IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISIONS NOS. 334 & 335 OF 2020

BETWEEN

OVADIUS MWANGAMILA.....1ST APPLICANT/RESPONDENT

GRACE KASUMBA..... 2ND APPLICANT/RESPONDENT

RONALD RWIGUZA.....3RD APPLICANT/RESPONDENT

VERSUS

TANZANIA CIGARETTE CO. LTD.....RESPONDENT/APPLICANT

JUDGMENT

Date of Last Order: 25/11/2021

Date of Judgment: 25/01/2022

I. ARUFANI, J.

This is a consolidated judgement of revisions No. 334 and 335 of 2020. Revision No. 334 of 2020 was filed in the court by the above-named applicants (to be referred in this judgement as the employees) and revision No. 335 of 2020 was filed in the court by respondent, Tanzania Cigarette Co. Ltd. (to be referred in this judgment as the employer). Both parties were aggrieved by the decision of the Commission for Mediation and Arbitration (hereinafter referred as the CMA) made in labour dispute No.

CMA/DSM/TEM/274/17/2014 which was delivered on 16/10/2019 by Hon. Kachenje J. J., Arbitrator.

The application emanates from the following background; the employees were employed by the employer on different capacities as Accountant Payable Supervisor, Chief Accountant and Financial Supervisor respectively. They were all terminated on 13/08/2014 on ground of misconduct namely gross negligence causing loss to the employer. Aggrieved by the termination of their employment, the employees referred the matter to the CMA where it was found they were unfairly terminated both substantively and procedurally and awarded 12 months' salaries as a compensation for the alleged unfair termination of their employment.

The grounds for revision of the award of the CMA filed in the court in relation to Revision No. 334 of 2020 are as follows:-

i. *That the Arbitrator erred in law in not providing for reasons of his decision not to reinstate the applicants (employees) after having made findings that their terminations were both substantively and procedurally unfair.*
ii. *That the Arbitrator erred in law for failing to order reinstatement of the applicants (employees) after finding that the applicants' (employees') termination was substantively and procedurally unfair.*

iii. *That the arbitrator erred in law by failing to order that the applicants (employees) were entitled to salaries from the date of termination to the date of award together with the awarded compensation of twelve months.*

iv. *That the arbitrator erred in fact and in law in failing to take into account evidence of delays on record caused by the parties in determining not to order reinstatement.*

v. *That the finding and basis of the Arbitrator decision not to order reinstatement are not supported by evidence and are contrary to the law.*

On the other hand, the grounds for revision filed in the court in relation to Revision No. 335 of 2020 are as follows:-

i. *That the arbitrator erred in law and in fact for failure to consider the evidence of the respondent before CMA in proving the offences charged.*

ii. *That the arbitrator failed to analyse the evidence of both sides in his award thus arriving at a wrong finding which has totally failed to consider the evidence of the parties as adduced on record in deciding on the issues in dispute.*

iii. *That the arbitrator erred in law and in fact for holding that there was no reason to terminate the complainants (employees).*

iv. *That the arbitrator erred in law and in fact by holding that the employer did not conduct an investigation thus contravened section 37 (2) of the ELRA read together with Rule 13 of GN. 42 of 2007.*

v. *That the arbitrator erred in law and in fact by holding that the charge sheet was not in conformity with the law.*

vi. *That the arbitrator erred in law and in fact by deciding issue no. 2 on procedural fairness using arguments and facts relating to substantive fairness thus arriving at a wrong finding.*

vii. *That the arbitrator erred in law and in fact by showing clear bias on part of the respondent in his award while deciding the issue in dispute.*

viii. *That the arbitrator erred in law by holding that the applicant (employer) did not comply with the procedures stipulated by law in terminating the respondents (employees) herein.*

Both applications were argued by way of written submissions. Whereas in both application Mr. Martin Mdoe, Learned Counsel appeared for the employees, Mr. Pascal Kamala, Learned Counsel was for the employer.

The counsel for the employees argued in relation to revision No. 334 of 2020 that, at the CMA the employees prayed for an order of reinstatement therefore it was wrong for the Arbitrator not to award such remedy after finding termination of employment of the employees was unfair both substantively and procedurally. He stated that, according to section 40 (1) (a) of the Employment and Labour

Relations Act, [CAP 366 RE 2019] (ELRA) it is crystal clear that, once termination of employment is found to be procedurally and substantively unfair the appropriate remedy to be awarded by the Arbitrator is reinstatement.

To support his submission the counsel for the employees cited in his submission the cases of **Tanzania Revenue Authority V. Elias Joseph Huruma,** Revision No. 572 of 2016, **Andrew Nathaniel Panga V. Kagera Sugar Limited,** Labour Revision No. 9 of 2020, **National Bank of Commerce (NBC) Ltd. V. Mariamu Mabula,** Revision No. 916 of 2018, (all decided by the High Court and are unreported) together with the case of **Magnus K. Laurean v. Tanzania Breweries Limited**, Civil Appeal No. 25 of 2018, CAT at DSM (unreported).

He went on to submit that, the Arbitrator relied on Rule 32 (2) (b) (c) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. 67 of 2007 (GN. No. 67 of 2007) in not granting reinstatement. He argued that, the decision of the Arbitrator is required to be premised with evidence and arguments arising out of analysis of the evidence as per Rule 27 (3) of GN. 67 of 2007 which was not done in this case. To support his submission, he cited

the case of **Tanzania Air Services Limited v. Minister for Labour, Attorney General and Commissioner for Labour** (1996) TLR 217.

It was his submission that, the invocation of Rule 32 (2) (b) of GN. 67 of 2007 which is about intolerable working conditions is not supported by evidence on record. He added that neither of the witnesses testified on the unfavourable working conditions that do not warrant reinstatement nor did the employees complained of the same. He further submitted that intolerable condition is one of the grounds for termination of the contract provided under Rule 7 of the Employment and Labour relations (Code of Good Practice) GN. No. 42 of 2007. Therefore, if established the employees in question would have complained of the same. He insisted that the present employees cannot be denied their right to reinstatement based on unproved ground of intolerable working condition.

He further submitted that, the purported claim that the present employees have been out of employment for long time as stated at page 29 paragraph 3 of the impugned award, is unfounded and cannot be used to detriment their right. To bolster his submission, he cited the case of **National Microfinance Bank v. Leila Mringo**

and 2 others, Civil Appeal No. 30 of 2018 and **National Microfinance Bank v. Leila Mringo and 2 others**, Civil Appeal No. 316 of 2020. He stated that in the cited cases the employees were terminated in 2010 and the decision for review by the Court of Appeal was delivered in June 2021 and an order of reinstatement was ordered pursuant to section 40 (1) (a) of the ELRA.

In concluding his submission, the counsel for the employees submitted that the arbitrator did not address himself to the conduct of the parties as regards to the delay in the conclusion of hearing of the matter. He stated that as reflected in the CMA's proceedings the delay to finalize the matter was contributed by the employer, hence it was not proper to abstain to order the employees to be reinstated in their employment on ground of length of the time passed. He argued that, as appearing at pages 3, 4, 11, 12, 15, 16, 26, 28, 39, 40, 41, 47, 56 and 57 of the proceedings of the CMA the delay of the matter was caused by the employer and argued that, the employer should not be allowed to benefit from their own wrong. To bolster his argument, he cited the case of **Abdallah Chitanda and 445 Others V. Tanzania Ports Authority**, Misc. Application No. 686 of 2019, HC Labour Division at DSM (unreported).

Responding to the submission by the counsel for the employees in relation to revision No. 334 the counsel for the employer submitted that, grant of the reliefs under section 40 (1) of the ELRA is discretionary. He argued that it is trite law that the appellate court will not interfere with discretionary powers exercised by the lower court. To support his argument, he cited in his submission the cases of **Mbogo & another V. Shah** (1968) EA 93, **Kiska Limited V. Vittorio De Angelis** (1960) EA 71 and **Deodat Dominic Kahanda V. Tropical Fisheries (T) Limited**, Misc. Com Application No. 200 of 2017, HC Com. Div. at DSM (unreported).

The counsel for the employer went on to submit that the arbitrator gave his reason for not reinstating the employees in the application at hand. He stated that the arbitrator considered the circumstance of the case where the employees were out of employment for a long period of time therefore, he based his decision on the principles of law pursuant to Rule 32 (2) of GN. 67 of 2007. To bolster his argument, he cited the cases of **Bugando Medical Centre v. Dr. Salvatory Ntubika** [2015] LCCD 165 and **National Microfinance Bank (NMB) v. David Bernard Haule** (2014) LCCD

256. He added that the CMA took into account that five years, an order for reinstatement or re-engagement was not practicable.

He further submitted that, since the employees were also charged with an offence related to trust and confidence it was not reasonably practical to reinstate them after lapse of five years. To strengthen his submission, he cited range of cases which one of them is the case of **Mathias Petro v. Jandu construction & Plumbers** [2015] LCCD 185. He also submitted that the cases concerning reinstatement cited by the employees' counsel are distinguishable from the circumstance of the case at hand.

On the allegation that the employer contributed to the delay of finalizing the matter the counsel for the employer submitted that, the employer attended throughout the proceedings and in case they failed to appear they had sufficient reasons which satisfied the CMA. He stated further that, the CMA took one year to compose the award after conclusion of hearing of the parties. Conclusively the learned counsel for the employer urged the court to dismiss the application for lack of merit.

In rejoinder the counsel for the employees reiterated his submission in chief. He argued that the cases cited by the counsel for

the employer are distinguishable from the circumstance of the application at hand and prayed the court to grant the application.

As for the revision No. 335 of 2020 the counsel for the employer submitted that the arbitrator discredited the evidence of DW1 for no apparent reason. He stated that, the evidence of the said witness was not analysed contrary to Rule 27 (3) of GN. 67 of 2007. He analysed the evidence of the employer's witnesses at length and strongly submitted that, there was sufficient reason to terminate the employment of the employees.

He stated that there was negligence on the part of the employees in the process of authorisation of payment of money which led to fraudulent payment to suppliers who had supplied services hence occasioned loss to the employer. The learned counsel for the employer defined the term negligence in relation to the matter in dispute and firmly submitted in this case the employees were aware of the necessary standard of care but they neglected to exercise that care which occasioned loss to the employer thus they were properly terminated.

Regarding the second ground of revision the counsel for the employer submitted that, the employer's decision to launch an

investigation was to unearth all culprits who were conspiring with the companies or suppliers who were benefiting from the suspected fraudulent payments. He stated that the process involved more than one department which raised doubt on how the employees failed to capture the imperfections which were seeing on the payment process. He further submitted that, the employees at hand were required to verify physical documents to see had endorsement of the invoice auditor and the service or department user before being sent to the paying authority. However, they failed to perform such task and occasioned loss to the employer.

It was further submitted by the counsel for the employer that there was no breach of law as alleged by the Arbitrator. He stated that, it was wrong for the arbitrator to held that the employer failed to establish valid reason simply because the charged offences were not listed in the disciplinary code. He argued that the law allows the employer to establish his own policies of which the employees were aware of the same.

As to the allegation of not conducting investigation the counsel for the employer submitted that the arbitrator erred in law and in fact for holding that the employer did not conduct investigation thus

contravened section 37 (2) of the ELRA read together with rule 13 of GN No. 42 of 2007. He stated that there was no any complaint from the charged employees in relation to the contents of the investigation report thus, it was improper for the Arbitrator to impeach the same.

He contended that there was no complaint that the charged employees did not understand the charges levelled against them. That was the arbitrator's own creation. He went on arguing that, there is no format of how the charge should look like. The law only requires the charge sheet to be in a language easily understood. He therefore submitted that, the employer managed to demonstrate valid reason to terminate the employees in question and she followed the required procedures.

As for ground (iv) the counsel for the employer submitted that, the arbitrator showed obvious bias against the employer by discrediting her witness (DW1) without stating the reasons thereof as clearly reflected at pages 21, 27 and 28 of the impugned award.

As for the (v), (vi) and (vii) grounds the counsel for the employer submitted that, the facts and findings of investigation report was the basis of the charges laid against the employees at hand. He argued that if the findings and recommendation of the

investigation report were different from the charges then the employees had an opportunity to challenge the charges and the arbitrator would be justified to determine that. He stated that, indeed the charges levelled against the employees were not actuated by malice.

He further submitted that the arbitrator's determination that the charge sheet was drafted by people who are not legally qualified and trained was improper and uncalled for. He argued that there is no law which requires a person of certain qualification to draft the charge. He added that the law does not mandatorily requires a workplace to have a person of certain qualification to hold the position of drafting charges. In the end the learned counsel for the employer urged the court to quash the CMA's award and order that the termination in this case was fair both substantively and procedurally.

Responding to the submission of the counsel for the employer in relation to the revision No. 335 of 2020 the counsel for the employees submitted that, the fact that DW1 was supposed to tender investigation report and he did not tender the same which is the basis of the allegation, the CMA was right not to believe his oral testimony. He stated that, failure to avail the employees with the investigation

report prior to the disciplinary hearing is fatal and makes the termination of the employees unfair as it was decided by the Court of Appeal in the case of **Severo Mutegeki and Rehema Mwasandube v. Mamlaka ya Maji safi na usafi wa Mazingira Mjini Dodoma (DUWASA)**, Civil Appeal No. 343 of 2019 (unreported).

As for the allegation that the arbitrator did not analyse properly the evidence the counsel for the employees submitted that, the arbitrator properly analysed the same in light of what was required to be proved by the employer. He strongly stated that since the employees were charged with gross negligence and occasioning loss it was the duty of the employer to prove such misconducts. To support his submission, he cited the case of **Exim Bank (T) Ltd. v. Jacquiline A. Kweka**, Revision Application No. 429 of 2019. He insisted that, throughout the proceedings there is no proof of the alleged loss.

As for the allegation that the employees never complained that they were victimized the counsel for the employees stated that the same is unfounded. He contended that the persons who prepared the charges were the same person who made decision to terminate the

employees. He said there was no plausible and justifiable reason to appoint persons outside the employer's office. He added that, there was no proof that the invoices were paid without approval.

Regarding the allegation that the evidence of DW1 was not challenged the counsel for the employees submitted that, such allegation is misconceived because the alleged evidence was challenged as reflected at page 7 to 19 of the CMA's proceedings. He further submitted that the employees were charged under section 6.1.1 and 6.1.4 of the Goods Receipt Procedure (Exh. D5). However, the cited provisions do not set the requirement of signing the invoices by the cost centre owner so that the employees in question can be held liable for contravening the same.

Regarding ground two of the revision the employees' counsel prayed for the same to be struck out because it was not pleaded in the employer's affidavit. On the other hand, he proceeded to submit on the same where he stated that there is no proof that the employees were served with investigation report prior to the disciplinary hearing commenced as reflected in the records.

As for grounds (iv) and (vii) he stated that, the same are also not in the employer's affidavit hence they should be disregarded. On

the allegation of bias, it was submitted that the same lacks merit because the arbitrator's award was composed pursuant to Rule 27 (3) of GN. 67 of 2007. He insisted that no proof that the termination was fair and justifiable.

Turning to grounds (v) (vi) and (vii) it was submitted that it is the duty of the employer to prove fairness of termination and in this case the employer did not prove the same. He stated that the employer did not prove the reasons for termination and he did not follow the required procedures. He insisted that, the employees were not afforded the right to mitigate the punishment to be imposed to them. He therefore urged the court to dismiss the employer's application. In rejoinder the counsel for the employer generally reiterated what he argued in his submission in chief.

After considering the submissions form both sides in relation to both revisions and after going through the record of the matter from the CMA the court has found the major issues to determine in this matter are two; namely whether termination of the employment of the employees was fairly both substantively and procedurally and what reliefs the parties were entitled. Starting with the first issue the court has found termination of employment of an employee is said to

be fair if it complies with what is provided under section 37 (2) of the ELRA which provides as follows:-

> *"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."*

The position of the law provided in the above quoted provision of the law is almost similar to what is provided under Article 4 of the ILO Convention which states as follows:-

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services."*

The above stated position of the law has been followed by this court in various cases which one of them is the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of

2014 where my learned Sister Aboud, J. held that:-

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness for termination of employment, Section 37 (2) of the Act.*
> *(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."*

While being guided by the above stated position of the law the court has found the employees were terminated from their employment on allegation that they committed the offence of misconduct. That is a breached of the common law rule of acting diligently and in good faith and therefore becoming dishonesty and lack of good conduct for being irresponsible (gross negligence) as stated in a termination letter (exhibit P6). Having gone through the record of the matter I have noted that, the question to be answered here is whether the employees committed the alleged misconduct of gross negligence and occasioning loss to the employer.

The court has found it is on record that the employees were employed on different position. Mr. Ovadius was employed as an Account Payable Supervisor, Mr. Ronald as Payable Supervisor and

Ms. Grace as a Chief Accountant. These employees had a duty of inspecting and verifying all payment intended to be made by the employer before approval of the payment is done. The stated verification included the invoices from Wings Bro's Investment as testified by DW1 at page 30 paragraphs 3, 4, 5 and 6 of the CMA's proceedings which shows the cost of washing cars in 2014 was very high compared with the cost of other years. That is evidenced by exhibit D1 (Invoice processed by Mr. Ovadius), exhibit D2 (invoice processed by Mr. Ronald) and exhibit D3 (invoice processed by Ms. Grace) which shows the invoices were verified by them for payment while they had not been approved and endorsed by the Invoice Auditor and User department which resulted into the loss the employer alleged to have suffered.

The court has found that the trial Arbitrator found the employees were terminated unfairly from their employment after finding the reason used to terminate the employment was not proved to be valid and fair. The trial Arbitrator arrived to the above stated finding after being of the view that, the evidence given by DW1 was not reliable to establish the validity and fairness of the reason used to terminate the employment of the employees. The court has found

that as rightly argued by the counsel for the employer the trial Arbitrator did not gave clear reason as to why he discredited the testimony of DW1.

The court has found it has been stated in number of cases which some of them are **Goodluck Kyando V. R**, Criminal Appeal No. 118 of 2003 and **Mapambano Michael @ Mayanga V. R**, Criminal Appeal No. 268 of 2015 decided by the Court of Appeal that every witness is entitled to credence and whoever question the credibility of a witness must bring cogent reasons beyond mere allegations. Although the above stated cited cases are criminal cases but to the view of this court the principle laid in those cases is also applicable in other cases including the labour matters.

The court has found the reason given by the trial Arbitrator in finding the evidence of DW1 is not reliable is that the mentioned witness was the source of the investigation report used to frame the charges levelled against the employees. The trial Arbitrator stated that, the allegations gave rise to the charge levelled against the employees were speculations calculated to victimize the employees as the charges were not supported by concrete evidence. The court has failed to see the basis of the trial Arbitrator to state the charges

levelled against the employees were based on speculation calculated to victimize the employees.

The court has found DW1 stated clearly in his testimony what caused the allegations gave rise to the charge levelled against the employees is the different defects found in the process of verification of payment of the costs of washing cars which shows there was unusual increase of the said costs in 2014 when compared with the costs of the previous years. DW1 stated that, when investigation was conducted it was discovered the employees neglected to verify if the services alleged was rendered to the employer were really rendered by seen the invoices were approved and signed by the service or department user and the vouchers auditor.

The court has found the evidence of DW1 was supported by exhibits D1, D2 and D3 which are the vouchers alleged were reviewed by the employees. Although the vouchers had no endorsement of the user department and the vouchers auditor but were approved by the employment for payment and caused loss to the employer. The court has also found it was not stated with clarity by the Arbitrator as to why the evidence of DW2 which was intended to supported the evidence of DW1 was discredited. It is the view of

this court that, as rightly argued by the counsel for the employer the trial Arbitrator erred in failing to give the deserving credence to the evidence of DW1 and DW2.

The court has found that, the testimony given by DW1 as appearing in the proceedings of the CMA and quoted in the submission of the counsel for the employer shows clearly how the employees were implicated in the disciplinary offence of gross negligence levelled against them. The court has also found that, the employees did not seriously dispute in their evidence to have approved the vouchers alleged were approved by them and occasioned loss to the employer. Their main concern is that they were neither the originator nor the last persons to approve the payment made in relation to the said vouchers.

It is the view of this court that, being neither originator nor a last person to approve the payment is not sufficient reason to establish the employees did not commit the disciplinary offence levelled against them. What is material is whether they had a role to play in the process of the payment alleged was the source of occasioning the loss alleged was suffered by the employer. To the view of this court the evidence given by DW1 and supported by DW2

together with exhibits D1, D2, D3 and other exhibits admitted in the matter managed to establish the employees had a role of reviewing the vouchers used to make the payment which caused the loss alleged was suffered by the employer.

The court has found that, if the employees acted carefully, they would have discovered the defects which were in the vouchers used to effect payment alleged it caused loss to the employer and avoid the stated loss. In the premises the court has found the employees' allegation that, as invoice transactions involved different departments, they did not commit the offence levelled against them lacks merit as they were supposed to act diligently on their department so as to exempted themselves from liability of occasioning loss to their employer.

The court has found that, it is clearly stated under Rule 12 (3) (d) of the GN. No. 42 of 2007 that, gross negligence is one of the acts which once established may justify termination of employment of an employee. The said position of the law was emphasized in the cases of **Saganga Mussa V. Institute of Social Work,** Lab. Div., DSM Consolidated Lab. Rev. No. 370 of 2013 and **Institute of**

Social Work V. Saganga Mussa, Consolidated Labour Rev. No. 430 of 2013.

The court has gone through the definition of the term gross negligence stated in the case of **Exim Bank (T) Limited** (supra) where is stated that, a person is gross negligent if he falls far below the ordinary standard of care that one can expect. The court has found that, when the said definition is applied in the evidence adduced in the matter by the employer's witnesses, it shows it managed to prove the disciplinary offences levelled against the employees to the standard required by the law which is on balance of probability.

The court has arrived to the above finding after seeing there is nothing explained in the definition of the term gross negligence stated in the above cited case which was not proved in the case at hand. In the premises the court has found the employer had fair and valid reason for terminating employment of the employees which arose from the offences of gross negligence occasioning loss committed by the employees and that offences were proved by the evidence of DW1 and DW2 together with documentary exhibits admitted in the matter as evidence.

The court has considered the finding by the Arbitrator that the offences levelled against the employees were not proved because there is no evidence adduced to show there was theft or attempted theft occurred at the working place of the employer but find the Arbitrator applied extraneous matters in issuing the award in favour of the employees. The court has come to the stated finding after seeing there is nowhere stated the employees were accused of committing the offence of theft or attempted theft but the offence they were facing is the offence of gross negligence and occasioning loss to their employer.

Coming to the argument raised by the counsel for the employees and the finding of the Arbitrator that the employees were victimized as the investigation which gave birth to the offences used to terminate their employment was initiated by DW1 who also participated in the termination of their employment, the court has failed to see any merit in the said argument. The court has arrived to the above finding after seeing that, there is nothing material stated in the evidence adduced before the CMA to establish what would have been the basis of the employees to be victimized.

It is the view of the court that, the position held by DW1 in the employer's company as an Internal Audit Manager casted a duty to him to oversee the business of the company were being done in accordance with the law and the required procedures were being adhered. Wherever he suspected there is violation of the law and procedures of conducting business of his employer he had a duty to take action against the stated violation. Under that circumstances the court has failed to see how it can be said to initiate a process of investigation of the allegations levelled against the employees and after the said allegations being established to take the action of terminating their employment was to victimize the employees.

Having found termination of the employment of the employees was made on fair and valid reason the next question to determine is whether the procedures laid down by the law was adhered. The procedure for termination of an employee is provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. The court has found in establishing the procedure for terminating employment of the employees was not followed the counsel for the employee argued that, the employees were not given investigation report so as to enable them to understand the

particulars of the disciplinary offence levelled against them for the purpose of enabling them to prepare their defence.

The court has found that, although it might be true as argued by the counsel for the employees that the employees were not supplied with the investigation report before the disciplinary hearing commenced but there is no legal requirement for the investigation report to be supplied to an employee before disciplinary hearing commenced. The court has found what is required to be done by the employer as provided under Rule 13 (2) of the GN. No. 42 of 2007 is for the employer to notify the employee of the allegations by using a form and language that the employee can reasonably understand.

The court has found in the case at hand there is exhibit P4 which is the complaint sheet and notice to attend an internal disciplinary hearing given to Ronald Rwigiza. That exhibit shows the mentioned employee was notified about the offences they were facing and the particulars of the offences charged in the said complaint sheet were stated thereon in a language which the court believes it was clear and understandable to the employees.

The court has gone through the case of **Severo Mutegeki and Another** (supra) cited by the counsel for the employees to

support his argument of failure to supply the investigation report to the employees but find that, even if the investigation report was supposed to be supplied to the employees, the said case is distinguishable from the case at hand. The court has found the position of the law stated in the above case was based on the fact that, there was an Audit Manual which had prescribed the modality of discussion of internal audit report with the management while in the case of the employees in the case at hand there was no such a manual. The court has found it had been stated in the said manual that, if there is no discussion of the internal audit report, no findings, conclusion or recommendations should ever be incorporated in an audit report that were not previously discussed with auditees of the employer of the cited case. In the premises the court has found what is states in the cited case cannot be invoked in the case at hand.

The court has found it is true that PW1 stated at page 60 of the CMA's proceedings that the investigation report was not issued to them before disciplinary hearing started being conducted but it was tendered in the disciplinary hearing at the time of hearing of the matter. If it was tendered at the disciplinary hearing it is to the view of this court that, the employees had a chance of challenging the

same by way of cross examined what is stated therein which to the view of this court shows the rule of fair hearing was not violated as argued by the counsel for the employees.

As for the finding by the Arbitrator that, the charge laid against the employees were not properly drafted the court has failed to see any material defect in the charge laid against the employees. The court has found the Arbitrator did not state which error is in the complaint sheet used to charge the employees so as to establish the charge was defective. To the contrary the court has found the charge was well drafted and was sufficient enough to meet the requirement of a proper charge.

The court has found there is another complaint raised by the counsel for the employees that as the Chairperson of the Disciplinary Hearing Committee was appointed out of the employer's staffs then hearing was not fair but failed to see any merit in the said argument. The court has found it was not stated what would have caused the said Chairperson to be not impartial in the hearing of the matter. To the contrary the court has been of the view that, the said Chairperson was a fit person to chair hearing of the matter as he was more impartial when compared to a situation where the committee would

have been chaired by a member of the staffs from the employer's company.

In the premises the court has found that, if the employees were given an opportunity to cross examine the contents of the report during disciplinary hearing and the chairperson of the disciplinary hearing was impartial as he was appointed out of the staffs of the company, then the right to a fair hearing was not infringed. Therefore, the employees' allegation regarding impartiality of the chairperson of the disciplinary hearing committee and infringement of the right of the employees of fair hearing is devoid of merit.

Coming to the issue of the reliefs the parties are entitled, the court has found that, in the light of all what the court has stated hereinabove the Arbitrator erred in finding termination of employment of the employees by the employer was unfair both substantively and procedurally. To the contrary the court has found the employer had valid and fair reason to terminate employment of the employees and fair procedure for terminating their employment was observed.

That caused the court to come to the finding that, the revision No. 335 of 2020 filed in this court by the employer deserve to be

granted. Consequently, the award of the CMA in revision No. 335 of 2020 is hereby revised and quashed and the order for payment of compensation made in favour of the employees in the impugned award is hereby set aside. The above finding makes the court to come to the finding that, the revision No. 334 of 2020 filed in this court by the employees seeking to be reinstated in their employment cannot succeed as the court has already found termination of their employment was both substantively and procedurally fair. Therefore, the revision No. 334 of 2020 is hereby dismissed for being devoid of merit and revision No. 335 of 2020 is granted as afore stated. It is so ordered.

Dated at Dar es Salaam this 25th day of January, 2022.

I. Arufani

JUDGE

25/01/2022

Court: Judgment delivered today 25th day of January, 2022 in the presence of Ms. Esther Msangi, Learned Advocate holding brief of Mr. Walter Shayo, Learned Advocate for the Applicant and Ms. Esther

Msangi, is also appearing for the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

25/01/2022