IN THE HIGH COURT OF TANZANIA

LABOR DIVISION)

AT DAR ESA SALAAM

REVISION NUMBER 392 OF 2022

(Arising from the Labor Dispute CMA/DSM/ILA/1206/2018 before Hon. Ndonde Arbitrator)

MWANANCHI COMMUNICATIONS LIMITED .....APPLICANT

VERSUS

JACKSON NGASA.....RESPONDENT

JUDGEMENT

27th April & 30th May 2023

OPIYO, J.

The application has been preferred under the provisions of Rule 91(1)(a),91(2)(a)(b)(c), 94(1)(b)(ii) of the Employment and Labour Relations Act No. 6 of 2004 read together with rule 24(1), 28(1)(a),(b), (c),(d) (e) of Labor Court Rules GN No. 106 of 2007. The applicant aim at moving the court for the following prayers:-

(a) That, this honorable court be pleased to revise and nullify the whole proceedings and award of the Commission of Mediation and

arbitration in respect of the labor dispute No. CMA/DSM/ILA/1206/2018

(b) That, this honorable court be pleased to issue an order that the applicant had genuine reason of terminating the employment contract of the respondent and followed all required procedures before termination of the said contract .

(c)Any other order this honorable court may deem fit and just to grant.

The application is supported by an affidavit sworn by Josephat Kasegaro, the Legal and Administration officer of the applicant. The matter was heard by way of written submissions. Both parties in this matter were represented. The applicant was represented by Ambrose Manace Kwera, learned counsel and respondent by Lwigiso Ndelwa, learned counsel.

The grounds upon which the application for revision is preferred are stipulated under paragraphs 20 and 21 of an affidavit of Josephat Kasegaro, the Legal and Administration Officer of the applicant. The said grounds are as follows.

1) Whether the Arbitrator erred in law and fact by issuing an award without considering the legal arguments by the applicant that he had valid reason for terminating the respondent employment contract.
2) Whether the arbitrator considered the legal arguments that the applicant followed all required and necessary procedures before terminating the employment contract of the respondent.

In support of the application Mr. Nkwera started by adopting the affidavit in support of the application in support of my application. He then proceeded to submit the first ground as to whether the Arbitrator erred in law and fact by issuing an award without considering the legal arguments by the applicant that he had genuine reasons of terminating the respondent employment contract. He stated that the law is very clear under Rule 12(3) of The Employment and Labor Relations (Code of Good Practice) G.N No 42 of 2007 that the acts which justify termination include gross dishonest, willful damage to property, willful endangering the safety of others and gross negligence . He then continued to submit that in terms of *the case of* **Csi Electrical Limited Vs Sadick Devid Mponda Revision No 904 of 2019** (unreported) at page 8 the employers are

allowed to terminate the employment of their employees only if they have fair reason to do so and have followed fair procedures in doing so.

He continued to submit that evidence on records clearly indicates that the respondent committed the offences of gross negligence and gross dishonesty as shown in the charge against him. Therefore, the two being among the genuine reasons which may render termination of the employment contract, the applicant was substantively fairly terminated. He stated that, irrespective of the fact that the evidence shows that the applicant conducted inquiries in respect of the offences and satisfied himself that the offences were committed by the respondent, but still the arbitrator disregarded the said evidence and went on and issue an award against the applicant. That the inquiries revealed that the respondent retired money advanced to him by the applicant using forged receipts. The receipts were claimed to have been issued by the transporter by the name Pawa Transport Company and Sky Company which were both not registered with BRELA, he argued. This was contrary to law because under the law once an employee has been proved to have committed the said offences, there will be no hesitation rather than terminating his

employment contract on part of the employer, he contends. To him such proof constitutes a valid and fair reason for termination in the ambit of section 37(2), (b) (i) the Employment and Labour Relations Act, Cap 366 RE 2019.

Coming to the second ground as to whether the arbitrator considered the legal arguments that the applicant followed all required and necessary procedures before terminating the employment contract of the respondent, Mr. Nkwera had this to say; that, Rule 8(1)(c) and rule 13(1),(2) of Employment and Labor Relations (code of Good Practice) GN 42of 2007 provide clearly the procedures to be followed in termination of employment contract among them being that when an employer is of the view that an employee has committed an offence of misconduct has to conduct an investigation to ascertain whether there are grounds for hearing to be heard. And after investigation, the employer shall notify the employee of the allegations using form and language which the employee can reasonably understand. To substantiate his argument he cited the cases of **Said Hassan v, Hansom Tanzania Ltd, Labor Revision No 802 of 2018 and Tanzania Railway Limited V. Mwajuma Said Semkiwa,**

Revision No 239 of 2014, High court Labor Division, DSM. In the latter case it was held that:-

> *"it is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedure fairness of termination of employment."*

He then continued to contend that, the applicant after noticing that there are dishonest conducts by the respondent she conducted an inquiry as per the requirement of the law. After conducting an inquiry he prepared a charge (exhibit J14 as admitted at CMA) and called the respondent to appear in a disciplinary committee. In the disciplinary committee the respondent was given an opportunity to be heard as shown by exhibit J15. Later the applicant issued the respondent with the termination letter after the disciplinary committee finding the respondent guilt of offences of gross negligence and gross dishonest.

That, both oral and documentary evidence tendered by the applicant before the Commission clearly indicates that the fair procedures per the law were observed by the applicant. But, the commission's award clearly

indicates how the arbitrator disregarded or did not put into consideration the legal arguments by the applicant that he had valid reason of terminating the employment contract of the respondent and had followed proper procedures in doing so. In that regard, the applicant pray that this court be pleased to quash the proceedings and award by CMA in the above labour dispute.

The above submission met the strong contention by Mr. Lwigiso Ndelwa, representing the respondent who started by praying for this court to uphold the award of the Commission for Mediation and Arbitration dated 3rd October 2022 because to him the instant application does not constitute sufficient reasons to warrant revision of the said award. He then prayed to adopt counter affidavit of Jackson Ngasa dated 6th December 2022 to form part of his submission.

He continued to submit that the respondent was employed by the applicant on a permanent contract since April 2008 as a Field Sales Executive. Because of exemplary performance in April 2014 the respondent lent was promoted to the position of Zonal Manager-Lake Zone and transferred to Mwanza. As a Zonal Manager-Lake Zone, the respondent reduced the

applicant's monthly newspapers' transportation costs from TZS 61,435,000/- to TZS 4,757,143/- and was congratulated by the applicant for that. Again, on 16 May 2017, the respondent was promoted to position of Area Sales Manager-Dares Salaam and relocated to Dares Salaam and ceased to be in charge of the Lake Zone. That on 21 August 2018, the respondent's salary was increased because of his good performance, but surprisingly on 31st August 2018, the respondent was issued with a charge sheet alleging dishonest and gross negligence occasioning loss to the applicant between November 2017 to May 2018 and falsely alleging that he was a Lake Zone Manager. Exhibit J9 showed that in those months the respondent was Area Sales Manager (Dares Salaam) and was never sent to Mwanza.

He continued to state that, the respondent was never served with an investigation report before the disciplinary committee hearing, thus, he was not given a proper right to be heard. Also that, the disciplinary committee was marred with conflict of interest and irregularities. That, after the hearing, the Human Resources issued a letter for his termination. Thereafter, appealed to the appeals committee which directed the respondent to sit with the Finance Manager and the Resources Manager to

verify whether a loss of TZS 13,524,000/- was genuine and real. This, in his view, confirmed the respondent occasioned no loss, but he was still terminated.

On whether the Arbitrator erred by issuing an award without considering the legal arguments by the applicant that he had a valid reason for terminating the respondent's employment contract, Mr. Ndelwa submitted that the Arbitrator correctly issued an award and considered all legal arguments before it in holding that the applicant had no valid reasons for terminating the respondent's contract of employment. He stated that, for termination of employment to be considered fair, it should be based on valid reasons. He also submitted that under section 37 (2) of the Employment and Labour Relations Act Cap 366. And under rule 12 (1) (a) of the Employment and Labour Relations (Code of Good Practice) G.N 47/2007 when one is required to decide as to termination for misconduct is unfair shall consider whether or not the employee contravened a rule or standard regulating conduct relating to employment.

He further submitted that, the respondent was allegedly terminated because of gross negligence and gross dishonesty, but analyzing the

available evidence, it is without a trace of doubt that gross negligence and dishonesty were never proven. And in deciding so the arbitrator did not disregard any evidence from the applicant. For instance, on pages 16 to 20 of the award the arbitrator well analysed the applicant's evidence regarding the fairness of the reasons for respondent's termination.

Starting with gross negligence, he argued that the evidence available shows that there was no gross negligence. He cited the case of **DHL Tanzania Ltd v Ramadhani Hamis Hassani Revision Application No. 452 of 2021** at page 18 which defined gross negligence to mean:-

> "a serious careless, a person is grossly negligent if he fails far below the ordinary standards of care that one can expect. It differs from ordinary negligence in terms of degree."

He continued to state that for a person to be liable for negligence following elements as stated in **Twiga Bancorp Limited v Zuhura Zidadu and Another (2015) LCCD** 18 must be present; that there is a duty of care owed by the respondent, there was a breach of that duty of care, the breach caused damage to the complainant and that the damage was foreseeable.

His further contention is that, the evidence available shows that gross negligence was not established. In this, the applicant did not state any provision or procedures in its internal rules which was breached by the respondent. Internal rules would have shown the extent of the respondent's responsibilities and established whether they were breached. Further, the applicant did not tender the respondent's job description for November 2017 to May 2018 failure of which negates gross negligence. He submitted that in May 2017 the respondent was reallocated to Dares Salaam as Area Sales Manager (Dares Salaam) and was not in charge of the lake zone as per Exhibit J9. That, DW2 confirmed that after relocation to Dar es Salaam, the respondent was never sent to the lake zone to verify receipts.

Also the loss of TZS 13,524,000/- was not proved because the applicant's appeals panel through Exhibit M10 directed the Finance Manager and the Human Resources Manager to sit with the respondent to verify if the loss of TZS 13,524,000/- was genuine. Had there been gross negligence and loss the Panel would not have ordered this verification, he argued. Again, the applicant did not lead any proof of the payments made to the transporters after the respondent's reallocation to Dar Es Salaam to prove

that there was a drop-in transportation costs. That, strangely DW3 who is a transporter refused to mention before the CMA the transportation costs paid to him, he submits.

His further submission in regard to proof of gross dishonesty is that it was also not proved. His argument is based on the fact that before the CMA and the Disciplinary Committee, no documentary evidence was tendered to substantiate that the respondent provided false information or partaken in deception or fraud. He argued that, although the applicant stated that retirement receipts were forged, no evidence substantiated that allegation. This is because, DW3 who was one of the transporters admitted that the receipts contained his number and that he did not report to the police that the receipts were not issued by him. He drew attention of this court to the case of **in Kilombero Sugar Co. Ltd v Hamis Kitole Hamisi & Another**

Revision No. 02 of 2021, HC, **Labour Division, at page 6** where the term dishonest was defined dishonest to mean;

> *"Dishonesty is however not defined by the law, but I think, it may include acts done without honesty. It is used to describe a lack of*

integrity, cheating, lying, or deliberately withholding information, or being deliberately deceptive or a lack of integrity."

Therefore, to him the threshold in proving any of the above acts on part of the respondent was not met by the applicant, justifying CMA's decision in his favour.

He added that, in an attempt to swim against the tides, the applicant submitted that she conducted inquiries and satisfied herself that the alleged misconducts were committed by the respondent. Before the CMA the applicant relied on the fraud report/investigation report, exhibit M2. The applicant's assertion on inquiries is that it is flawed for several reasons; first, the fraud report was never served to the respondent. Second, the respondent was not questioned during the inquiries. Third, the said investigation report does not state the methodology applied in reaching its findings. Fourth, the applicant did not provide any proof of payment made to the transporters in the alleged months. Thus, a single-sided fraud report which was not backed up with evidence cannot be sufficient reason to prove misconduct, he contended.

On whether the arbitrator considered the legal arguments that the applicant followed all required necessary procedures before terminating the employment contract of the respondent, Mr. Ndelwa submitted that the Arbitrator correctly considered the evidence available and all legal arguments in holding that the applicant did not adhere to the required procedures before terminating the respondent. He argued that evidently on pages 21 to 24 of the award, the arbitrator analysed the evidence regarding the fairness of the procedure by the applicant in terminating the respondent's contract.

That, section 37 (2) (c) of the Employment and Labour Relations Act Cap 366 RE 2019 and Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 provides for what amounts to a fair procedure. And submitted that, the applicant terminated the respondent unfairly by not following fair procedures mandated by the law as we expound hereunder.

First, the applicant did not avail the respondent with the investigation report/fraud report, exhibit DI which formed the basis of charges against the respondent. Further, the investigation report was not tabled before the

disciplinary committee as admitted by DW1 and DW2 who stated that investigation report was confidential and was not issued to the respondent. He argued that investigating is not enough; the said investigation report must be availed to the charged employee. In addition, investigating officer DWI did not interview the respondent during the investigation. This denied the respondent's proper right to be heard, he submitted. To him, this showed the unfairness of the procedures as stated in **KBC (T) Ltd v Dickson Mwikuka [2013] LCCD 132** where it was held that:-

> "The fact that the auditors did not interview the respondent simply because his mobile phone was not reachable raises a lot of doubt as to how the investigations were conducted and how information was obtained and relied upon. The auditors had to hear him so by relying on the audit report which again was not availed to him before the disciplinary hearing took place implied the respondent was not given a fair hearing."

Second, the disciplinary committee as shown in Exhibit M8 was constituted contrary to rule 13(4) of G.N No. 421/2007. This is because the committee was chaired by a junior officer Sebastian Nkoha who was of the same rank as the respondent. This was not contradicted by the applicant. Further, all other members of the disciplinary committee had a clear conflict of

interest. Aika Massawe and Josephat Kasegero were members of both the disciplinary committee and the Appeals Panel. Deus Turyamureeba, Paul Ongoma and Francis Nana daily obligations were involved in verifying all receipts and imprest as shown in Exhibit M1 which bears their names and signatures. Francis Nanai was also a member of the Appeals Panel. As such both the disciplinary committee and the Appeals Panel lacked impartiality, he submitted. He opined that, instead of being in the committees Deus Turyamureeba, Paul Ongoma and Francis Nana were also supposed to be charged under Rule 12 (1) (b) (iv) of the Code of Good Practice GN 42 of 2007.

Third, the applicant did not comply with Rule 13 (5) of GN 42 of 2007. The hearing form Exhibit M10 shows that the respondent was not given the chance to cross-examine witnesses. In addition, the respondent was neither given the right to bring witnesses nor was he allowed to challenge the evidence. **In Barclays Bank Tanzania Ltd v Kombo Ally Singano Labour Revision No 65 of 2013 the Labour Court held that** rule 13 (5) of GN 42 of 2007 forms the basis of a fair disciplinary hearing. By not complying with it the applicant breached the respondent's right to be heard.

Fourth, the Honourable Arbitrator correctly held that the applicant did not adhere to rule 13 (7) of GN 42 of 2007 as the respondent was not given a chance to put forward mitigating factors before a decision on sanction was imposed. Hearing form Exhibit M10 shows that there was no mitigation and further, DW2 admitted that the respondent was not allowed to mitigate.

He continued to submit that, before the CMA applicant did not cross-examine the respondent's testimony on procedural unfairness. As such the CMA was right to find that the procedures for termination were not followed in line with the Court of Appeal decision in **Jacob Mayani v R Criminal Appeal No.** 558 of 2016 that:-

> "It is trite law that a party who fails to cross-examine a witness on a certain matter is deemed to have accepted and will be stopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth'

Thus, to him, clearly the arbitrator properly considered and analysed the evidence presented before the commission and correctly made an award in favour of the respondent. This is because the applicant terminated the respondent without following fair procedures. Since the respondent was under a permanent contract he was entitled to remedies as specified in

section 40 of the Employment and Labour Relations Act Cap 366 R.E 2019. He therefore submitted that the arbitrator was right to order payment TZS 51,212,000/- being 12 months compensation to the tune of TZS 36,816,000/-, annual leave to the tune of TZS 3,068,000/- severance pay to the tune of TZS 8,260,000/- as the respondent worked for ten years and one-month salary in lieu of notice to the tune of TZS 3,068,000/-. Based on the foregoing the respondent prayed for the dismissal of the application and consequent uphold the Commission's award.

Mr. ..... was quick to rejoin by stating that the assertion by the respondent in his reply submission that the offences of gross negligence and gross dishonest were never proven are baseless because the evidence on record shows that the respondent during his employment Contract with the Applicant as a Zonal Manager at lake zone clearly shows that he was involved in dishonest and negligent acts which prompted the applicant herein to take disciplinary action against him. That is to say he was making retirements on the forged invoices where when the applicants representative one Emmanuel Mkondya (DWI) tried to trace on the viability and availabilities of the Companies they were nowhere to be found as the

result the applicants herein suffered loss. He cited the case of **Alex Eriyo and 4 others v Bank of Africa, Labor Revision No 3 OF 2020,** (Unreported) to fortify his argument. In the case, it was held that:-

> "the arbitrator should be reminded that gross negligence is an offence which had to be proved by establishing the existence of the of its element as follows one; the employee must owe a duty to the employer, two the employee must fail to perform such duty three the employer must suffer harm or injury and four such injury must be linked to the failure of the other party to perform his duties"

He then argued that all the elements of gross negligence as stated in the above stated case has been manifested to in the investigation report as they have been done by the respondent. Since The respondent had a duty of ensuring that he do not forge the receipt with an intent of deceiving his employer that the same were issued by the transporting companies of PAWA Transport company and SKY Company while knowing that the said companies were not existing. The said action resulted the applicant to suffer a loss amounting to 13,524,000/=. However the arbitrator in CMA didn't make a consideration and critically analyze the presented evidence. He insisted that, rule 12(3) of The Employment and Labour Relations (code of Good practice) G.N No 42 of 2007 has indicated the offences warrants to

termination of employment contract of employment if they are proved. Therefore as there was investigation report which was admitted in CMA as (exhibit M2) which proves the offences of gross negligence and gross dishonest, the offences were proved and the arbitrator had to hold so.

He continued to submit that the assertion by the respondent that he was never given a proper right to be heard during the disciplinary hearing are baseless due to the fact that the proceedings of the disciplinary committee have clearly shown that the applicant after discovering dishonest and negligent conduct of the respondent he conducted an inquiry so as to ascertain the validity or truthfulness of the said allegation hence he came to the conclusion that the respondent committed the said offences hence prepared the charge (Exhibit J14) and served the respondent. That the charge indicated the offences which the respondent was charged with and the date on which the disciplinary hearing will be held. The respondent was also notified to prepare his defense for the disciplinary hearing. Furthermore, the disciplinary proceedings revealed that the respondent entered his defense, thus complying with the law.

He continued that the applicant observed all the required procedures to be considered before terminating ones employment contract as it was clearly stated in the applicant's testimony. He then, reiterated what he submitted in chief on the point for emphasis.

In addition, he stated that, the assertion by the respondent that the disciplinary committee was marred with conflict of interest and irregularities are baseless. This is because the evidence on record shows that disciplinary committee was formed as per the requirement of the law whereby it was formed with the chairman whom is the superior in rank compared to the respondent. Also during the disciplinary hearing the respondent was availed with an opportunity of defending himself therefore there was no any irregularity or conflict of interest on part of the applicant's disciplinary committee. Since the disciplinary proceeding found the Respondent guilt it warranted his termination.

He therefore concluded that the respondent is not entitled to any remedy as per the law since the whole proceedings and the award of the Commission for mediation and arbitration were procured without considering the weight of evidence and legal argumentation on the part of

the applicant. Therefore, he reiterated for the reliefs stated in their submission in chief to be granted.

Parties' submissions were duly considered and the CMA proceedings painstakingly examined. The issue for this court's determination is whether the applicant arguments were sufficiently considered by the CMA in reaching the award in favour or the respondent. The applicant challenges the CMA award for not considering her arguments in relation to the fact that both grounds for which the applicant was terminated for were dully proved. These include dishonest and gross negligence.

Starting with proof of gross negligence; indeed as argued by Mr. Ndelwa gross negligence was not proved in absence of ascertained loss that was occasioned. It was alleged that the respondent's gross negligence resulted to the financial loss to the applicant to the total of 13,524,000/-. However, the alleged loss of 13,524,000/- was obviously not proven that is why the appeal committee ordered for its authentic verification in their verdict. It is on record that the appeal committee ordered for verification if the loss was real. No report on the verification exercise they ordered was tendered at the CMA to prove that the loss was indeed real. Instead the respondent

was stormed with the termination letter, seemingly before the ordered verification was conducted. In my considered view, the decision by the appeal committee was contradictory, as argued by Mr. Ndelwa. This is because, after they found that the alleged loss was not proven and even ordered verification, it was inconsistent for them to uphold the termination of the respondent on unproved allegation. Gross negligence only stand proven if there is a duty of care that has been breached occasioning loss. If it was still doubtful if such loss was really occasioned, it was an error on part of the appeal committee to uphold the decision founded on unproved allegation. What they were supposed to do was to wait for report on the genuineness of the loss they ordered verification of to reach their verdict.

The above testimony is what was presented before the CMA. It was therefore right for it to find that this allegation as a ground for termination was not proved to the required standard. Based in the decision of the court in the case of **Twiga Bancorp Limited v Zuhura Zidadu and Another** (supra) when there is no proof of loss that has been occasioned, negligence is far from being proved. Therefore, I agree with the finding of the CMA that the gross negligence was not proved against the respondent. I find no reason to fault them on that.

The respondent was also terminated on the issue of dishonest. The basis of alleging dishonest is that he submitted forged receipts in imprest retirement. The respondent defended himself that the receipts were issued by the transporter, who appeared as DW3 during trial. However, DW3 during his testimony denied issuing such receipts but he admitted that the receipts contained his number. He also admitted that, he issued receipts to the applicant which were returned, but he did not tender those returned receipts as exhibits in court. This would have assisted on verification whether the mentioned receipts were different from the receipts allegedly forged by the respondent.

In my view, comfortably admitting the alleged forged receipts having his number and failure to take necessary action against the possible falsifier, the respondent for this matter, positively connect him to the receipts than the respondent. And also failure to submit the receipt he was issuing to the applicant and instead stating that after the return of receipts they were dealing without a receipt based on trust is so unlikely especially when dealing with legal person like the applicant herein. It remains that, it was transporter's words against the respondent's words that were put on the

scale by the CMA on that. The one to be believed depends on the weight of evidence he availed. The respondents words were then trusted for the right reasons as seen above.

Again, despite the applicant stating that they were receiving receipts from the transporters the applicant did not tender such receipts for the arbitrator to make a comparison. In addition, the applicant failed to prove that PAWA Transportation Company and Sky Company never existed as alleged in their investigation report as argued by Mr. Ndelwa. This is because, during trial the person who prepared the investigation report tendered no proof that he procedurally inquired from the Business Registration and Licencing Agency (BRELA) as to the existence of these two entities. His mere words are not enough to prove such a serious allegation. This indeed leaves a lot to be desired in proof of dishonest alleged. Therefore, by the CMA believing respondent's words rather than those of applicants witness at trial does not mean that it did not consider applicants evidence as alleged in this application. The arbitrator had a reason for that as he explained, which I entirely agree with.

Moreover, motive of falsification was also not proved. I am saying so because, agreeing with respondent's advocate, it was not put forward whether the amount paid to the transporter was different from the amount reflected in the receipts. The transporter did not disclose amount of pay to him to see if it differed with the amount in the receipts in order to establish the motive of presenting the falsified receipts which is possibly gaining the difference amounts. So, if the amount remained the same, it means no costs were inflated. The applicant never gained the alleged occasioned loss. This even leaves a wonder as to where the alleged loss emanated from. In order to prove gross dishonesty, it was important to establish how the loss of TZS 13,524,000/- was arrived at. In this, the applicant did not prove the actual amount they paid to transporters vis-à-vis the amount allegedly claimed or retired by the respondent as correctly argued by Mr. Ndelwa.

After all, before the CMA it was established that all receipts and payments were authenticated and approved by the Finance Manager, the respondent's head of department and the Director. If there was forgery these officials were supposed to discover the same or made accountable as correctly argued by Mr. Ndelwa. But, instead of being held accountable

they were unusually made members of the disciplinary committee giving them an unfair advantage to defend their conflicting interests.

Undeniably, before both the disciplinary committee and the CMA the respondent stated the reasons for dropping transportation costs were that the applicant closed some newspaper drop-off centers and started to combine its parcels with those of her competitors. The applicant did not provide evidence to the contrary. On this premise, as both gross negligence and honest were not proved, the CMA rightly reached a finding that the applicant terminated the respondent's employment on unproved reason.

The other issue complained of is whether the procedures were followed in termination of the respondent's employment contract. According to section 37(2)(c) of the Employment and Labour Relations Act (supra) a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. In the instant case the respondent was terminated for reasons related to misconduct; that is gross negligence and dishonest. Fairness of procedure for that is as stipulated under rule 13 of GN. No 42 0f 2007.

That applicant stated to have complied with the procedures stipulated therein having conducted investigation, serving the respondent with the charge sheet and notice of hearing proceeded by conducting hearing attended by both parties. However, the respondent put forward a number of challenges that he allege to have tainted the procedures. First, that, the disciplinary committee was chaired by Junior Manager of his level contrary to provision of sub rule (4) of rule 13 above which provides for the committee to be chaired by sufficiently senior management representative who has not been involved in the circumstances giving rise to the case. Looking at committee proceedings, the committee was chaired by on Sebastian Nkoha, whom respondent had stated to be a junior manager just of his rank. This indeed contravened the rule above as correctly held by the CMA. And as the applicant did not contradict it at trial it remained to be believed as true.

Further complaint was on same members forming the two committees. It was argued that, Aika Masawe and Josephat Kasagero who were members of the first instant committee were also members of the appeal committee. This in reality constitutes one siting on appeal against his or her own decision, which in turn obviously impairs ones impartiality. This fact was

again not successfully contradicted by the applicant. It is therefore my view that, this constituted fatal irregularity leading to no proper determination of the matter in two different levels as alleged. In essence, the appeal determined by the same persons is as good as there was no appeal in the language of the arbitrator, to which I entirely subscribe to.

The respondent also criticized the procedures invoked by the respondent stating that, no witness was called to testify before the disciplinary committee hearing. Rule 13(5) of the Code requires evidence in support of the allegations to be presented at the hearing. The sub-rule also gives an employee a right to respond to those allegations, right to question employer's witnesses and the right to call witness if necessary. Examination of committee proceedings in exhibit M10, it is true no witness was called to prove the allegation. What this amounts to is that, the allegation was not proved if no testimony was produced to that effect.

Production of investigation report alone did not suffice without calling those who informed the report. This is especially for the report which did not also involve the respondent during the investigation. It is on record that, the investigation conducted did not give the respondent a chance to be

interrogated during the process. He was also not availed with the investigation report before the disciplinary committee hearing. This fact was undisputed by the respondent. Both DW1 and DW2 have been recorded to have admitted so in the cross examination. Therefore, failure to involve the respondent during investigation and failure to avail the complainant with the investigation report prior to the disciplinary hearing meeting is tantamount to a denial of the right to be heard. This is fatal and truly a transgression of the procedural law referred to above. This certainly is procedural unfair termination as held by CMA.

In all, the applicant failed to prove both the fairness of the reasons and procedure in terminating the respondent. Having said so, I find nothing to default the CMA award for. I therefore, dismiss the appeal for lack of merits. No order as to costs, this being a labour matter.

M. P. OPIYO,

JUDGE,

30/5/2023