THE UNITED REPUBLIC OF TANZANIA

(THE JUDICIARY)

HIGH COURT LABOUR DIVISION

AT MTWARA

APPLICATION FOR LABOUR REVISION NO. 2 OF 2020

(From the Original Award No. CMA/MTW/LD/108/2017 of the Commission for Mediation and Arbitration delivered by Mr. KWEKA, A. J., Arbitrator on 29th May, 2018 at Mtwara)

EVARISTO MIHO.....APPLICANT

VERSUS

TANZANIA POSTS CORPORATION.....RESPONDENT

R U L I N G

4 March &. 11 May, 2021

DYANSOBERA, J.:

This revision takes exception to the Award of the Commission for Mediation and Arbitration at Mtwara on Labour Dispute No. CMA/MTW/LD/108/2018 passed by Hon. Kweka, A.J., the Arbitrator, dated 29th day of May, 2018. Before this court, the applicant Evaristo Miho has, by way of a Chamber Summons and a notice of application filed on 3rd day of October, 2018, invoked the provisions of Section 91 (1) (a), (2) (b) (c), (4) (a) (b) and section 94 (1) (b) (i) of Employment and Labour Relations Act No. 6 of 2004 as amended by the Written Laws (Misc. Amendments) Act No. 3 of 2010 and Rule 24 (1), (2), (a), (b), (c),(d), (e), (f) and (3) (a), (b),

(c),(d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007 and any other enabling laws, seeking orders and reliefs:-

1. That this Honourable Court be pleased to revise, quash and set aside the Arbitration award of the Commission for Mediation and Arbitration at Mtwara on Labour Dispute CMA/MTW/LD/108/2017 delivered by Hon. KWEKA A.J.Arbitrator on 29th May, 2018 for the material irregularities and errors in law and fact on the face of the record and make any other order as it may deem fit to grant.
2. Any other relief as this Honourable Court may deem fit and just to grant.

The application has been opposed by the respondent by way of a notice of opposition as well as a counter affidavit affirmed by Ms.Nuru Mkazi, a Principal Legal Officer of the Respondent.

The time line of events giving rise to this revision are apothegmatic. The applicant was employed by the respondent on 23rd day of December, 2002 and given PF 23845. He was confirmed in the service on 23rd June, 2013. On 1st September, 2009 he was promoted and elevated to a post of Regional Manager, Mtwara. Fortune was, however, not on his side as on the 3rd day of July, 2017 he was served with a letter of termination and his entitlements were detailed. His appeal to the Postmaster General was dismissed. He then filed a labour dispute before the Commission for Mediation and Arbitration which found that the reason for termination was valid and the procedure in terminating his employment was followed. The

labour dispute was, consequently, dismissed. The applicant was aggrieved by the Award of the Commission for Mediation and Arbitration hence this application for revision which is pegged on five grounds as shown under paragraph 5 (A)-(E) of the applicant's affidavit filed on 28th day of February, 2020.

The hearing of this application was conducted by way of written submissions.

Arguing the 1st ground, the applicant submitted that an employer who wants to terminate the services of an employee must adhere to the provisions of section 37 (1) and (2) of the Employment and Labour Relations Act, 2004 read together with Rule 8 of the Code of Good Practice Rules in that the employer must follow a fair procedure before terminating the contract and must have a fair reason to do so as defined under section 37 (2) of the Employment and Labour Relations Act 2004. The applicant argued that in this case there was no direct evidence and that the allegations on negligence, incapacity and gross dishonesty were serious in such that there ought to have been investigation and the applicant would have been given a chance to be heard. The applicant further argued that rule 13 (1) of the Rules, the employer is duty bound to conduct investigation to ascertain whether there are grounds for hearing to constitute fairness of the procedure and sub-rule (3) states that the employee is entitled to a reasonable time to prepare for hearing and be assisted in the hearing by a trade union representative or fellow employee or a personal representative of his own choice.

The applicant explained that the Chairman of the Investigation Committee (Kamati ya Uchunguzi) invited him to defend himself against the allegations arising from poor work performance. He said that the letter written by Damas Seseja read in part as follows, ' una haki ya kuja na mtu kukusaidia katika utetezi wako lakini Shirika halitahusika na gharama zozote zitakazohusika na mtu huyu'. The applicant contends that he was denied the opportunity to exercise that statutory right of being accompanied by a person of his own choice, his witness, involved employees such as a District Post Master, service users and others to attend such hearing at the headquarters. He placed reliance on the case of **NBC MWANZA v. Justa B. Kyaruzi**, Revision No. 79 of 2009 (Rweyemamu R.M.J. as she then was).

In his further argument on the first ground, the applicant informed the court that the respondent flouted the mandatory procedure provided for under Rule 13 (5) of the Employment and Labour Relations Code of Good Practice Rules, GN No. 42 of 2007 which requires that the evidence collected in the course of conducting investigation to be tabled at the disciplinary hearing so that an employee can have an opportunity to cross examine.

With respect to the 2nd ground, the main complaint by the applicant is the termination of his services on the recommendation of the Investigation Committee without involving the Board of Directors and, therefore, the General Manager Corporate Resources was a judge in his own cause. The applicant clarified that on page 17 Clause 3.12 of the Financial Regulations

of the Corporation it is stated that if the General Manager Corporate Resources in his opinion, considers that the Controlling Officer is consistently negligent in the discharge of his duties under these regulations, he shall report to the Postmaster General (PGM) who shall investigate the matter. If negligence is proved the Postmaster General (PGM) shall report it to the Finance and Administration Committee for institution of appropriate disciplinary action and not for information after the applicant has been terminated by the Management. According to the applicant, the Finance and Administration Committee must deliberate on the termination and the Board of Directors informed accordingly. He contended that the Controlling Officers are defined in the Financial Regulations as Corporation's heads of departments, Units, Zanzibar and Regions and are appointees of the Board of Directors and, therefore, the authority to terminate the applicant's employee is entrusted to the Board of Directors. It was not proper for the General Manager Corporate Resources Management to form and investigation committee as testified by DW 2 Mr. Kindamba, the applicant insisted. It was his further argument that the General Manager Corporate Resources is the one who instituted an audit, wrote suspension and termination letters and formed an investigation committee, a procedure which went contrary to the Corporation's Regulations.

Addressing on the 3rd ground, the applicant informed the court that the chairman of the investigation committee invited the applicant to attend the meeting on poor performance as can be seen from exhibits EM7, EM8 and EM9 and not gross negligence and gross dishonesty as per exhibit EM4. The applicant complains that he was not given time to prepare his defence

on the notice of the offence he was charged before the Disciplinary Committee. He said that there was a variation between the charge and the reason stated in the letter of termination. This makes the termination to be unfair. He cited the cases of **World Vision Tanzania v. Charles Masunga Maziku**: Revision No. 7 of 2014 (Mipawa, J. as he then was) and **Coca Cola Kwanza v. Emmanuel Mollel**, Revision No. 22 of 2008 (Mandia, J (as he then was)) to support his argument.

On the allegations of poor performance on his part leading to his termination, the applicant argued that there was no evidence to prove that the procedure for termination was followed. Citing rule 4 of GN No. 42 of 2007 on the warning to the employee who continues to make an unsatisfactory performance and that employment may be terminated if there is no improvement, the applicant said that Staff regulations stipulate that first breach attracts warning and the sixth breach is termination. On the duty of the employer to produce sufficient evidence to prove that the employee was working under poor performance and its duty to set performance standards with which the employees are required to meet as per rule 16 (1) of GN No. 42 of 2007, the applicant relied on the case of **Tanzania Breweries Ltd v. Leo Kobelo**, Dar es Salaam, Revision No. 211 of 2015 (Mashaka, J.).

With regard to the respondent investigating and hearing the dispute, the applicant said that he was not afforded an opportunity to contradict the employer's witnesses as the investigation committee did not travel to Mtwara where he was working as a Regional Manager. He referred this

court to the book titled **Legal Aspects Managing Employee Relations** by Chowdhury- Eastern Law House and the Law on Unfair Dismissal by Steven D. Anderman, Third Edition on the employers' restriction allow an investigation into the facts surrounding a disciplinary case to extend into a disciplinary hearing.

Insisting on the compliance of rule 13 (1) of the Code of Good Practice by the employer to conduct an investigation to ascertain whether there are grounds for hearing to be held, the applicant informed the court that it was not correct to say that the Investigation Committee (Kamati ya Uchunguzi) was the same as the Disciplinary Committee (Kamati ya Nidhamu) as the investigation committee cannot be the disciplinary committee at the same time with the same chairman and members. He cited the case **of Knight Support (T) Ltd v. Chrispinus S. Kaloli**, Rev. No. 35 of 2009 on the requirement of the employer to conduct investigation to ascertain whether there are grounds for hearing to be held.

With respect to the 5th ground, the applicant's complaint was centred on the Audit Report. He contended that he received the Audit Report on December, 2017 at the time he had been terminated from employment since 10th July, 2017. That the said report was brought at the Arbitration stage as additional evidence and yet it was incomplete as the Third Column which is reserved for management deliberations had not been filled to justify management had decided to take actions on matters arising from the audit report. He further argued that the Audit Attributes which were at the Regional Office cannot be said to be an Audit report as the only discussion between the applicant was at the exit meeting where the respondent

alleges that the applicant confessed. It was in his argument that the respondent's allegations through the Audit Attributes could not be a substitute for a charge sheet in that he was yet to be given a charge sheet and an opportunity to cross examine the witnesses. He relied on the case of **Tanzania Telecommunication Company Ltd v. Augustine Kibandu**, Revision No. 122 of 2009 and rule 13 (2) of GN No. 42 of 2007. Reliance was made on the case of **KCB v. Dicskon Mwikuka**, Revision No. 45 of 2013 (Hon. Wambura, J.) in which it was held that the auditors did not consult the respondent nor was he availed a copy of it before the disciplinary hearing commenced, a fact which minimises the credibility of the report as evidence against the respondent.

On the inappropriateness of termination as a sanction, the applicant relied on rule 12 (1, (4) (b) of the Rules and the case of **National Microfinance Bank PLC v. Aizack Amos Mwampulule**, Revision No. of 2013 and added that under Rule 5 of the Code of Good Practice contending that the employer has to apply the sanction of termination consistently with the way in which it has been applied to the same employees in the past and consistently as between two or more employees who commit the same misconduct. He was of the view that the termination was not an appropriate sanction. Imputing malice on part of the respondent, the applicant told this court that he was made accountable to all allegations leaving other officers with reasons that he was the boss and therefore leaving almost the entire staff members who were also heads of departments, sections untouched. The applicant denied to have misused Tshs 31, 113, 800 asserting that

there was no direct evidence to implicate him. He cited the case of **National Microfinance Bank v. Eliamlis Mlay and Charles Boniphace** to stress his argument. The other cases referred to by the applicant were **Tanzania Revenue Authority v. Andrew Mapunda**, Revision No. 104of 2014 and the case of **Tanzania Telecommunications Company Ltd v. Nkaira Moshi**, Labour Revision No. 29 of 2015.

In response to the submission by the applicant, Ms Nuru S. Mkazi, the respondent's Principal Legal Officer, at first raised her concern on the applicant's failure to attach the copies of the cited unreported cases so as to enable the respondent to easily make reference to them. This failure, the Principal Officer of the respondent contended, dented the credibility of the applicant's chief submission. Ms Mkazi, then, had the following to submit.

With regard to the first ground, she argued that what the law requires is the conduct of investigation and that how it has to be conducted, the statute is silent. She explained that in the present case, the proceedings are clear that after the receipt of the audit report (exhibit KW 1), the applicant was commissioned to account as to why disciplinary actions should not be taken against him via the letter dated 10th April, 2017 (exhibit KW 6B). She argued in his testimony, Mr. Msham Kindamba told the Commission that on 18th April, 2017 the applicant replied the respondent's letter (exhibit KW 7) in which the applicant admitted to have acted contrary to the law thus requested the respondent to forgive him. It was in the respondent's further submission that the respondent initiated disciplinary hearing upon receipt of the audit report by auditors and the applicant's explanations accounting for

all audit issues. She elucidated that the respondent decided to conduct the hearing after establishing that there are grounds for hearing via the applicant's confession that have contravened the Financial Management Regulations and Circulars and that the respondent was right to proceed with the hearing with a view to proving the misconducts against the applicant of using Tshs. 15,738,083/21 without a permit and/or authorisation and failure to comply with the procurement law and regulations by engaging one service provider.

The respondent's Principal Officer was of the view that whenever there is admission to misconducts, the position is that the employer is not compelled to adhere to each procedural steps provided for under the law prior to termination. It was her argument that in this case, the respondent followed all legal procedures including undertaking audit and commissioning the applicant to explain as to why disciplinary actions should not be taken against him, the position which was addressed in the case of **Frank Saluhara and Charles Nyambo v. Nyanza Bottling Co. Ltd** (2014) LCCD 133 and further that whenever there is admission to the charges there is no need of strictly adhering to the procedural laws. Reference was made to the case of **Rungwe District Council v. Daudi F. Juvenal** (2014) LCCD 128 and that even the Arbitrator observed that the applicant admitted to the charge and/or conceded to misconducts during exit meeting with auditors through KW 1 and through explained letter dated 28th April, 2017 (KW 7) and upon this observation came up with the view that the grounds for terminating the applicant's employment contract were valid and fair.

With respect to the right to representation, it was argued on part of the respondent that the applicant was given with the right to come with a representative of his own choice at the disciplinary hearing, availed with audit report during the exit meeting with auditors, asked to account for allegations found in the audit report, given enough time to prepare his defence to the charges, given reasonable time to prepare for hearing, the disciplinary committee was chaired by an impartial chairperson, was given an opportunity to raise mitigation facts and, allowed to appeal to the Post Master General after the decision pursuant to rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007.

In response to the 2nd ground, Ms Mkazi contended that the applicant was not supposed to be terminated by the Board as according to the respondent's internal procedure, the termination is undertaken after conducting the disciplinary hearing. She said that the Board of Directors does not have power to deal with disciplinary issues of employees and the applicant did not adduce any authority to prove his assertion. It was further contended on part of the respondent that the allegations that Clause 3.12 of the Financial Regulations of the Corporation was violated which requires the respondent to refer the disciplinary hearing report to the Finance and Administration Committee for deliberation and recommendations and to the Board of Directors for approval is not true because the applicant did not tender the Financial Regulations in the Commission to form part of his evidence and therefore, now it is too late in the day.

As regards the 3rd ground, the respondent's Principal Legal Officer submitted that the applicant was terminated on account of having unclaimed payments and using the respondent's money without permit and/or authorisation amounting to Tshs. 31, 113, 880/=, spending Tshs. 21, 700,000/= for procurement without adhering to the procurement law and regulations of 2011, using Building Electrical Contractor, a service provider, without undertaking tender processes in accordance to the law and spending Tshs. 10,439,000/= to maintain and repair the computer without a permit from the Head Quarters. Reference was made to exhibits KW 1, KW 2, KW 3 and KW 4. It was strenuously contended on part of the respondent that the applicant committed the misconduct of which were grave and he cannot, therefore, hide in the umbrella of the charge by saying that he responded and was summoned by the disciplinary hearing committee to account for poor performance. The respondent urged the court to look at the contents of the letter (s) to ascertain whether from its contents the applicant understood what exactly was charged of and whether the charge sheet reflected the misconducts. In supporting the argument that the heading of the termination letter did not affect the contents of the termination letter, the respondent relied on the observation in the case of **the University of Dodoma v. Denis Andrew Hellar and Another**, [2014] LCCD 23 (Mipawa J. It was further contended on part of the respondent that the Arbitrator analysed the evidence of both parties and concluded that gross negligence and gross dishonest had been termed by the respondent to be poor performance and that the title did not infringe the applicant's rights as he understood the charge and that is why he responded and conceded.

On the applicant's contention that he was summoned to the Investigation Committee and not to the Disciplinary Committee, the respondent was of the view that a disciplinary hearing committee was conducted and this led to the termination of the applicant's employment contract. The respondent stressed that the Investigation Committee (Kamati ya Uchunguzi) was formed to hear and determine whether the applicant is guilty of misconducts as charged and that is why all disciplinary hearing procedures were followed as per the law. To support her argument, the respondent relied on the case of **Dominic A. Kalangi v. Tanzania Posts Corporation**, Labour Revision No. 10 of 2018 (Hon. Ngwembe, J.).

In answering the 5th ground, the respondent submitted that the applicant was availed with the Audit Report and the Arbitrator noted that Mr. Pius Anthony Malya who undertook the audit inspection exercise left the report to the applicant. Further that in the letter dated 10th April, 2017 with Ref. No. MHR/PF. 23845/2016 titled "Kusimamishwa kazi" admitted as exhibit KW A, the applicant was told that he had been suspended following the audit report and was commissioned to respond on the raised audit issues. To stress this point, the respondent made reference to the first paragraph of the letter which reads "unasimamishwa kazi kupisha uchunguzi wa tuhuma zinazotokana na utendaji wako wa kazi usioridhisha kama ilivyoainishwa na Kitengo cha Ukaguzi katika taarifa ya Ukaguzi katika mkoa wako uliofanyika tarehe 06/03/2017 hadi tarehe 1/03/2017". It was also contended on part of the respondent that after receiving the letter the applicant on 18th April, 2017 made a reply thereto via the letter titled "Kukutumia Maelezo baada ya kusimamishwa kazi" by confessing and /or

admitting to the misconduct and promised and /or committed to change the behaviour and to start adhering to the regulations and instruction from his superiors. The respondent informed the court that the applicant did not complain to have not been availed with the Audit Report by auditors; instead, responded to all allegations without problem and this explains his reply during cross-examination that "kwamba wakaguzi walifuata taratibu zote za ukaguzi na alipewa mrejesho wa mapungufu yaliyobaininka wakati wa ukaguzi na aliyatolea majibu". The respondent also argued even the Arbitrator noted that the applicant had conceded to the loss of money (upungufu wa pesa).

The respondent prayed the court to dismiss the applicant for lack of merit.

In rebutting the respondent's reply to the written submission in chief, the applicant stated that rule 13 (1) of GN No. 42 of 2007 imposes a mandatory obligation upon the employer to ascertain whether there are grounds for hearing. He reiterated the case of **Kninght Support (T) Ltd.** The same applicant reiterated that he was not availed with the audit report during the exit meeting. The applicant also argued that he was placed in a disadvantageous position when he was required to foot the costs of the person who would accompany him.

The applicant also complained that the chairperson who chaired the disciplinary hearing committee one Damas Seseja (exhibit KM 4) was partial in that chaired both in the Investigation Committee and Disciplinary hearing committee and hence was not impartial and was biased. To

buttress his argument the applicant referred this court to rule 9 (4) of GN No. 42 of 2007 and insisted that rules 4 (1) and 13 (3) of the said Rules as well as the Respondent's Financial Regulations, 2014 (exhibit KW 2) were contravened. In fine, the applicant reiterated almost all what he had submitted in chief.

I have heard the submissions by the applicant and Ms. Nuru S.Mkazi, the respondent's Principal Legal Officer and perused the record of the Commission for Mediation and Arbitration. I have also taken into account the case laws referred to me by the parties to this application.

In the deliberation of the applicant's raised grounds for revision, I have to point out at the outset that the established legal principle is that for termination of employment to be considered fair it should be based on valid reason and fair procedure. That is the import of section 37 (2) of the Employment and Labour Relations Act No. 6 of 2004. Besides, Article 4 of the International Labour Organization Convention (ILO) 158 of 1982 provides that:

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

This position was confirmed by this court in the case of **Tanzania Railways Limited v. Mwinjuma Said Semkiwa**, Lab. Div. DSM, Rev. No. 239 of 2014.

It cannot be gainsaid that the employer bears the burden of proving that the termination of the employee was for valid and fair reason (Substantive Fairness). Likewise, it is provided under section 37 (2) (c) of the Employment and Labour Relations Act that 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 (Procedural Fairness). This court made emphasis on this aspect in the case of **Othman R. Ntarru v. Baraza Kuu la Waislamu (BAKWATA)**, Revision No. 323 of 2013 where it held:-

> *"The law puts the burden of proof to the employer to prove that he had sufficient reasons and followed the required procedure in terminating the services of the employee."*

The issues for determination in this application can be summarised as follows.

One, whether or not there was valid and fair reason for the respondent to terminate the employment of the applicant (Substantive Fairness).

Two, whether the respondent followed fair procedure before terminating the applicant's employment (Procedural Fairness).

Since the grounds raised in this application turns around these issues, the determination of the issues will, undoubtedly, determine the whole appeal.

The question for consideration and determination in respect of the first issue is whether allegations levelled against the applicant was proved to the required standard. A careful analysis of the presentations and the record leads me to answer this question in the negative.The reasons are not far-fetched.

In the first place, the record is not clear on the counts of the charge detailing the offence the applicant committed, the particulars of such offence and the specific provisions in the Corporation's Code of Conduct or other relevant law the applicant was alleged to have breached. In other words, the respondent failed to frame, leave alone, frame proper charges. The proper framing of the charges could have enabled the Disciplinary Committee and the applicant to identify the particular offences alleged to have been committed and a means which could ease the leading the required evidence to prove or disprove the particular offences. Likewise, framing of charges could have enabled the applicant to enter a focused response and the Disciplinary Committee to arrive at focused recommendations. Since there was no charges or if the charges were there they were not properly framed, the allegations on the applicant's misconduct were improperly referred to the Disciplinary Committee.

Second, there is no record of the Disciplinary Committee hearing showing how the allegations against the applicant were proved. In other words, there was no evidence produced, both by way of testimonies or documentary, proving the allegations against the applicant. At the Disciplinary hearing, the respondent was duty bound to lead evidence

linking the applicant with the offences he was alleged to have committed. No witness testified, no document was tendered and there was no cross examination of the witnesses conducted on part of the applicant and respondent.

Third, the record shows that Arbitrator found the allegations against the applicant proved on account that the applicant admitted the loss and asked for pardon. In finding that there were fair and valid reasons for termination and that the respondent followed a fair procedure in terminating the applicant's employment contract, the Arbitrator in the Award observed:

> *"Tume imejiridhisha kuwa sababu za kuachishwa kazi ni halali kutokana na ukiri wa mlalamikaji katika hoja husika kwa mujibu wa Kielelezo KW 1 na Kielelezo KW 7 na pia barua ya kumtaka ajieleze na barua ya kuachishwa kazi tuhuma husika zimefafanuliwa KW 6B na KW 8. Pia makossa yaliyothibitika ni makosa yanayostahili kuachishwa kazi kwa mujibu wa Kanuni ya 12 (3) (a) (d) ya Employment and Labour Relations (Code of Good Practice,) GN. No. 42/2007 na kwa mujibu wa Kanuni za Utumishi za Shirika Toleo Na. 4/2014- KW 10.*
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> *Kwa kujibu hoja zinazobishaniwa kwanza sababu ya uachishwaji kazi kama ilikuwa halali, baada ya kusikiliza ushahidi na kupitia maelezo yote na vielelezo sababu iliyotajwa ni utendaji usioridhisha na utendaji huo kwa barua zote ulifafanuliwa kwa kuainisha mambo ambayo yamempelekea kuwa na utendaji usioridhisha ambapo zimetumiwa zile hoja za ukaguzi yale mapungufu yaliyobainika. Katika kikao cha uchunguzi mlalamikaji katika tuhuma zote zilizoainishwa kwenye barua ya kumtaka ajieleze zipo zilizoondolewa baada ya utetezi na zipo*

zilizobaki ambazo kwazo ndipo zilizothibitishwa kuwa mlalamikaji ana hatia. Mlalamikaji katika majibu ya hoja wakati wa ukaguzi na hata katika maelezo yake ya kujitetea amekiri kuwepo kwa mapungufu katika utendaji wake na kuomba msamaha na kuahidi kujirekebisha. Kutokana na ukiri wa mlalamikaji kwamba kuna mapungufu na kuomba msamaha ni uthibitisho kwamba tuhuma zilizotokana na hoja za ukaguzi ni za kweli na hoja au tuhuma hizo kwa pamoja ndio mlalamikiwa aliziita utendaji usioridhisha lakini alizifafanua kwa kuzitaja hoja husika ambazo kwa ujumla ndizo zinapelekea utendaji usioridhisha. Kwa tuhuma hizo zilizothibitishwa na kamati ya uchunguzi ni miongoni mwa hoja alizokiri na kuziombea msamaha mlalamikaji wakati wa kumaliza ukaguzi na hata kwa maelezo yake. Hivyo sababu hizo au kutokana na tuhuma zilizothibitishwa na kamati ya uchunguzi na kumtia hatiani mlalamikaji ndizo zilizotumika kupendekeza na kupitishwa kwa adhabu ya kuachishwa kazi. Tume imejiridhisha kuwa sababu ya kuachishwa kazi ni halali kutokana na ukiri wa mlalamikaji katika hoja husika kwa mujibu wa kielelezo KW1 na kielelezo KW7 na pia barua ya kumtaka ajieleze na barua ya kuachishwa kazi tuhuma husika zimefafanuliwa KW6B na KW8. Pia makosa hayo yaliyothibitika na makosa yanayostahili kuachishwa kazi kwa mujibu wa kanuni ya 12(3)(a)(d) ya Employement and Labour Relations (Code of Good Practice) Gn. No. 42/2007 na kwa mujibu wa kanuni za utumishi za shirika toleo Na. 4/2014 KW10. Kwa kujibu hoja ya pili ya utaratibu wa kumwachisha kazi sheria ya Ajira na Mahusiano Kazini Na. 6/2004 katika kifungu cha 37(2)(c) pamoja na kanuni ya 13 ya Employment and Labour Relations (Code of Good Practice) GN. 42/2007 utaratibu halali wa kumwachisha kazi mfanyakazi umeelezwa. Kwa hoja ya barua zote zilizotolewa wakati wa shauri la mlalamikaji kusainiwa na Marcice Mbondo mlalamikaji ameona ni kukiukwa kwa utaratibu kwani muhusika alikuwa Mkuu wa

Kitengo cha ukaguzi wa mahesabu na kaimu Meneja Mkuu Rasilimali za shirika hivyo kuwa na mgongano wa maslahi. Jambo la msingi katika utaratibu ni kwamba barua zote za msingi alipewa ya kusimamishwa kazi, kutakiwa kujieleza, kuitwa kwenye kikao, kuachishwa kazi, barua zote hakusaini mkuu wa kitengo cha ukaguzi wa mahesabu bali alisaini kwa cheo chake kipya cha kaimu Meneja Mkuu Menejimenti ya Rasilimali za shirika. Hivyo barua zilisainiwa na mamlaka husika.

Sheria inamtaka kufanya uchunguzi kisha kumtaarifu mwajiriwa juu ya tuhuma husika kwa lugha inayoeleweka na kumpa mtuhumiwa masaa 48 ya kujiandaa kusikilizwa kwa mujibu wa kanuni ya 13(1) (2) ya Employment and Labour (Code of Good Practice) GN. No. 42/2007 utaratibu huu wa kisheria mlalamikiwa ameuzingatia na swala la kumpeleka shahidi sheria haijasema kwamba mwajiri amgaramie shahidi wa mfanyakazi. Ifahamike kuwa shahidi wa mfanya kazi atafika kwenye kikao kwa ajili ya mfanyakazi na sio mwajiri na sheria imetoa nafasi ya shahidi kuwa na mfanyakazi mwingine au mwakilishi wa chama cha wafanyakazi, hivyo mtuhumiwa kwa kuwa anataka kushinda anapaswa kutumia fursa alizopewa kisheria kuwa na shahidi ili kumtetea kwa gharama zake kwani yeye ndiye anayempeleka kwenye shauri.

Imedhihirika kuwa alipewa taarifa ya tuhuma na kupewa nafasi ya kusikilizwa kwa kielelezo KW6A na B hadi kielelezo KW10 utaratibu mzima umezingatiwa hadi rufaa iliyokata kwenda kwa PostaMasta Mkuu baada ya kutoridhishwa na uamuzi wa kuachishwa kazi. Kamati ya uchunguzi ilipendekeza adhabu tu na kwa makosa ambayo yalithibitika kumtia mlalamikaji hatiani. Kwa mujibu wa kielelezo KW10 kanuni za utumishi za Shirika Uk.36 kipengele F.35 imeelezwa kamati ya Ajira na Uteuzi ndizo zinaweza kutoa maamuzi ya mambo ya kinidhamu, imethibitika kuwa kamati ya uchunguzi ilipendekeza adhabu na adhabu

iliyopendekezwa mwajiri aliridhia na kielelezo KW8 barua ya kuachishwa kazi imeeleza tuhuma zilizothibitishwa na kamati ya uchunguzi na kurejea vipengele vya sheria na kanuni mbalimbali mwajiri alimuachisha kazi kwa barua iliyoandikwa na Meneja Rasimali watu na kupitishwa na Meneja Mkuu Rasimali za Shirika hawa wakiwa ni mamlaka ya Ajira na uteuzi na uthibitisho wa taratibu kufatwa rufaa yake ilijibiwa na Postamasta Mkuu kielezo KW6. Hivyo utaratibu mzima wa kisheria ulifuatwa na haki zote za kisheria mlalamikaji alipewa wakati wa shauri lake hadi rufaa yake ilipokataliwa.

Hivyo hoja ya mwisho haki za kila upande katika mgogoro huu hoja kuu mbili zimethibitishwa na mlalamikiwa kuwa sababu ya kuachishwa kazi ilikuwa halali kwa makosa yaliyomtia hatiani mlalamikaji kwa mujibu wa kamati ya uchunguzi kwamba ni makosa ya kinidhamu yanayostahili kuachishwa kazi kwa mujibu wa sheria za kazi na hata kanuni za utumishi za shirika na kwamba hayo ingawa katika barua yalijumuishwa na kuitwa utendaji usioridhisha bado ndani ya barua hizo makosa husika yalifafanuliwa na kwamba makosa hayo mlalamikaji aliyakiri na kuomba msamaha hivyo makosa halali yalithibitika na utaratibu halali ulifuatwa kwa muhimu za mlalamikaji alipewa kama alivyojulishwa kwenye barua ya kuachishwa kazi. Dai la stahiki ya cheti cha utumishi dai hili lilitekelezwa na mlalamikiwa baada ya kumaliza ushahidi na mlalamikaji alikipokea cheti hicho cha utumishi".

With unfeigned respect to the Hon. Arbitrator, I cannot but disagree to his finding. Despite my taking pains to peruse the record of the CMA, I could not find anywhere the applicant made unqualified and unambiguous admission of the alleged misconducts which could justify his being terminated prior to and during the hearing of matter before the Disciplinary

Committee. The documents relied upon by the Arbitrator make his finding that the applicant admitted the offences clearly show that what the applicant did was not to admit the commission of the offence; rather, he was explaining or explaining away the circumstances leading to the allegations. Besides, the applicant was not given opportunity to offer his defence and cross examine the witnesses and question the authenticity of the audit report.

After all the burden of proof lied on the respondent to prove that she had a valid and fair reason of terminating the applicant. This duty, the respondent failed to discharge. It was a misdirection, misapprehension and misapplication of law on part of the Arbitrator, in the circumstances of this matter, to shift the burden of proof from the respondent to the applicant.

As rightly submitted by the applicant, the respondent failed to discharge her burden, both legal and evidentiary, of proving the allegations and could not, therefore, be heard to rely on the non-existing the admission of the applicant.

With those observations, I am satisfied that there was no proved valid and fair reasons for the respondent to terminate the applicant as required by section 37 (2) (a) of the Employment and Labour Relations Act, No. 6 of 2004.

As far as the second issue of procedural fairness is concerned, this court is, in main, guided by two instruments. One, the **Employment and**

Labour Relations Act, No. 6 of 2004 and two, the **Tanzania Posts Corporation Financial Regulations, 2014.**

The Tanzania Posts Corporation Financial Regulations, 2014, Clauses 1.2, 3.11 and 3.12, in particular, read together with Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007, particularly the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures, a Schedule to the Code, provide a clear and detailed procedure for termination of employment.

Reading the provisions of Tanzania Posts Corporation Financial Regulations, 2014, Clauses 1.2, 3.11 and 3.12, in particular, and Rule 13 of the Code of Good Practice, particularly the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures, conjunctively, one will come to realise that what the record of the Commission for Mediation and Arbitration had to reflect the following or something akin to this:-

The General Manager Corporate Resources Management, if in his opinion considered that the applicant was consistently negligent in the discharge of his duties under these Regulations, had to report to the Postmaster General (PMG) for investigation.

After the Postmaster General received the report from the General Manager Corporate Resources Management, he had to make preliminary investigation, frame charges and require the applicant who was the accused to respond within 48 hrs. Upon receipt of the applicant's response, the

Postmaster General had to consider it and if he thought that there was breach of the complained of misconducts and needed to impose a penalty, report to the Finance and Administration Committee for it to institute appropriate disciplinary action. For that purpose, the Finance and Administration Committee had to form a Disciplinary Committee to hold a disciplinary committee meeting. The formed Disciplinary Committee to hold the meeting and conduct the hearing in accordance with the procedure explained in the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures in that the Disciplinary Committee had to be given the charges, response and all evidence.

The Disciplinary Committee then had to notify the applicant of the day, date, time and place of hearing. The letter summoning the applicant had to inform him the right to select any other employee to accompany him. The number of members of the Disciplinary Committee had to be between three to seven. During the hearing, there had to be employer's representative who is NOT the Disciplinary Authority and the employee with his accompanying representative. The hearing of by the Disciplinary Committee had to be in two phases.

In the first hearing phase, the charge was to be read over to the applicant, witnesses had to be called and documentary evidence had to be tendered. This had to be in the presence of the applicant who had to ask questions to each witnesses.

The second hearing phase would relate to the respondent's defence which had to start with reading the response submitted by the applicant, then go through evidence submitted and ask questions to the applicant regarding his response and evidence. The applicant had to be allowed to bring witnesses if so wished. At the end of the hearing the representative of the respondent, if any, who is not a member of the Disciplinary Authority and the applicant should have been asked to leave so that the Committee remained alone to discuss what transpired at the hearing and then make **recommendations**.

The recommendations had to contain whether charges had been proved or not, state the reasons, state any facts which mitigated the gravity of the offence and state any fact which, in the opinion of the committee, was relevant. The Report of the disciplinary committee and the Hearing Form would then have been submitted; one copy to the Disciplinary Authority (PMG?) for action and one copy to the applicant.

After receiving the Report of the Disciplinary Committee and the Hearing Form, the Disciplinary Authority should have studied the recommendations and take appropriate action such as imposition of penalty or not. In case of imposition of the penalty, the applicant had to be given a chance to mitigate. The Disciplinary Committee had to be governed by the rules of natural justice. As is apparent from the record, this procedure was not followed. This means that the respondent flouted not only the law but also her Tanzania Posts Corporation Financial Regulations, 2014!

This answers the second issue that is, the respondent did not follow the fair procedure before terminating the applicant's employment contract.

Even if, for the sake of argument, the respondent had discharged her legal burden of proof on both substantive and procedural fairness, still I am far from being convinced that the termination of employment was the appropriate sanction in the circumstances of the case. Generally, termination of contract of employment for misconduct is expected to be a measure of last resort, reserved for serious misconduct or for repeated misconduct where the employee has not heeded corrective disciplinary action such as warnings. The fundamental question to be asked is whether the misconduct committed by the employee renders the continuation of employment relationship intolerable. The record before me is silent on the misconducts, if at all existed, which rendered the continuation of employment relationship intolerable; even the respondent has suggested none. That aside, the Arbitrator was, before arriving at the finding that the termination by the appellant was fair and appropriate, enjoined to consider the other factors such as the lengthy of service of the applicant, his previous disciplinary records, his personal circumstances, the nature of his job and circumstances leading to the infringement itself.

Having found that the respondent miserably failed to discharge her burden of proving that she had a valid and fair reason to and followed the procedure before terminating the employment contract of the applicant, I find the all the grounds for revision with legal merit. I am, thus, satisfied that the Arbitrator misapprehended the evidence and came to improper and

irrational conclusion that the termination was for valid and with a fair reason and that she followed the fair procedure in terminating the applicant.

Invoking the powers vested in this court under the provisions of section 91 (2) and (b) of the Employment and Labour Relations Act No. 6 of 2004 read together with Rule 28 (1) (c) and (e) of the Labour Court Rules, GN No. 106 of 2007, I quash and set aside the Commission for Mediation and Arbitration Award in Labour Dispute No. CMA/MTW/LD/108/2017 and order the applicants to be reinstated and be paid his remuneration in accordance with sections 40 and 44 (1) and (2) of the Employment and Labour Relations Act, No. 6 of 2004.

W.P. Dyansobera

Judge

11.5.2021

This ruling is delivered under my hand and the seal of this Court on this 11th day of May, 2021 in the presence of the applicant in person and in the presence of Mr. Gerald John Kessy, the Acting Regional Manager, Mtwara, for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge