee's office for official transactions therefore it was very difficult for one to foresee that the sexual harassment would have taken place and get prepared for the recording.

I have also noted the employee's submission on the inconsistences of evidence during the disciplinary hearing. It is true that some of the victims denied the nature of the sexually harassment stipulated in the charge sheet however neither of the victim rebut the position that there were harassed in one way or another. For instance, Rachel Mukhandi (DW3) denied the fact that

the accused employee navigated his fingers into her private parts but she admitted that the employee used to call her closer to where he was seated whenever she entered his office. She added that sometimes he would stand up from office chair and place his hands round her body without her consent. The victim further stated that he would also touch her buttocks, breast and pull her close to his body.

The employee also wants this Court to fault the employer's reason of termination basing on the testimony that Pauline Songa (DW4) denied to be the one who reported the matter to the RAAWU Secretary. In my view I find that inconsistence not sufficient enough to rebut the whole position that the employee did the sexual harassment to the victims in question and indeed the matter was reported to the RAAWU Secretary. As evidenced by Internal Memo (Exhibit D7) the matter was initially reported and the employee in question was verbally warned not to repeat such kind of bad behaviour. The report of the matter is also testified by the employee's witness (PW2) who stated that at the said meeting between the Executive Director, Assistant Director HRM & Administration and Chairman of RAAWU the misconduct in question was not proved. Therefore, on the basis of the foregoing in my view the relevant point

to be captured is that the matter was initially reported and the employee at hand was warned not to repeat such misconduct.

However, the employee in question did not honour the agreement and repeated the same misconduct after a short period of time. As testified by Priscila Mushi (PW1) the second time where the employee repeated such misconduct was worse as he attempted to rape her. From such incident it is where the victims got courage and decided to formalise their complaint and at the end the employee at hand was found guilty and dismissed accordingly.

Therefore, on the basis of the above discussion I have no hesitation to say that the misconduct levelled against the employee at hand was proved on the balance of probabilities. The employee's allegation that his office was near to other offices is immaterial as all the victims testified that most of the times the offences were committed on his office while they were two, that is the victim and the accused employee. I wish to emphasis that offences of this nature do not need the whole day to be accomplished it may take a minute for a person to sexually harass another person either by grabbing or touching one's body.

As to the third issue as to whether the employer followed laid down procedures in terminating the employee at hand. The procedures for terminating an employee on the ground of misconduct are provided under section 13 of GN 42 of 2007. In this case the employee is contesting that the following procedures were not followed by the employer in terminating him.

Firstly, he is alleging that there was no investigation conducted in this case. The requirement to conduct investigation is provided under Rule 13 (1) of GN. No. 42 of 2007 which provides as follows:-

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

The provision of the quotation above demands an employer to conduct investigation so as to establish if there is a prima facie case established against the accused employee. The record reveals that the accused employee was sent on a compulsory leave effective from 18/01/2016 to pave way for investigation. Though the law does not impose the duty to the employer so give the employee the investigation report as submitted by the Learned State Attorney for the employer but it is obvious that the accused employee is supposed

to know the outcome of the investigation. In the circumstances of this case the accused employee was suspended pending investigation however nothing was put in the record to know what transpired in such investigation.

It is very unfortunate that the employer decided to attach the investigation report in this Court but he did not tender the same neither at the Disciplinary hearing nor the CMA. The employee in question demanded all necessary evidence that would have helped him to prepare for his defence but he was not availed with the copy of the investigation report. Failure to accord the employee with the investigation report which is the basis of allegation amount to denial of the right to be heard. This was also the position by the Court of Appeal in the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma (unreported) where the Court held that:-

> *'It is our considered view that, though the Internal Auditor's ultimate reporting responsibility lies to the Director General it is not in dispute that, those actually audited where the appellants and it is the audit report which triggered the charges against them. In*

that regard, the non-involvement of the appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for the hearing before the disciplinary committee of the respondent. Instead, it is the respondent who being in possession of the report had all the ammunition to make a stronger case which was to the disadvantage of the appellants which rendered what followed to be unprocedural....'

The employee at hand is also contending that the Disciplinary Hearing Committee which terminated him was not chaired by the Senior Management Employee as provided under Rule 13 (4) of GN. No. 42 of 2007 which provides as follows:-

'Rule 13 (4) - The hearing shall be held and finalized within a reasonable time, and chaired by a sufficiently senior management representative who shall not have involved in the circumstances giving rise to the case'.

The provision above is also in line with Guideline 4 (2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and

Procedure of GN. No. 42 of 2007 (herein the Guidelines) which is to the effect that:-

> *'The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may serve as chairperson'.*

On the basis of the cited provision above is my view that, the law does not forbid to outsource the Chairman of the Disciplinary Committee however the appointed person should be a Senior Manager. In this application the disciplinary hearing was chaired by a Senior Lecture from the University of Dar es Salaam, Mr. Mkombozi Mhina. The question to be addressed is whether the appointed chairman was a senior Manager in his office? There is no any evidence in the record to prove if the said chairperson was a Senior Manager or not. In my view being a Senior Lecture does not automatically prove that he was in the Senior Management team in his office. Though in the letter of the appointment of that chairperson the employer substantiated genuine to outsource the Chairman that, the accused employee was in the Management staff and the Disciplinary Authority for him is the Board of Directors which

however, cannot prefer charges against the staff, determine the charges on its own and proceed to adjudicate since it will be unlawful. In my view such a reason would have merit if the appointed chairman would have been the senior Manager from another Public Officer and not just a Senior Lecture without any proof that was a Senior Manager in his institution.

On the basis of the above discussion, it is my view that though the employer had a very good case against the accused employee on the procedural aspect, he overlooked or ignored some of them as discussed above. The employer did not give the employee investigation report to enable him to prepare for his defence and the disciplinary hearing was not chaired by a proper person as rightly found by the Arbitrator. It has to be noted that the concept of fair termination must be reflected from the beginning of the disciplinary action process to the end. That is to say both the employer and employee must be availed at least equal chances or opportunity to make their case good by proper preparation. It is well known that normally employer are in better position in all means, that is to engage competent lawyers or advocates and access to all the possible available information to build their case compared to the

employees. Employees as the practice has shown after they lose their jobs it becomes difficult to get financial muscles to hire competent advocates to defend them and, sometimes there are denied very vital information that would have assisted them to concretize their defence case. That is a reason when labour disputes are considered by the authority they need to take into account that the disciplinary authority has made all possible opportunities to let the suspected employee have the information from the office which will help her/him to prepare well the defence. In my view doing opposite to that will not be considered there has been a fair termination.

On the last issue as to what reliefs are the parties entitled. As indicated in the form CMA-F.1 the employee prayed for an order of reinstatement, one month salary in lieu of notice, transport and subsistence allowances. The employer alleged that upon termination the employee was paid his terminal benefits as listed in the termination letter. Going through the record there is no any evidence to prove that the employee at hand was paid his terminal benefits as indicated, therefore, the employer is ordered to pay the employee in question the terminal benefits as listed in the termination letter.

As to transport and subsistence allowances, the position of the law as set under section 43 (1) of the Act; it requires the employer to pay the employee transport allowance and subsistence allowance upon termination of the contract. The relevant provision is to the effect that:-

> *'43 - (1) Where an employee's 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 recruitment.*
>
> *(b) Pay for the transportation of 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.*
>
> *(2) An allowance prescribed under subsection (1) (c) shall be equal to at least a bus fare to*

the bus station nearest to the place of recruitment. (3) For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent'.

The above position is also reflected in section 44 (1) (f) of the Act which provide that:-

'On termination of employment, an employer shall pay an employee any transport allowance that may be due under section 43'.

I therefore decline the Learned Counsel's for the employee's invitation to interpret section 43 (1) of the Act which is in respect of payment of transport allowances as quoted above. I believe the Court's duty to interpret the law is where there is any ambiguity or uncertainty. However, the disputed provision does not constitute any ambiguity or uncertainty for this court to intervene and interpret the same. According to the wording of the relevant provision appears from the quotation above, it is crystal clear that the employee should be entitled to be paid transport allowance to the place of recruitment. Thus, the allegation that the employee has no permanent place in the place where he/she was recruited is immaterial in relation to the

mandatory provision of the law as rightly found by the Arbitrator. This is also the position of the Court in the case of **Coca Cola Kwanza Ltd. Vs. Kareji Misyangi**, Lab. Div. DSM, Rev. No. 238 of 2008 where it was held that:-

> *'The transport and subsistence is to be paid where the employee is necessitated to quit job on employer's accord or at the end of the contract'.*

Also in the case of **Higher Education's Loan Board Vs. George Nyatega**, Rev No. 846 of 2018 HC Lab. Div. DSM it was held that:-

> *'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.'*

Regarding the order of reinstatement, it is my view that as it is found that the employer had valid reasons to terminate the employee's employment such an order will not be appropriate. I believe the order of reinstatement is granted where the employee is unfairly terminated both substantively and procedurally and the circumstances of his case allows him to be reinstated to his position

in the employer's organization without disturbing the working environment at the particular working place. It is on record that upon findings that the employee was unfairly terminated procedurally the CMA awarded him six months salaries compensation. The employee wants this Court to fault such an award on the reason that the Arbitrator has no power to award less that 12 months compensation on a finding of unfair termination. In my view the Arbitrator was wrong to award such an award because the provision of section 40 (1) given discretion to the Court to award the employee any order among those in section 40 (1) (a) (b) or (c). Section 40 (1) (c) is very clear that in awarding compensation if the Court decides to do so by using its discretion it should order payment of compensation to the employee of not less than twelve months remuneration. The Court notes the compensation is of remuneration and not only salary which is part of remuneration as is defined under section 4 of the Act. Reading between the lines section 40 (1) (c) sets the minimum stand and the Court is allowed to award more than 12 months remuneration and not less depending on the circumstance of the case. I fully agree with those who expresses their view regarding section 40 (1) that provides for the remedies when the termination is found to be unfair. Unfair termination is defined under section 37 (2)

of the Act. Reading between the lines I am reluctant to say the legislature made a demarcation as to what extent of unfairness the provisions of section 40 (1) (c) can apply, that is the minimum stand of not less than twelve month's remuneration can apply. In my view in labour matters, there must be a minimum stand as it is in the relevant provision and, that is why the Court is left to use its discretion to go above it. It is my considered view that every law enacted by Parliament must be obeyed to the letters. No matter how unreasonable or unjust it may be, nevertheless if it is clear on the point, the Judge have no option. They must apply the law as it stands. The Judges have a duty to administer and apply the law of the land and, if we depart from it and do so knowingly we would be guilty of misuse of our inherent power which any Court of justice must possess to prevent any abuse of the Court's process which would bring the administration of justice into disrepute among right thinking people.

In the result I find application no. 755 of 2018 has no merit and is accordingly dismissed. Regarding application no. 858 of 2018 the Court finds has merit and it upholds the Arbitrator's award save to payment of twelve (12) months remuneration as compensation for

unfair termination in accordance to section 40 (1) (c) of the Act and one month salary in lieu of notice.

It is so ordered.

I.D. Aboud

JUDGE

16/04/2021