IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 113 OF 2022

(Arising from an Award issued on 14/1/2022 by Hon. Msina, H.H, Arbitrator, in Labour dispute No. CMA/DSM/KIN/835/19/403 at Kinondoni)

ECOBANK (T) LIMITED ..... APPLICANT

VERSUS

STEPHEN ROCKY.....RESPONDENT

JUDGMENT

Date of last Order: 16/08/2022
Date of Judgment: 09/09/2022

B. E. K. Mganga, J.

On 30th April 2015, respondent signed an employment contract for unspecified period with the applicant in the position of Country Treasurer reporting to the Managing Director with effect from 1st June 2015. Respondent's job description was *inter-alia* to ensure compliance regulatory/applicant's requirements guidelines and control, ensure business meets obligation on the prevention of money laundering, ensure the business meets its obligation in terms of client appropriateness and suitability of products. It was alleged that in 2019 applicant noted that

respondent breached policies, procedures of the market risk limits and summoned the respondent before the Board Credit and Risk Committee on 20th May 2019 to give clarification on reported issues. It was also alleged that the Board and the Committee revoked the respondent's treasury limits and issued an order that any borrowing was subject to approval of the Managing Director. It was further alleged that, while aware that his treasury limits have been revoked, respondent continued to place, invest, and borrow without obtaining approval, as a result, he concluded 17 deals amounting to USD 40 Million. It was said that respondent did not seek approval even though his limit has been revoked, as a result, applicant issued a warning letter to the respondent. It was also said that applicant conducted investigation and found that respondent executed some of his duties carelessly and or negligently exposing the applicant to financial, regulatory and reputation risks. Following the said investigation, respondent was suspended and required to respondent to the allegations. On 13th November 2019, applicant terminated employment of the respondent.

Aggrieved with termination, on 27th November 2019, respondent filed Labour dispute No. CMA/DSM/KIN/835/19/403 before the Commission for

Mediation and Arbitration henceforth CMA at Kinondoni claiming to be paid TZS 653,904,000/= being 72 months salaries compensation for unfair termination. In the Referral Form(CMA F1), on procedural fairness of termination, respondent complained that (i) he has never been warned even a single day, (ii) the offence which are alleged to have been committed were not serious enough to warrant termination, (iii) two disciplinary hearing were conducted without reason, (iv) he was not given investigation report as a result, he attended the disciplinary hearing without knowing the outcome of the investigation, (v) was not given a right to mitigate the penalty. In the said CMA F1, respondent complained on fairness of reasons that (i) he doesn't know exactly the misconduct he committed because all what he did were for the benefit of the applicant, and they were approved up to the level of Board of Directors and that (ii) the Managing Director did not want him hence manhunter and reason for termination.

Having heard evidence of both sides, on 14th January 2022, Hon. Msina, H.H, Arbitrator, issued an award that applicant had no valid reason for terminating employment of the respondent hence termination was unfair. The arbitrator found further that respondent was not served with

the investigation report and concluded that termination was also procedurally unfair. The arbitrator therefore awarded respondent to be paid TZS 217,968,000/= being 24 months' salaries compensation.

Applicant was aggrieved by the award, as a result, she filed this application seeking the court to revise the said award. In the affidavit affirmed by Mariam Ibrahim Possi, advocate of the applicant in support of the Notice of Application, applicant raised seven (7) grounds namely: -

1. *The Hon. Arbitrator erred in law by admitting into evidence Exhibit AP-1 being a photocopied document considering that the respondent is the maker of the said document.*
2. *Having found as a fact that the Human Resources Policy (Exhibit D2) sanction on commission of a repeated act of insubordination against one's superior warranted termination on first breach, the Arbitrator erred by making a ruling that the reason for termination was not serious enough to warrant termination.*
3. *Having found as a fact that the Delegated Dealers Mandate (exhibit D4) had a summary dismissal term, the Arbitrator erred by holding that the reason for termination.*
4. *That the Arbitrator having found as a fact that respondent was present in the Executive Committee Meeting held on 23rd May 2019, erred by assuming without proof to the contrary, that respondent was absent and allegedly on leave.*
5. *That the Ho. Arbitrator having found as a fact through Exhibit D8 that on 20th May 2019 through the Applicant's Bank's Credit & Risk Committee, the respondent was aware that his limits were expanded by the Board, the Hon.*

Arbitrator errored by assuming without proof that the respondent was officially aware of such revocation in August 2019.

6. *The Hon. Arbitrator having found as a fact through Exhibit D18 being a proof that investigation was conducted between 15th August 2019 and 22nd August 2019 albeit in the absence of the respondent who was then away on leave and on 15th October 2019 through Exhibit D10, (titled Query - Treasury Department Infraction along with its appendices I and II) was made aware of the then ongoing investigation outcome, the Hon. Arbitrator errored in finding that investigation may not have been conducted and if it did, the report was not given to the respondent to prepare for the disciplinary hearing.*
7. *The Hon. Arbitrator erred by awarding such an excessive and unjustified compensation totaling at TZS 217,968,000/= being twenty-four (24) months' salaries in the circumstances of the case.*

Respondent opposed the application by filing both the Notice of Opposition and the Counter affidavit.

When the application was called on for hearing, Mr. Obeid Elias Mwandambo and Ms. Mariam Ibrahim Possi, learned Advocates appeared and argued for and on behalf of the applicant, while Mr. Johnson Johannes Kachenje, learned Advocate appeared and argued for and on behalf of the respondent.

Arguing the 1st ground, Mr. Mwandambo, Advocate for the applicant submitted that arbitrator erred to admit Exhibit AP1 that is a photocopy while the respondent is the author. He submitted further that, that was

contrary to the provisions of section 67 of the Evidence Act [Cap. 6 R.E. 2019] and Section 18 of the Electronic Transaction Act, No. 13 of 2015. He went on that exhibit AP1 is a typed letter attached to the email that respondent sent to the applicant as a response to the charge that he was served by the applicant. Counsel submitted further that respondent admitted during cross examination that he tendered the copy and retained the original. He concluded that the said document formed a base of the arbitrator's decision without adhering to strict application of rules of evidence.

Arguing the 2nd and 3rd grounds, Ms. Possi, Advocate for the applicant submitted that applicant was charged for gross misconduct i.e., repeated insubordination. She elaborated that the nature of insubordination was that applicant was mishandling banking activities without approval and without mandate. She referred the court to exhibit D6 and submitted that on 21st May 2019, the Board of Directors of the applicant decided that respondent's limit should be cancelled. She further referred to minutes of the Executive Committee (Exhibit D7) and submit that on 23rd May 2019 the limits of the respondent were cancelled in the presence of the respondent who was in attendance of the meeting. She submitted further

that, conditions were put to the respondent if he wanted to trade, but he defied the orders and continued to trade inter banks without approval. Ms. Possi submitted further that, respondent continued to trade in disregard of the ban to the accumulation of USD 35 Million and that, due to the acts of the respondent, a red flag was raised that there was a cost pressure to the applicant.

Ms. Possi submitted further that, due to the said disobedience, on 06th August 2019 respondent was served with a warning letter (Exhibit D8). She went on that Clause 6.4 and 6.5 of the Ecobank Tanzania Human Resources Policies & Procedures (exhibit D2) provides at Item 19 that a repeated insubordination warrants termination. She added that, Delegated Dealers' Mandate for Country Treasury Issued in October 2015 (exhibit D4) provides that if a person trades out the limit, he must face a summary dismissal. She submitted further that exhibit D4 was signed by the respondent at the time of signing his employment agreement. Ms. Possi submitted that in terms of Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, there was fairness of reason for termination of the respondent based on exhibit D2 that is the standard regulating employment of the parties. She cited the

case of ***Vedastus S. Ntulanyenka & 6 Others v. Mohamed Trans Ltd,*** Revision No. 4 of 2014, to support her argument that the policy or personal manual suffices as standard regulating employment. She therefore concluded that there was valid reason for termination.

Arguing the 4th ground, Ms. Possi submitted that the minutes of the Executive Committee (exhibit D7) shows the respondent's name as Head of Treasury amongst the persons who were in attendance. She went on that, the only person who was recorded absent was Benedicto Makoye, the Chief Finance Officer. She submitted further that; the arbitrator erred to hold that respondent did not sign exhibit D7 to indicate that he was present. She argued that the conclusion by the arbitrator is contrary to Section 148(2) of the Companies Act, [Cap. 212 R.E. 2002] because minutes are supposed to be signed by the Chairperson. She went on that, the chairperson was Mwanaiba Mzee, the Managing Director, and the Secretary was Hope Liana. She strongly submitted that there are no signatures of other persons apart from that of the Chairperson and the Secretary and that there was no proof that respondent was on leave. She concluded by submitting that the arbitrator erred by assuming without proof that respondent was absent and allegedly that he was on leave.

Arguing the 5th ground, Ms. Possi, submitted that respondent was present in the meeting that was held on 23rd May 2019 as per exhibit D7 and that item 3 of the said exhibit reports what was decided by the Board of Directors. She concluded that had the arbitrator considered this, she could have not concluded that respondent became aware that his limit was cancelled in August 2019.

On the 6th ground, Ms. Possi, learned advocate for the applicant submitted that investigation was conducted, and the report was tendered as exhibit D18. She however conceded that respondent was not served with the investigation report. She argued further that the law does not provide that it is mandatory to serve an employee with investigation report. She was quick to add that, respondent was availed with query into Treasury Department infractions dated 15th October 2019 (exhibit D10) which is feedback of investigation report, and that respondent was served with the charge (exhibit D10) on 16th October 2019.

Arguing the 7th ground that the arbitrator erred to award an excessive and unjustified compensation of TZS 217,968,000/= as 24 months' salaries to the respondent, Ms. Possi, submitted that, there is no explanation that was offered by the arbitrator in awarding that amount.

She went on that the award was issued in contravention of Section 88(9) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Rule 8(2) of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, GN. No. 66 of 2007 that provides that an award must be reasoned, certain and concise. Counsel for the applicant submitted that the impugned award did not meet this standard. She therefore prayed that the application be allowed by quashing and setting aside the CMA award.

Resisting the application, Mr. Johnson Kachenje, Advocate, submitted on the 1st ground that exhibit AP1 was a response to the queries raised and sent by the applicant to the respondent through an email. Counsel for the respondent submitted further that, respondent filed an affidavit to prove email authenticity and that exhibit AP1 was sent to the respondent through email. He argued that since exhibit AP1 was sent through email, the only option that was available to the respondent was to print and swear affidavit and attach an email to that effect. He concluded that there was no violation of Section 67 of Evidence Act or Section 18 of the Electronic Transaction Act.

It was submissions of Mr. Kachenje, advocate for the respondent on the 2nd ground that there is no evidence that was tendered by the applicant proving that respondent's limit was cancelled, and that respondent required approve of his superior. He also submitted that the Managing Director of the applicant had a duty to issue a letter to the respondent showing that his limits have been cancelled but respondent was notified by the letter date 06th August 2019 (exhibit D8) that his limits has been cancelled thereafter respondent did not trade beyond his limits. Counsel went on that, respondent testified that on 23rd May 2019 he attended the meeting by virtue of his office and as an invitee and that he (respondent) left the meeting after submission of his report. Mr. Kachenje submitted further that the decision to cancel his limits was taken in absence of the respondent and that respondent was never notified by a letter that his limit was cancelled. Mr. Kachenje submitted further that minutes (exhibit D8) does not prove that respondent was present and went on that no attendance Register was tendered to prove that respondent attended the said meeting. Counsel submitted further that section 348 of the Companies Act deals with matters of the Companies unlike this matter that is an employment dispute hence section 348 of the Companies is not applicable.

Responding to the 3rd ground, Mr. Kachenje submitted that respondent was a treasurer hence there was no need for him to seek approval because the directive of seeking approval from the Managing Director or Treasurer was for junior employees who were working with the respondent. During his submissions, Mr. Kachenje, conceded that the Managing Director is superior to the Treasurer but maintained that respondent did not require approval from any person including from the Managing Director.

Regarding the 4th ground, Mr. Kachenje, learned advocate for the respondent submitted that respondent was not present in the said Executive meeting. During his submissions, counsel conceded that no evidence was tendered by the respondent to show where he was on that material day. He was quick to submit that since respondent was not in that meeting and applicant has failed to prove by evidence that respondent was present, he prayed this ground be dismissed.

Mr. Kachenje learned counsel for the respondent briefly submitted on the 5th ground that there is no evidence to prove that limit of the respondent was revoked prior issuance of exhibit D8.

Responding to the 6th ground, Mr. Kachenje submitted that no investigation was conducted by the applicant and that the report that was tendered (exhibit D18) is unsigned hence useless. He went on that, exhibit D18 was never served to the respondent prior attending the disciplinary hearing to enable him to prepare his defence. He argued that Rule 13(5) of GN. No. 42 of 2007(supra) provides that employees should be served with the document that employer intend to rely upon during disciplinary hearing to enable an employee to prepare himself. He added that, one of those documents is investigation report. He cited the case of ***Severo Mutegeki & Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)***, Civil Appeal No. 343 of 2019, CAT (unreported), ***Higher Education Student's Loans Board v. Yusufu M. Kisare,*** Consolidated Revision No. 755 and 858 of 2018 HC (Unreported), ***Fredrick Mizambwa v. Tanzania Ports Authority***, Revision No. 220 of 2013, HC (Unreported) and ***KCB (T) Limited v. Dickson Mwikuka,*** Revision No. 45 of 2013 HC (Unreported) to support his submissions that respondent was supposed to be served with investigation report.

Mr. Kachenje submitted further that respondent was not given right to mitigate. It was submitted by Mr. Kachenje that the Disciplinary hearing

was conducted twice and that no reason was assigned. He went on that in the 1st disciplinary hearing, no findings were reached as shown by exhibit AP2 that was signed on 04th November 2019. He went on that; a 2nd disciplinary hearing (exhibit D16) was conducted wherein respondent was not properly led to understand the charge. He argued that it was not fair because a decision to terminate the respondent was made in that disciplinary hearing.

On the 7th ground, Mr. Kachenje, learned counsel for the respondent submitted that the relief and the amount awarded to the respondent was at the arbitrator's discretion because respondent's monthly basic salary was TZS 9,082,000/=. He concluded his submissions by praying that the application be dismissed.

In rejoinder, Ms. Possi, learned counsel for the applicant submitted that emails were not tendered but only the response (exhibit AP1). She reiterated her submissions that respondent was present in the meeting held on 21st May 2019 as invitee and in the Executive Committee meeting that was held on 23rd May 2019 was present as a member. She maintained that all Meetings of the applicant are governed by the Companies law. She went on that according to exhibit D4, respondent knew his limit from the

date of employment and that he needed to seek approval from his supervisor namely, the Managing Director. She submitted that Rule 13(5) of GN. No. 42 of 2007 (supra) requires documents to be relied at the hearing and not before hence it is not proper to demand the investigation report to be served to the respondent.

On reasons for holding two disciplinary hearing, Ms. Possi submitted that, in his evidence, DW1 explained the reason for conduct the 2nd disciplinary hearing after the 1st disciplinary hearing minutes that were served to the respondent for review, but respondent did not return until after expiration of five (5) days within which a decision was supposed to be taken according to the law. She submitted that this was a reason as to why the 2nd disciplinary hearing was conducted. On discretionary power of the arbitrator in awarding 24 months' salaries as compensation to the respondent, counsel for the applicant submitted that the Arbitrator did not exercise his powers judiciously.

I have examined the CMA proceedings and considered arguments advanced in favour and against this application and I have opted, in this judgment, to start with the issue relating to fairness of reasons for termination, because, in my view, that is the most contested. It was

submitted on behalf of the applicant that respondent was terminated due to gross insubordination as it was alleged that he repeatedly mishandled banking activities without approval of the Managing Director and without mandate even after his limit was cancelled on 21st May 2019 by the Meeting of the Board of Directors and the Executive Committee Meeting that was held on 23rd May 2019. It was further argued that the limits of the respondent were cancelled in his presence as he was also in attendance of the said meetings.

On the other hand, it was submitted on behalf of the respondent that no evidence was tendered by the applicant proving that respondent's limit was cancelled and that he required approve of his superior. It was submitted further that the Managing Director of the applicant had a duty to issue a letter to the respondent showing that respondent's limits have been cancelled but respondent was only notified by the letter dated 06th August 2019. It was submitted further on behalf of the respondent that respondent did not trade beyond his limits after he was served with a letter dated 6th August 2019. It was argued that on 23rd May 2019, respondent attended the meeting by virtue of his office and as an invitee and left the meeting after submission of his report hence the decision was made in his

absence and was never notified by a letter that his limit was cancelled. It was also submitted that respondent did not attend the Executive Committee Meeting that was held on 23rd May 2019 and that no Attendance Register was tendered as a proof that respondent attended the meeting. It was argued on behalf of the respondent that respondent was a treasurer hence there was no need for him to seek approval because the directive of seeking approval from the Managing Director or Treasurer was for junior employees who were working with the respondent. However, during his submissions, counsel for the respondent, conceded that the Managing Director is superior to the Treasurer but maintained that respondent did not require approval from any person including from the Managing Director.

I have revisited evidence adduced by the parties at CMA to see whether respondent did not require approval as submitted by Mr. Kachenje learned counsel and find that he needed approval. The evidence of Hope Liana (PW1) is clear on this point that Delegated Dealers Mandate (exh. D4), Dealers code of conduct (exh. D3) that are applicable to all employees and applicant's Job description (exh. D5) that respondent required approval. While testifying under cross examination, Stephen Rocky (PW1),

respondent stated that the memo (exh. D4) which he also signed, gives limits of trade to treasurer and dealers and that whoever exceeds the limit is liable for misconduct. Respondent admitted in his evidence that according to exhibit D6, treasurer needed approval of the Managing Director and that trading without approval was contrary to Code of conduct.

I have examined the CMA record and found also that it is not dispute that on 1st June 2015 applicant employed the respondent as Country Treasurer and that respondent confirmed acceptance of his post on 8th June 2015 as per contract of employment (exh. D1). I have also examined both Dealers Code of conduct (exh. D3) that was signed by the respondent on 21st January 2016 and Memo issued in October 2015 (exh. D4) and find that there was a requirement of seeking approval. Exh. D3 provides in part: -

> *"…Dealers should check to ensure there is sufficient capacity within the credit limit for the proposed transaction. Pre-approval must be sought for credit risk. Approval is required for all treasury products, and dealers are required to be familiar with the associated usual risks and processes".*

On the other hand, exhibit D4 provides: -

> *"…Under no circumstances these limits can be breached. Any trade outside these limits must get a* ***PRIOR*** *approval from the* ***Treasurer and/or Managing Director within respective limits. Trades done without such***

approval will be subject to disciplinary actions including summary dismissal."

Exhibit D4 shows that on 7th October 2015, respondent signed his limits namely USD 2,000,000 and USD 5,000,000 for (i) interbank foreign exchange and customer foreign exchange and money market trade and (ii) interbank money market respectively. On 13th October 2015, Michael Sangawe, ALM officer, signed exhibit D4 showing that his limit was USD 1,500,00, USD 500,000 and 1,000,000 for interbank market, interbank foreign exchange, and customer foreign exchange and money market trade respectively. I have decided to include the limits of Michael Sangawe, ALM officer, because it was also one of the charges the respondent was facing. It is my considered opinion that there were limits and that respondent was not supposed to trade outside those limits without approval of the Managing Director. Submissions by Mr. Kachenje learned advocate for the respondent that respondent did not need approval is not correct. Respondent signed the limits to show that he is bound by them otherwise, there was no need for him to sign the said limit (exh. D4).

It was submitted on behalf of the applicant that on 21st May 2019 and on 23rd May 2019 the Meeting of Board of Directors and the Executive Committee Meeting cancelled the limits of the respondents, but respondent

defied the orders and continued to trade without approval of the Managing Director. Respondent's response on this was that he only became aware that his limits were cancelled on 6th August 2019 after being served with exhibit D8 and further that on 23rd May 2019, the decision was taken in his absence because he left. In the award, the arbitrator found that respondent attended the meeting of the Board of Directors on 21st May 2019 as an invitee and that he did not attend the Executive Committee Meeting on 23rd May 2019 because he testified that he was on leave. It was views of the arbitrator that in terms of section 39 the Employment and Labour Relations Act [Cap. 366 R.E. 2019] applicant had a burden to prove that respondent was present and that he was not on leave. I should comment albeit briefly that, not every allegation raised by an employee cast a duty to the employer to prove. In my view, in terms of section 39 Cap. 366 R.E. 2019 (supra) the employer has a burden to prove that termination was fair. The employer is not, in my view, required to prove every allegation that can be raised by an employee.

That said, let me revert to the claim that respondent was on leave on 23rd May 2019 and did not attend the Executive Committee Meeting. That claim came out while respondent giving his evidence in re-examination. At

that point, the employer had no opportunity to cross examine the respondent. I have examined evidence of the parties and find that witnesses for the applicant were not cross-examined by the respondent to show that respondent was on leave on 23rd May 2019 when the Executive Committee Meeting was held. I take the "on leave issue" as an afterthought and I reject it. According to exhibit D7, the only person who was on leave is Benedicto Makoye as reflected in the minutes. The said minutes shows further that another person who was not physically present is Saleh Awadhi who participated via Teleconference. In fact, while under cross examination, Respondent (PW1) testified that only Raphael Benedict did not attend the said meeting. This takes me home and dry that respondent attended the Executive Committee Meeting in which his limits were cancelled. That said and done, I safely conclude that limits of the respondent were cancelled in his presence on 21st May 2019 by the Board of Directors as reflected in the minutes (exh. DD6), and on 23rd May 2019 in the Executive Committee Meeting as reflected in the minutes (exh. D7) also in his presence. It is not true therefore that respondent only became aware of cancellation of his limits on 6th August 2019 as submitted by Mr. Kachenje learned counsel. Again, when respondent was cross examined in

relation to exhibit D6, he admitted that his limit was revoked and was put under personal improvement programe. As if that was not enough, evidence shows that respondent was reminded cancellation of his limit on 6th August 2019 through exhibit D8. In fact, respondent does not dispute to have been served with exhibit D8.

Having held that respondent knew that his limit was cancelled, the issue is whether, respondent committed the alleged misconduct by trading outside the limit without approval and dates of occurrence of those misconducts. This issue was answered by evidence of DW1 that respondent committed the misconducts he was charged with. Again, the Internal memorandum dated 27th August 2019 titled "Investigation into reported Treasury Infractions in Ecobank Tanzania" exhibit (D18) supports my conclusion. Findings (iv) in exhibit D18 are that all dealing limits for the Treasurer were revoked by the Board during the meeting that was held on 21st May 2019, but the Treasurer continued trading and borrowing without the Managing Director's approval and that respondent concluded 17 deals with cumulative value of USD 40M without recourse to Managing Director. It was indicated in exhibit D18 that from June to August 2019, (i) inter-bank placement was USD 4.5M, USD 13M and 12.5 M respectively, (ii)

inter-bank borrowing was USD 64.5M, USD 61.6M and USD 68.5M respectively, and (iii) inter-affiliate borrowing was USD 0, USD7.7M and USD 3.0M respectively. It was recommended in the said exhibit D18 that disciplinary action should be taken.

Apart from that, a letter dated 15th October 2019 addressed to the respondent titled "Query-Treasury Department Infraction" (exhibit D10) had 7 counts. I will only paraphrase these counts and put them in three groups namely (i) that in June 2019 and July 2019 respondent allowed head of ALM to conclude certain placements of amounts higher than the approved limit in disregard of the laid down procedure (as shown in the 1st count), (ii) respondent continued to engage in trading without receiving approval as directed; an act of insubordination, (iii) on 31st September 2019, without authorization and approval, respondent executed a deal with the client OFFGRID for a value of USD 2,500,000 (as reflected in the 7th count) in the full knowledge that the referenced deal was well above his approved limit and required the approval of the Managing Director and that this amounted to a breach of set down procedures and an act of insubordination. Exhibit D10 was received by the respondent on 16th October 2019 at 10:00AM.

I have examined summary of the disciplinary hearing proceedings that was conducted on 28th October 2019 **(**exh. AP2) and find that, during hearing, respondent stated that the allegations relating to limits in the 1st count was within his limits and that he became aware of cancellation of his limits on 6th August 2019. In the said exhibit AP2 it is recorded that respondent responded to the allegations in the 2nd and 4th counts that the same was wrong action but has been regularized. On the 7th account, in which it was alleged that on 31st September 2019, without authorization and approval, respondent executed a deal with the client OFFGRID for a value of USD 2,500,000 without approval, he responded that by oversight, he failed to route it to the MD for approval. It is my firm view that, respondent cannot claim that he did not need approval or that he was not aware because allegations in the 7th count covers the period after being served letter dated 6th August 2019 (exh D8), reminding him that his limits have been cancelled. There is no dispute that respondent received exhibit D8.

While under cross examination, respondent (PW1) admitted in relation to the 7th count that the process did not reach the Managing Director and further that there was a mistake on his side. He also admitted

the allegations in the 2nd count. Admissions of the respondent in his evidence relating to the 2nd and 7th counts were sufficient proof that respondent proved the alleged misconduct. It was an error on the part of the arbitrator to hold that allegations were not proved. In my view, taking evidence on record in its totality, including evidence of the respondent, the allegations were proved to the required standard of proof. In fact, evidence of the respondent took forward the case of the applicant. Conduct and admission by the respondent pairs with the misconducts he was charged with. For example, respondent (PW1) was recorded while giving his evidence in chief in relation to exhibit D8 as follows: -

> "*Swali. Barua ya tarehe 06/08/2019 D8 ilitoka kwa MD na ilielekezwa kwako je ulipokea lini hii barua.*
> *Jibu: nilipokea tarehe 06/08/2019 msaidizi wangu alinipigia simu kwa hiyo nilivyoisoma nikawaagiza watu wangu kuwa hatuna madate ya ku-trade nikawaambie kwenye billing room vile vile* ***nikamuagiza msaidizi wangu aende kwa MD kuwa huu uamuzi ni kwamba hatuwezi kufanya kazi kama treasury. MD*** *alipoambiwa kashtuka na hivyo aka approve limits za wasaidizi wangu mimi hakunipa line zozote kwangu na hili lilikuwa ngumu kwangu ilikuwa kama nimeshafukuzwa kazi tayari".*

The bolded words in the above quoted piece of evidence tells all. In my view, respondent as the head of Treasury was supposed to see the

Managing Director for discussions if he felt there were issues to be resolved, to the contrary he sent his subordinate.

I therefore conclude that termination of employment of the respondent was substantively fair. Again, there is no dispute that breach of the limits as provided in the Memo (exh. D4) that was signed by the respondent warranted disciplinary actions including summary dismissal hence dismissal was the appropriate action.

It was submitted by Mr. Kachenje on behalf of the respondent that respondent was not served with documents applicant intended to rely upon in the disciplinary hearing including the investigation report prior to attend the disciplinary hearing to enable him to prepare his defence. Counsel submitted further that Disciplinary hearing was conducted twice, and that no reason was assigned. He went on that in the 1st disciplinary hearing (exhibit AP2) no findings were reached. He argued that in the 2nd disciplinary hearing (Exhibit D16) respondent was not properly made to understand the charge hence termination was procedurally unfair. On the other hand, Ms. Possi counsel for the applicant submitted that it is not mandatory to serve an employee with investigation report. She was quick to add that respondent was availed with query into Treasury Department

infractions dated 15th October 2019 (exhibit D10) which is a feedback of investigation report, and that respondent was served with the charge (exhibit D10) on 16th October 2019.

I agree with counsel for the applicant that there is no requirement of serving an employee with the investigation report. What Rule 13(1) of the Employment and Labour Relations Act [Code of Good Practice) Rules, GN. 42 of 2007 provides is that the employer shall conduct investigation to ascertain whether there are grounds for hearing to be held. That provision, in my view, does not put a mandatory obligation to the employer to serve the investigation report to the employee. The only obligation under this Rule, in my view, is for the employer to conduct investigation. The purpose of the investigation itself is provided for under the said rule as to enable the employer to ascertain whether there are grounds for an employee to be charged and for the disciplinary hearing to be conducted. In other words, the purpose of the investigation is to enable the employer to make an informed decision, whether an employee should be taken to the disciplinary hearing or not. If the employer finds that the allegation against an employee is unfounded, then, she drops the matter and that becomes the end. But, if investigation reveals that allegations against an employee

are founded, then, the employer takes another step, namely, charging the employee and serving him with a notice to appear before the disciplinary hearing and finally hearing before the disciplinary hearing committee and give a decision thereof. In fact, that is what was in essence, held in the case of ***Severo Mutegeki & Another vs Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini Dodoma***, Civil Appeal 343 of 2019) [2020] TZCA 310, cited by counsel for the respondent.

Therefore, my reading of Rule 13(1) of GN. 42 of 2007(supra) and interpretation thereof, does not lead to the conclusion that an employer is mandatorily required to serve an employee with an investigation report. I therefore agree with submissions by Ms. Possi, learned counsel for the applicant. It is my view that the wording of the said Rule is clear and unambiguous and must be interpreted in its plain meaning as it has been held several times that if the language of statute is unambiguous, it must be interpreted in its plain meaning. See the case of ***Republic vs Mwesige Godfrey & Another***, Criminal Appeal No. 355 of 2015 [2015] TZCA 264 and ***Pan African Tanzania Limited vs Commissioner General Tanzania Revenue Authority***, Civil Appeal 172 of 2020) [2021] TZCA 287. In ***Mwesige's case*** (supra) it was held inter-alia that: -

"…It is elementary that the meaning of a statute must in the first instance, be sought in the language in which the act is framed…, and if it is plain ... the sole function of the courts is to enforce it according to its terms… Courts must presume that a legislature says in a statute what it means and means in a statute what it says there"

I further agree with counsel for the applicant that respondent was served with "query into Treasury Department infractions dated 15th October 2019" (exhibit D10) which is a feedback of investigation report, and that respondent was served with the charge (exhibit D10) on 16th October 2019 and there is no dispute that he responded to the query as evidenced by exhibit AP1 that was tendered by respondent himself. I therefore reject submissions by Mr. Kachenje that respondent was not served with documents to enable him to prepare his defence. In fact, exhibit D10 shows what was revealed in investigation and it is the base of the disciplinary charges.

It was submitted on behalf of the respondent that two disciplinary hearing were conducted without assigning reasons thereof. I have read evidence of Hope Liana (DW1) and find that she gave justification. DW1 testified that after conclusion of the disciplinary hearing that was conducted on 28th October 2019 (exh. D13), on 4th November 2019 respondent was called to sign the minutes but he took the minutes to his

lawyer for review and did not bring them back until when five days within which to issue the outcome of the disciplinary hearing elapsed. She testified that, that led to holding the 2nd disciplinary hearing. That evidence is supported by what respondent testified while in chief that after the 1st disciplinary hearing, he prayed to be served with minutes and time to go through before signing. He testified further that he signed the said minutes on 7th November 2019 while the Disciplinary hearing was conducted on 28th October 2019 as reflected in exhibit AP2.

Evidence of both DW1 and PW1 in relation to the reason for holding two disciplinary hearing is reflected and supported by a suspension letter dated 7th November 2019 and call to disciplinary hearing (exh. D14). The said exhibit D14 reads in part: -

> *"…During the meeting of Monday 4th November 2019, you requested that the Bank gives you time to review the minutes with your lawyer, and despite this being an internal process, the Bank's Management exceptionally acceded to your request. The Bank's Management is disappointed to note that despite this gesture of good will, you have to date failed to return back the signed meetings and offered no explanation of the same. Your above actions have rendered this process legally time barred, consequently annulling the disciplinary hearing of Monday, 28th October 2018(sic)…"*

The Respondent acknowledge receipt of exhibit D14 on 7th November 2019 at 16:52. Together with exhibit D14, respondent received

a notice to attend the disciplinary hearing to be held on 13th November 2019 with similar charges. It is my conclusion that, there were reasons for holding the 2nd disciplinary hearing. I have examined the charges in the two disciplinary hearing and find that they are the same. Therefore, the complaint by Mr. Kachenje that respondent did not properly understand the charge is without substance. I have also noted that the said complaint was not raised by the respondent in his evidence at CMA hence it cannot be accepted at this stage.

I have noted that in the disciplinary hearing that was conducted on 28th October 2019 as reflected by exhibit AP2 and the one that was conducted on 13th November 2019 (exhibit D16), no evidence was adduced on behalf of the applicant. It is only the respondent who was cross examined. This was contrary to the provisions of Rule 13(5) of GN. 42 of 2007 (supra) that requires an employer to adduced evidence in support of the allegation against an employee. The said Rule provides: -

> *"13(5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employees shall be given a proper opportunity at the hearing to respond to the allegations, questions any witness called by the employer and to call witnesses if necessary.*

I therefore hold that termination was unfair procedurally. I therefore agree with the findings of the arbitrator but for a different reason that termination was procedurally unfair.

At CMA respondent was awarded to be paid TZS 217,968,000/= being 24 months' salary compensation as the arbitrator found that termination was both substantively and procedurally unfair. I have held hereinabove that termination was substantively fair but procedurally unfair hence there is no basis of awarding the respondent 24 months' salary compensation. Since termination was substantively fair, but only procedurally unfair, and respondent is entitled to be paid compensation of less than twelve months as it was held by the Court of Appeal in the case of ***Felician Rutwaza v. World Vision Tanzania***, Civil Appeal No. 213 of 2019 (unreported).

It was submitted on behalf of the applicant that the violated the provisions of section 88(9) of Cap. 366 R.E. 2019(supra) and Rule 8(2) GN. No. 66 of 2007(supra) allegedly that it was not reasoned, not certain and concise. With due respect to counsel for the applicant, I have read the award and find that reasons for the decision was given. I have found

further that it is certain as to the amount the respondent was awarded. I therefore dismiss this ground for being unmerited.

For all said hereinabove, having found that. termination was only procedurally unfair, I hereby order that respondent be paid TZS 36,328,000/= being Four (4) months' salary compensation.

Dated at Dar es Salaam this 9th September 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 09th September 2022 in chambers in the presence of Johnson Kachenje, Advocate for the respondent but in the absence of the applicant.

B. E. K. Mganga
JUDGE