

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 192 OF 2022**

*(Arising from an Award issued on 20/5/2022 by Hon. William R, Arbitrator, in Labour dispute No.*

*CMA/DSM/ILA/161/2021/145/2021 at Ilala)*

**METROPOLITAN TANZANIA INSURANCE CO. LTD ..... APPLICANT**

**VERSUS**

**ELIAMESHINDA WILLIAM KYUNGAI ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 31/08/2022*

*Date of Judgment: 16/9/2022*

**B. E. K. Mganga, J.**

On 25<sup>th</sup> January 2016, applicant employed the respondent as an accountant. In May 2017, applicant promoted the respondent to the position of acting Chief Account and confirmed her as Chief Account in August 2017. The two enjoyed their employment relationship until March 2021 when applicant alleged that respondent altered receipts for cash payment and show in the system that money was deposited in the bank by applicant's clients while no money was deposited. Following that allegation,

applicant conducted investigation, suspended the respondent, and thereafter terminated her employment for gross dishonest.

Respondent was aggrieved by the said termination, as a result, she filed labour dispute No. CMA/DSM/ILA/161/2021/145/2021 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that she was unfairly terminated. On 20<sup>th</sup> May 2022, Hon. William R, Arbitrator, having heard evidence of both sides, issued an award that termination of the respondent was unfair both substantively and procedurally. The arbitrator therefore ordered the applicant to reinstate the respondent without loss of remuneration.

Applicant was aggrieved by the said award, as a result, she filed this application seeking the court to revise the said award. In support of the notice of application, applicant filed the affidavit of Henry Mgala, her Legal Officer containing three grounds of revision namely:-

- 1) The arbitrator erred in law in not admitting bank statements.*
- 2) The arbitrator erred in law and fact in issuing illogical and contradictory award.*
- 3) The arbitrator erred in law and fact for failure to analyze evidence of the applicant.*

When the application was called on for hearing, Mr. Praygod Uisso, advocate appeared and argued for and on behalf of the applicant while Mr. Remmy Ephraim, Advocate appeared and argued for and on behalf of the respondent.

Mr. Uisso Submitted on the 1<sup>st</sup> ground, that respondent altered cash receipts to show in the premia system that money was deposited in bank applicant's customers. He went on that, during hearing, DW1 tendered a bank statement that was received as ID1 showing that no money was deposited. Mr. Uisso submitted further that, respondent being the Chief Accountant, was given money by Nurdin Suleiman (DW4) so that she can bank them, but she did not. Learned counsel added that, receipts (exhibit D3) shows that customers paid cash and gave the money to Nurdin Suleiman (DW4) who handled the same to the respondent. He submitted that, reason for non-admission of the bank statement (ID1) as exhibit was that it did not comply with Section 18 of the Electronic Transactions Act. Counsel for the applicant submitted that arbitrator wrongly rejected the said bank statement (ID1) because section 84 of the Employment and Labour Relation Act [Cap. 366 R.E. 2019] requires arbitrators not to rely on technicalities in disposing disputes. Counsel also cited the case of ***I & M***

***Bank (T) Limited V. Gregory Ogweyo***, Consolidated Revision No. 724 & 761 of 2019 (unreported) to support his submissions.

Arguing the 2<sup>nd</sup> and 3<sup>rd</sup> grounds, Mr. Uisso submitted that the arbitrator failed to evaluate evidence of the applicant especially the bank statement and receipts. He argued that the arbitrator found that respondent was called to attend the disciplinary hearing but thereafter held that respondent was not aware of the charge she was facing. Counsel for the applicant submitted further that guideline relating to disciplinary hearing as provided under the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 was complied with and that on 23<sup>rd</sup> May 2021 respondent was served with notice of hearing and that hearing was conducted on 27<sup>th</sup> May 2021. Counsel for the applicant argued further that it is not true that respondent was not aware of the charge until when she entered the disciplinary hearing. Counsel for the applicant submitted that arbitrator therefore erred to hold that respondent was not heard during investigation. He went on that, the case of ***Hamis Mayage v. The Board of External Trade***, Civil Appeal No. 37 of 2007 relied on by the arbitrator is not applicable and does not exist.

Mr. Uisso submitted further that, it is not the requirement of the law for the employee to participate in investigation and that the procedure was followed. He strongly submitted that Rule 13(1) and (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 requires employee to be informed/notified and called to the disciplinary hearing. Counsel made reference to the investigation report(exhibit D2) and submit that the said Rule was complied with. Counsel for the applicant went on that, in his evidence, respondent admitted that he was served with investigation report and was called in the disciplinary hearing. He concluded his submissions by praying the application be allowed and order trial *de novo* before a different arbitrator.

Responding to submissions made on behalf of the applicant, Mr. Ephraim, learned counsel for the respondent submitted on the 1<sup>st</sup> ground that, the arbitrator was right for not receiving the bank statement because it did not comply with the law. He argued that a bank statement is a bankers' book as per Section 78, 78A of the Evidence Act [Cap.6 R.E. 2019] and that these sections provide procedures on how the bankers' book can be tendered in evidence. He went on that, in terms of Section 78(2) of Cap. 6 R.E. 2019 (supra), the said bank statement was supposed to be attached with an affidavit or tendered by the Bank Officer. Counsel

for the respondent submitted in the alternative that, even if the said bank statement would have been admitted in evidence, yet that would have not proved the alleged misconduct against the respondent. Mr. Ephraim refuted submissions that DW4 handled the money to the respondent and that money was kept in safe by DW2 and were deposited on the next day.

Responding to submission made by counsel for the applicant in relation to failure of the arbitrator to invoke the provisions of Section 84 of Cap. 366 R.E. 2019 (supra), counsel for the respondent submitted that, it was a discretion by the arbitrator to invoke that section or not. He was quick to add that the law requires minimal application of technicalities.

Submitting on the 2<sup>nd</sup> and 3<sup>rd</sup> grounds, counsel for the respondent argued that, it is not true that the arbitrator failed to analyze evidence. He submitted further that, arbitrator analyzed evidence and the award was fairly issued in favour of the respondent.

Mr. Ephraim submitted that there was no alteration of cash receipts (exhibit D3) as was testified by DW4 and that investigation report (exhibit D2) did not show that respondent participated in misappropriation of money of the applicant. He submitted further that, exhibit D2 shows that user ID of the respondent was used in alteration of the receipts, but

according to evidence that was adduced at CMA, that is not a cash receipt. Counsel submitted further that, respondent admitted that there was sharing of user ID password with her co-employee and that DW2 testified that, that was the practice as per minutes Exhibit A10. Counsel went on, that the respondent testified that the person who was in position to alter cash receipts is DW4.

Counsel for the respondent submitted further that, respondent attended the disciplinary hearing unaware of the charge she was facing because, she was served with two different show cause. In his submissions, counsel for the respondent concede that the first charges were thereafter recalled hence remaining with the new charges that was similar to the charges that were withdrawn. Counsel for the respondent conceded further that respondent was served with the investigation report and new charges and that termination of employment of the respondent was based on the new charges. Counsel for the respondent submitted further that the new charges were served to the respondent on 30<sup>th</sup> April 2021 and the disciplinary hearing was conducted on 07<sup>th</sup> May 2021.

On the right to be heard, counsel for the respondent submitted that, respondent was supposed to be heard during investigation, but she was

not. On the prayer to nullify proceedings and order retrial, counsel for the respondent submitted that this Court has power to evaluate evidence and confirm CMA award.

In rejoinder, Mr. Uisso submitted that money was deposited by the respondent and not DW2 who was on leave. He went on to submit that respondent was served with the charge prior to attend the disciplinary hearing. It was submission by counsel for the applicant that the law does not require/provide that an employee must participate in the investigation process hence there was no violation of right to be heard.

I have examined the CMA record and considered submissions made on behalf of the parties to see whether termination of the respondent was unfair or not and the reliefs each party is entitled to.

It was submitted on behalf of the applicant that the arbitrator erred in law for not admitting into evidence the bank statement (ID1) and that the arbitrator relied on technicalities in not admitting the said bank statement in evidence. On the other hand, counsel for the respondent submitted that the said bank statement did not comply with the law hence the arbitrator cannot be faulted. I have examined the said bank statement (ID1) and find that the same bears no rubber stamp of the bank that



issued it. In my view, in absence of the rubber stamp and being not certified as a printout issued by the bank, it cannot be proved that it was issued by CRDB Bank. It is my view therefore that the said bank statements were properly rejected, and the arbitrator cannot be faulted. Submissions by counsel for the applicant that arbitrator for failure evaluate the bank statement is without substance. I therefore dismiss the 1<sup>st</sup> ground.

It was submitted by counsel for the applicant that the arbitrator did not analyze evidence. Based on that ground, counsel for the applicant prayed that the award be nullified and order trial de novo. On the other hand, counsel for the respondent submitted that this Court has power to evaluate evidence adduced by the parties at CMA. I agree with counsel for the respondent because that is the correct position of the law. This court being the first refuge after CMA decision, has powers to re-evaluate the evidence, step into shoes of the trial court and draw its conclusion. There is a plethora of authorities to that position including the case of *Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd and 2 others*, Civil Appeal No. 51 of 2016 CAT (unreported), *Domina Kagaruki .v. Farida F. Mbarak & 5 Others*, Civil Appeal No. 60 of 2016, ***Okeno v. Republic*** (1972) E.A.32, ***Peters vs***

***Sunday Post Limited*** (1958) E.A 424), ***James Makundi vs Permanent Secretary, Ministry of Lands, Housing & Human Settlements Development & Others***, Civil Appeal No. 181 of 2021) [2022] TZCA 242, ***Salhina Mfaume & Others vs Tanzania Breweries Co. Limited***, Civil Appeal No. 111 of 2017 [2021] TZCA 209 to mention but a few. In ***Kagaruki's case*** (supra), the Court of Appeal emphasized that:-

*"...However, such jurisdiction must be exercised with great caution. The jurisdiction can be exercised if there is no evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong..."*

In the application at hand, counsel for the applicant prayed that the whole proceedings be nullified as the arbitrator did not analyze evidence but counsel for the respondent prayed the court to re-evaluate the evidence and draw its conclusion. Faced with that situation, I will evaluate evidence adduced by the parties at CMA to see whether the arbitrator's findings and conclusion are sound in law.

It is undisputed by the parties that respondent was charged with four counts of gross dishonest. The particulars were that (i) on 7<sup>th</sup> January 2020 respondent altered cash Receipt issued to Dennez Engineering Ltd for TZS 1,45,580.00 to indicate that it was paid through bank and that on 18<sup>th</sup>

February 2020, respondent approved that receipt or narration to show that money was paid in bank and not as cash; (ii) that, on 28<sup>th</sup> December 2018 respondent made alteration of cash receipt issued to Elegance Developers Company Ltd for TZS 5,800,720.59 to show that it was paid in bank instead of cash and that on 9<sup>th</sup> January 2019, respondent approved the said receipt in the system; (iii) that, on 31<sup>st</sup> December 2019 respondent made alteration of cash receipt issued to Abdulswamad A. Abdulwamad for TZS 590,000 to show that it was paid in bank and that on 2<sup>nd</sup> January 2020, respondent approved the said receipt in the system; (iv) that, on 2<sup>nd</sup> January 2019, respondent, dishonestly instructed a refund process of TZS 3,841,973 to Spanco signs Africa Limited as repayment of earlier on rejected premium for a financial guarantee policy while aware that the received cash was never deposited in the alleged bank and was never accounted for.

It was evidence of Emile Brown Mwakalapa (DW1) that respondent who was the chief account of the applicant, was duty bound to make bank reconciliation for the cash received and banked on the tenth day of every month. DW1 testified further that, respondent breached trust because he changed details in the system to show that money that was received as cash was received through bank but money was also not banked. In his

evidence, DW1 tendered cash receipts (exhibit D3) showing that money that was received as cash, was not reflected in the bank statement. DW1 further tendered investigation report (exhibit D2) showing that respondent's user ID was used to facilitate changes in the premia system to show that money were directly paid in bank while it was not true. While under cross examination, DW1 testified that, according to job description, respondent does not receive money or prepare receipt. DW1 went on that Money from Dennez Engineering was received in office by Leticia and Nurdin and further that, respondent had a duty to control the system. In relation to Password sharing, DW1 testified that it is prohibited as per ICT policy and that the investigation report (exhibit D2) shows that respondent made changes by approving in the system that money was paid directly in bank while it was received as cash. While under re-examination, DW1 testified that Nurdin can update the receipt by changing customer name and motor vehicle number, but changes must be approved by the Chief Accountant (respondent).

In her evidence, Alice Jared Lisso (DW2), a senior Accountant, testified that they used to log in Premia system by using passwords. She testified that (i) receipt dated 3<sup>rd</sup> January 2020, (ii) receipt dated 30<sup>th</sup> December 2019, and (iii) receipt dated 27<sup>th</sup> February 2018, money was

paid as cash by customer, agent and broker respectively. In her evidence, DW2 testified that respondent changed in the premia system to show that money in respect of those receipts was not paid as cash, rather, was directly deposited in bank. In her evidence, DW2 is recorded stating: -

*"...risti ilipotolewa tarehe 27/12/2018...aliyetoa risti ni Nurdin Suleiman...aliye update risti ni Eliameshinda...tarehe iliyobadilishwa risiti ni 28/12/2018, aliye approve mabadiliko ni Eliameshinda...Column ya mwisho, old reference FNB BRK baada ya kubadilishwa CRDB 22/12/2018 BRK hii ni Dhahiri kwamba fedha pesa zilishakabidhiwa tarehe 27 mabadiliko yakafanyika tarehe 28 ambayo accountant alikuwa hana access na hiyo pesa tena na ndiyo siku ambayo pesa zilipelekwa benki na Chief Accountant...Transaction ya pili ilipokelewa tarehe 3/1/2020, hii ndiyo siku pesa zilipokelewa, risiti ilitolewa na Lathanas ikaja kubadilishwa na Eliameshinda tarehe 7/1/2020 siku 4 mbele kutokea pesa ilipopokelewa na kukabidhiwa siku hiyo hiyo kwa Chief accountant...Risiti ya tarehe 30/12/2019 ilipokelewa na Nusuleiman ikawa updated na Eliameshinda tarehe 31/12/2019. Eliameshinda kwa sababu risti imetolewa tarehe 3/01/2020 akakabidhiwa pesa tarehe 3/1/2020 kama ingekuwa accountant anahusika, siku hiyo hiyo ya tarehe 3/1/2020 asingetolea hiyo risit kama cash kwa sababu baada ya hiyo siku Accountant anakuwa hana access tena na hiyo ela..."*

While under cross examination, DW2 is recorded stating: -

*"...Cashier akipokea ela anatoa risiti ya mfumo na kukiwa ba makosa kwenye risiti anayebadilisha ni Chief accountant.*

*Q- Siku ya tarehe 3/01/2020 nani alikabidhiwa pesa na cashier?*

*A. chief Accountant*

*Q. Kiasi cha Sh. Ngapi?*

*A. Sh. Milion 23.*

*Q. Chief accountant akapeleka wapi?*

*A. Kwenye safe kama sheria inavyosema.*

*Q. Baada ya safe alitakiwa kupeleka wapi?*

*A. Alitakiwa kupeleka benki*

*Q. Nani alipeleka benki?*

*A. Chief Accountant*

*Q. Tarehe 27/12/2018 nani alikbadhiwa pes ana cashier*

*A. Chief Accountant (Eliameshinda)*

*Tarehe 27/12/2018 alikabidhiwa shilingi ngapi?*

*A. Nikirejea kielelezo D4, alikabidhiwa Sh. Milioni 29.*

*Tarehe 27/12/2018 senior Accountant alichukua kiasi gani kwenye safe?*

*A. Sijui.*

James Girango Njoroge (DW3) testified that he participated in investigation with a view of establishing whether there were irregularities in the process of cash collection, cash entries/ posting in the accounting system and banking. In his evidence, DW3 testified that, in their investigation, they discovered that there were lapses in user rights allowing some of the users to edit transactions including receipts issued to the clients. DW3 testified further that, User ID of Eliameshinda (respondent) was used to effect those changes in the system. While under cross examination, DW3 testified that Nurdin Suleiman was editing receipts.

Nurdin Suleiman Fuma (DW4), also a senior Accountant, testified that actual receipts in the file shows that cash money was received while in the system it is shown that money was deposited in bank by applicant's clients.

DW4 testified that he is the one who reported to the management the incidence of editing receipts for money received as cash to show that was deposited by clients in bank. In his evidence in chief, DW4 is recorded stating:-

*"...Transaction alizokuwa anatuhumiwa nazo ni za tarehe 3/1/2020, 27/12/2018 na 30/12/2019...ID iliyotumika kwenye ku-update ni ya CA. update zote zimefanyika baada ya pesa kuwa banked...Receipt ya 3/1/2020, pesa ilikabidhiwa 3/1/2020, updation ilifanyika 7/01/2020. Mwenye power ya kufanya updation ni CA kwani mtu mwingine mpaka apate approva ya CA...Kwenye ripoti, hiyo transaction ya mwisho naitambua na ninaitambua hiyo user ID ni yangu, nilikosea narration na aliyenipa approval ni Chief Accountant. Kuhusu madai hajaonewa yeye ndiye anahusika na upotevu wa hizo fedha zote".*

While under cross examination, DW4 is recorded stating: -

*"Q. Kwa tarehe husika Eliashinda ali-deposit kiasi gani.*

*A. Nikirejea kielelezo D4, tarehe 3/1/2020 alibank shilingi 4,632,750.*

*Q. je, sh. 1,455,580 ipo kwenye hiyo amount uliyoitaja?*

*A. Haipo.*

*Q. kwa siku hiyo ya tarehe 3/1/2020 ulikabidhi kiasi gani?*

*A. Sh. 4,632,750 plus 1,225,575.*

*Q. ulimkabidhi lini?*

*A. tarehe 3/1/2020.*

*Q. tarehe 27/12/2018 kiasi gani alideposit benki?*

*A. S. 20,064,500 plus 5,800,720.*

*Q. Hizo sh. 5,800,720 zipo ndani?*

*A. Hapana.*

*Q. tarehe 30/12/2019, Eliashinda ali-deposit kiasi gani.*

*A. Sh. 1,744,049.*

*Q. ulimkabidhi kiasi gani.*

*A. Sh. 1,744,049 plus 590,000/=.*

*Q tarehe 3/1/2020, 27/12/2018 na 30/12/2019 Eliashinda alikuwepo Ofsini?*

*A. Ndiyo.*

*Mwenye mandate yaku-cancel reipt ni aliye issue receipt.*

*Q. Eliashinda ali-deposit pesa zote ulizomkabidhi.*

*A. Hapana.*

*Q. alizipeleka wapi baada ya kumkabidhi?*

*A. Kwenye safe.*

*Wenye uwezo wa kuaccess safe ni Chief Accountant, senior accountant na Financial Controller.*

*Cashier anaweza kualter receipt.*

*Tarehe 10/1/2020 kulikuwa na change na fedha hazikuwadeposited receipt ilitolewa ijumaa na deposit ikafanyika jumatatu tarehe 13/1/2020. Aliye update receipt ni Nusuleiman.*

*Nina access ya ku-update receipt..."*

I should point that DW4 was honest enough when he admitted in his evidence that the last transaction in the investigation report showing alteration of the receipt was done by himself. He however explained that he made that alteration after approval from the respondent.

Ramadhan Kashiskashi Abdallah (DW5), the Human Resources officer of the applicant testified that respondent's employment was terminated due to gross dishonest. He testified also that respondent admitted that her user ID was used to modify information in the system.



On her side, Eliameshinda William Kyungai (PW1), respondent, testified that on 25<sup>th</sup> January 2016 she secured employment with the applicant as accountant and in May 2017 she was promoted to to the post of acting Chief accountant and later on confirmed as Chief Accountant. In her evidence, PW1 testified further that, it was not her duty to deposit money in bank and that on 10<sup>th</sup> February 2021 she was called by the Chief Executive Officer of the applicant who required her to explain as to why money is not being deposited in bank. On reason for termination, PW1 testified that, she was charged for misappropriation of company fund, gross dishonest and gross negligence. She testified also while under examination in chief that, the investigation report (exh. A8) concluded that her user ID was used to edit receipts and that it was concluded that she was responsible with taking the money but there was also user ID of Nusuleiman (DW4). PW1 testified further that, there was a practice of sharing password and that the management was aware of that practice. While under cross examination, PW1 admitted that exhibit D3 were for cash but exhibit D4 shows that money in exhibit D3 were paid directly in bank. She admitted further that, transaction of Dennez Engineering was done in 2020 as per exhibit D2 but loss was discovered in 2021 almost a year later and that her user ID and that of Nusuleiman were used to make

changes. She admitted in her evidence that Chief Accountant and Financial Controller had power to approve changes in the system and further that she had capacity to make alterations. She admitted also that at the disciplinary hearing, she stated that her user ID was used by another person and maintained that password sharing was a practice due to challenges in the system.

It is my view, from the evidence of the parties that there was valid reason for termination and that applicant proved the case at balance of probabilities. I have pointed hereinabove that the bank statement was not admitted as evidence, correctly in my view, but the arbitrator thought that in absence of the bank statement showing that no money was deposited therein, applicant failed to prove her case. That assumption was erroneously made. I am of that view because failure to tender an exhibit does not render oral evidence relating to the said exhibit not admissible. This is because, section 61, 62 and 63 of the Evidence Act [cap. 6 R.E. 2019] has nothing to do with admissibility of physical exhibits. see ***Julius Billie v. Republic*** [1981] TLR 333, [\*\*\*Lancet Laboratories Tanzania Limited v January Munyuri Byaro\*\*\*](#), Revision Application No. 463 of 2021, HC (unreported) and [\*\*\*Flano Alphonse Masalu @ Singu vs Republic\*\*\*](#), Criminal Appeal No. 366 of 2018 [2020] TZCA 197. In ***Flano***

**Alphonse's** case (supra), the Court of Appeal clarified what was held by this court in **Billie's case** (supra) by holding that: -

*"non-production of a thing which is the subject- matter of court proceedings goes only to the weight and not to the admissibility of the evidence concerning or relating to it. The court did not lay down or restate any principle of law requiring the tendering of the stolen goods or the offensive weapon as a precondition for establishing the guilt of an accused person. Whether or not the prosecution must tender such items depends, on the whole, upon the circumstances of the case."*

Further evidence showing that money was not deposited in bank though receipts for cash (exhibit D3) were altered to show that they were deposited, is found in special Audit for cash Collection of Premium Receipts (exhibit D2). It is clearly stated in exhibit D2 that was admitted without objection that :-

*"There were lapses in user rights allowing some of the users to edit the transactions including the receipts issued to the clients. Some of the receipts issued to the clients for cash received were edited and converted to receipts for amount received in the bank. Thus, resulted in amount being collected, but not deposited into the bank account. As a result of this, entries not appearing in the bank statement, are not captured in the accounting records and thus no transaction appears as part of bank reconciliation. We have found 4 receipts, which were originally issued as cash receipts, later on edited to show that they were bank deposits. We have checked the bank book and the bank statements, but we could not find the amount for these 4 receipts being received in the bank...these edited receipts were never accounted in the bank ledgers. As a result of this, they never appeared as bank reconciliation item..."*

I have examined annecture I to exhibit D2 and find that it shows that on 3<sup>rd</sup> January 2020 Lathana created document/ cash receipt No. 20200187 for Dennes Engineering Ltd at 11:41:40 AM. The said cash receipt was updated in the premia system by Eliameshinda (respondent) on 7<sup>th</sup> January 2020 at 6:26:41 AM and the said update was approved by Eliameshinda (respondent) on 18<sup>th</sup> February 2020. Amount involved in that cash receipt is 1,455,580.00. Change details shows old Reference No. FNB-DSF (on the document/ cash receipt in the file) and new Reference in the premia system after change is No. CRDB 1,225,575. I have examined exhibit D3 especially receipt RTPR11ST100120200187 which shows that money was paid in cash but exhibit D4 shows that on 3<sup>rd</sup> January 2020 client deposited money in bank through transaction document RTPR11ST1020200187 that was deposited by Dennes Engineering Ltd.

The said annecture also shows that on 27<sup>th</sup> December 2018 Nusuleiman created document/ cash receipt No. 201812838 for Elegance Developers Company Ltd at 12:37:26 PM. The said cash receipt was updated in the premia system by Eliameshinda (respondent) on 28<sup>th</sup> December 2018 at 5:27:50 PM and that the said update was approved by Eliameshinda (respondent) on 9<sup>th</sup> January 2019. Amount involved in this receipt is 5,800,720.59. Change details shows old Reference (cash receipt) No. FNB-

BRK and new Reference No. CRDB 22/12/2018 BRK. I have examined cash receipt (exhibit D3) No. RTPR11ST100121812838 which shows that money was paid in cash but exhibit D4 shows that 590,000 was deposited in bank by client on 30<sup>th</sup> December 2019.

Annexure to exhibit D2 shows further that on 30<sup>th</sup> December 2019 Nusuleiman created document/ cash receipt No. 2019121055 for Abdulswamad A. Abdulwamad Dove at 9:36:03 AM. Exhibit D2 shows that the said receipt was updated in the premia system by Eliameshinda (respondent) on 31<sup>st</sup> December 2019 at 1:58:07 PM and that update was approved by Eliameshinda (respondent) on 2<sup>nd</sup> January 2019. Amount involved is 590,000.00 and change details shows old Reference No. FNB-AGT and new Reference No. CRDB 590,000. This relates to receipt RTPR11ST1001201912105 on exhibit D3.

Not only that but also exhibit D2 shows that on 10<sup>th</sup> January 2020 Nusuleiman created document / cash receipt No. 202001521 for T998 DJS at 9:36:03 AM. The said receipt was updated in the Premia system by Eliameshinda(respondent) on 31<sup>st</sup> December 2019 at 2:55:07 PM and that update was approved by Eliameshinda (respondent) on 16<sup>th</sup> January 2020. Amount involved is 1,239,000.00. Change details shows old description premium for T998 DJS Nazir Mustafa Karamagi, old reference No. FNB DSF

MTICL 030. New description shows premium for T998 DJS with new reference No. CRDB 1,239,000. From the foregoing, money was paid in cash and receipts were issued to clients by Nusuleiman, but respondent indicated in the premia system that money was directly deposited in bank by clients.

In connection to the foregoing, respondent tendered a letter dated 12<sup>th</sup> February 2021 titled "Discrepancies in the cash receipt and bank Ledger" (exhibit A5) which she wrote as a response to the allegations against her. Exhibit A5 confirms that money was not deposited in bank. In the said exhibit A5, respondent indicated that receipt No. 20200187 was not seen in the bank statement. This receipt relates to the 1<sup>st</sup> count she was charged with. She indicated further that money relating to receipt No. 201812838 and receipt No. 2019121055 relating to the 2<sup>nd</sup> and 3<sup>rd</sup> counts were also not found in the bank statement. In exhibit A5, respondent indicated that receipt No. 202001521 and the amount thereon, were not seen in the bank statement. She however stated in exhibit A5 that in relation to this receipt, there are two different narration in the premia system namely; PREMIUM FOR T998 DJS NAZIR MUSTAFA KARAMAGI on one hand and Premium For T712 CRC Moravian Church Southern Tanzania on the other.

My conclusion from all what I have explained hereinabove is that, evidence shows that money was not deposited in bank despite the receipts approved by respondent showing that money was deposited in bank. I therefore conclude that even in absence of the bank statement that did not meet admissibility test, evidence sufficiently proved that receipts for cash were altered to show that money was directly deposited in bank while it was not. Worse, no money was deposited. It is my view further that, the mere fact that DW4 participated in altering one of the receipts, that fact on itself does not exonerate respondent from the charges she was facing. In fact, DW4 was not discredited in his evidence while under cross examination when he testified that he gave money to the respondent for the later to deposited in bank but it was not deposited. Again, I have treated evidence of DW4 with caution and considered it in totality of all evidence that was adduced including evidence adduced by the respondent and find that applicant proved her case. I therefore find that arbitrator erred to conclude that applicant had no valid reason for termination. That said, I hold that there was valid reason for termination.

It was argued by counsel for the respondent that there was password sharing by applicant's employee. Counsel for the respondent was raising an argument that possibly, the said receipts in the premia system were altered

by someone else and not the respondent hence it was not proven that alterations were done by the respondent. Once again, to put it clear, the standard of proof in labour cases is at balance of probability and not beyond reasonable doubt. See [Public Service Social Security Fund vs Siriel Mchemba](#), Civil Appeal No. 126 of 2018 [2022] TZCA 284. Evidence by the applicant shows that password sharing was prohibited. That evidence came from DW2. On her side, respondent testified that there was a practice of sharing password by applicant employees. During hearing, applicant attempted to tender IT Policy, but applicant raised objection that the same being generated from computer, applicant was supposed to attach an affidavit of which she failed. Consequently, the IT policy was not admitted in evidence. As I have held hereinabove, failure to tender a documentary or physical exhibit does not render oral evidence relating it inadmissible because that goes to the credibility of witness and evidence adduced thereof. DW2 did not testify that employees were not sharing passwords. It is my view that respondent did not state that there was no IT Policy or that employees were not prohibited to share passwords. What she testified is that password sharing was a practice among applicant employees and that the practice was well-known. It is my view, that it is illogical for the employer to issue passwords for security measures to her



employee and then allow employees to share passwords. Again, in my view, if applicant's employees shared passwords, they did so on their own risk and that cannot be a justification for committing misconducts. At any rate, respondent did not state in her evidence the name of the person she happened to have shared her password.

I should point out albeit briefly, that now parties are increasingly raising objection on admissibility of documents on ground that they are electronic documents and that for them to be admitted, an affidavit must be filed. I am not sure whether, they know what electronic document is and what is not. The danger that is ahead of us is that parties may be obsessed with those preliminary objections forgetting to administer justice. I cordially advise arbitrators that they should not be trapped in that trap because even the documents that are filed before them by the parties are all printed from electronic devices. Even this judgment is a product of that process. Now if parties will be more fascinated with objections relating to admissibility of electronic evidence and the objections wrongly upheld, there will reach a point no document will be admitted in absence of an affidavit. For now, I will stop here because that was not one of the issues for determination. I reserve my conclusions for the appropriate time when need arises.

Having held that there was valid reason for termination, the follow up issue is whether applicant followed fair procedures in terminating employment of the respondent. I have examined evidence of both DW5 and that of the respondent (PW1) and find that termination was procedurally fair. In her evidence, Respondent (PW1) testified that on 10<sup>th</sup> February 2021 she was called in office by the Chief Executive Officer of the applicant who served her with the notice to show cause attached with 14 receipts. She testified further that the said Executive Officer need explanation from the respondent as to why money was not deposited in bank. According to the evidence of the respondent (PW1), the said show cause required her to respond by 15<sup>th</sup> February 2021. As pointed hereinabove, respondent responded as per exhibit A5. It is in evidence of the respondent that she was served with suspension letter and a notice to attend disciplinary hearing. In fact, evidence shows that on 3<sup>rd</sup> May 2021, respondent was served with the charge and the notice to attend the disciplinary hearing to be held on 7<sup>th</sup> May 2021 as reflected in exhibit D5. It was submitted by counsel for the respondent that initially, respondent was served with charges that were later on recalled and respondent was served with new charges. Counsel elaborated that new charges were served to the respondent on 30<sup>th</sup> April 2021 and disciplinary hearing was conducted on

07<sup>th</sup> May 2021. It was further submitted by counsel for the respondent that respondent was not served with the investigation report. I have examined evidence of the parties and find that this complaint is without substance. In her evidence, respondent complained that the documents that the employer used in the investigation report were not attached to the report that she received. In my scrutiny of evidence, I have found that respondent was properly served with the investigation report, which is why, she managed to respond to the allegations as reflected in her response to the allegations (exhibit A5). More so, respondent was properly afforded right to be heard during disciplinary hearing and signed the disciplinary hearing Form (exhibit D7) on 12<sup>th</sup> May 2021. In the said hearing form, the disciplinary committee proposed that employment of the respondent should be terminated.

In her evidence, respondent (PW1) complained that the charge (exhibit A11) was drafted by the legal officer who is her subordinate to show that termination was procedurally unfair. With due respect to respondent, there is no evidence showing how that prejudiced the respondent. In fact, apart from stating that the new charges were drafted by a legal officer who is subordinate to her, respondent did not explain how that affected fairness procedures of termination. Again, no evidence was adduced to show that

there was a senior legal officer who was not subordinate to the respondent who was supposed to draft the said charges. The complaint by the respondent, in my view, means that, if there is no senior legal officer who is not subordinate, then, senior employees cannot be charged for misconducts based on charges drafted by subordinate legal officers. It is my view that, drafting of charges by the legal officer who was subordinate to the respondent, did not make termination to be unfair procedurally. The said legal officer did not participate and there was no complaint by the respondent that the said legal officer, participated in the disciplinary hearing. In my view, as pointed hereinabove, evidence of DW5 and that of the respondent (PW1) proved that termination was fair procedurally.

Counsel for the respondent submitted that initially respondent was served with charges that was later withdrawn as a result respondent was served with new charges with an investigation report. With that in mind, counsel for the respondent was of the view that the procedure was not proper. It is my view that, the procedure did not prejudice the respondent because, as admitted by counsel for the respondent, new charges were similar to the earlier ones and there was enough time for the respondent to prepare for her defence. In fact, as pointed hereinabove, respondent responded to the allegations by writing exhibit A5 that she tendered to

support her case. Incidentally, exhibit A5 corroborated evidence of the applicant that no money was deposited despite receipts altered by respondent showing that money was deposited in bank by applicant's customers.

For all what I have explained hereinabove, I hold that termination was both substantively and procedurally fair. I therefore allow the application, quash, and set aside the CMA award.

Dated at Dar es Salaam this 16<sup>th</sup> September 2022.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 16<sup>th</sup> September 2022 in chambers in the presence of Praygod Uisso, Advocate for the applicant and Remmy William, Advocate for the respondent.



B. E. K. Mganga  
**JUDGE**