

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

**REVISION APPLICATION NO. 27380 OF 2023**

*(Arising from an Award issued on 22/9/2023 by Hon. Mbena, M.S, Arbitrator, in Labour dispute No. CMA/DSM/ILA/502/21/1/22 at Ilala)*

**UPL LIMITED/ARYSTA LIFE SCIENCE ..... APPLICANT**

**VERSUS**

**RASHID MDOKA ..... RESPONDENT**

**JUDGMENT**

*Date of last order: 20/2/2024*  
*Date of Judgment: 13/3/2024*

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

Facts leading to this application are that, on 15<sup>th</sup> October 2014, UPL Limited/Arysta Life Science, the herein applicant entered unspecified period contract of employment with Rashid Mdoka, the herein respondent. In the said contract, respondent was employed as sales Representative for the Central Area. In November 2021, applicant served the respondent with disciplinary charges with four counts namely, (i) forgery of the Local Purchase Order (LPO) belonging to Kilombero Cane Growers Association (KCGA) with an order number 0034 dated 23<sup>rd</sup> January 2019 with a valued of TZS. 152,986,000/=, which

constitute a gross misconduct, (ii) forgery of the Local Purchasing Order (LPO) belonging to Msolwa Ujamaa Cane Growers Association (MUCGA) with an order number 0045 dated 24<sup>th</sup> May 2019 with a value of TZS. 100,679,600/= which constitute a gross misconduct, (iii) gross dishonest to defraud the employer's agro-chemical goods amounting to the value of TZS 241,085,600/= and (iv) misappropriation of funds that belongs to the employer amounting to the value of TZS 99,749,600/= deposited in his personal NMB Bank account. In the disciplinary hearing that was conducted on 5<sup>th</sup> November 2021 at 14:42hrs, respondent was found guilty, consequently, on 11<sup>th</sup> November 2021, his employment contract was terminated by the applicant.

Aggrieved with termination of his employment, on 17<sup>th</sup> November 2021, respondent referred Labour dispute No. CMA/DSM/ILA/502/21/1/22 before the Commission for Mediation and Arbitration (CMA) complaining that applicant terminated his employment unfairly. In the Referral Form(CMA F1), respondent indicated that he was claiming to be paid leave pay, severancy pay, repatriation allowances, salary for November 2021 and TZS 82,561,538/= being 36 months salary compensation for unfair termination. In the said CMA F1, respondent prayed also to be reinstated. On procedural fairness, respondent indicated that procedures were not followed because he was

not given sufficient time to defend his case. On validity of reason, he indicated that applicant had no valid reasons to terminate his employment.

On 22<sup>nd</sup> September 2023, Hon. Mbena M.S, arbitrator, having heard evidence of the parties, issued an award that termination was unfair for want of reasons. The arbitrator awarded respondent to be paid (i) TZS 19,860,000/= being 12 months' salary compensation for unfair termination, (ii) TZS 1,655,000/= being one month salary in lieu of notice, (iii) TZS 1,655,000/= being leave pay, (iv) TZS 1,655,000/= being salary for November 2021, (v) TZS 3,119,046/= being severance pay, all amounting to TZS 27,944,038/=.

Applicant was aggrieved with the said award as a result, she filed this application seeking the court to revise the said award. Applicant filed the affidavit sworn by Christopher Mhagama, her National Sales Manager to support the Notice of Application. In the said affidavit, the deponent raised six (6) issues to be determined by this court namely:-

- 1. Whether the arbitrator properly analyzed evidence on record in reaching a decision that there was no valid reason for termination.*
- 2. Whether the arbitrator was right in holding that procedures for termination were followed but the said procedures were null and void because reasons for termination were improper and unfair.*
- 3. Whether the arbitrator considered the reasonableness and legality of the amount of TZS 27,944,038/= awarded as compensation and that the*

*said compensation was made without taking into consideration of the loss occasioned to the applicant by the respondent.*

- 4. Whether the arbitrator was right in holding that there was forgery but no witness linked the respondent with the allegations.*
- 5. Whether there was confirmity of oral evidence on the record and the analysis in the award, and*
- 6. Whether the respondent is entitled to payment of notice and severance pay.*

When this application was called on for hearing, Mr. Felix Okombo, learned advocate, appeared and argued for and on behalf of the applicant, while Mr. Charles Masaga, learned advocate, appeared and argued for and on behalf of the respondent.

In arguing the application, Mr. Okombo, learned advocate for the applicant, argued the 1<sup>st</sup> and 4<sup>th</sup> issues together. In support of these issues, counsel for the applicant submitted that, the arbitrator did not consider the gist of the issue that was before her. He submitted that, respondent was terminated due to misconduct of forgery and occasioning loss and dishonest. Learned counsel for the applicant submitted further that, DW1 testified that, they realized that the LPO that were submitted by the respondent were not from Kilombero Cane Growers (KCGA) and Msolwa Ujamaa Cane Growers Association(MUCGA). Learned counsel submitted further that, Kilombero Cane Growers Association (KCGA) was dissolved by the Government before 2018 hence it was not existing at the time respondent submitted

the said LPO in 2019. To support his submissions, learned counsel invited the court to examine exhibits D7, D1 and D2. He went on that, Menrad Okota(DW6) testified that he has never worked with Kilombelo Cane Growers Association and that, he did not give the respondent the said LPO.

Mr. Okombo submitted further that, the LPO purported to be issued by Msolwa Ujamaa Cane Growers Association(MUCGA) were disowned by Paul Makunga (DW5), the Accountant of Msolwa Ujamaa Cane Growers Association. He added that, DW5 stated that they have never submitted such documents to the respondent. Learned counsel for the applicant went on that, DW5 was not cross examined by the respondent on that aspect. He submitted further that, DW6 distanced himself with the LPO relating to Msolwa Ujamaa Cane Growers Association by testifying that he did not submit the said LPO to the respondent. He added that, DW6 was not cross examined also.

Counsel for the applicant submitted that, the LPO from Kilombero Cane Growers Association and Msolwa Ujamaa Cane Growers Association led applicant to release the Cargo valued at TZS 241,085,600/= as evidenced by exhibit D8 collectively. He submitted further that, out of the said money, only TZS 21,000,000/= were paid to the applicant. He went on that, payment of TZS 21,000,000/= only

prompted investigation that opened the eyes of the applicant that the said LPO were not from those Associations. He submitted further that, that was the base of termination of employment of the respondent.

Learned counsel for the applicant submitted further that, since DW5 and DW6 were not cross examined in relation to the LPO for Kilombero Cane Growers Association an Msolwa Ujamaa Cane Growers Association, their evidence is deemed to be true. To support his submissions, learned counsel cited the case of **George Maili Kemboge V. The Republic**, Criminal Appeal No. 327 of 2013, CAT (unreported). He further cited Rule 9(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and submit that, applicant was required to prove at balance of probability and that, she did prove as per evidence of DW1, DW5 and DW6 and that, loss was proved according to exhibit D9. He concluded that applicant proved fairness of reason.

Arguing in support of the 5<sup>th</sup> issue, Mr. Okombo submitted that, the arbitrator confused evidence of DW6 especially at line 9 of page 11 of the award by inserting words that were not stated by the witness. He added that, the arbitrator did the same at page 10 line 5 when discussing evidence of DW5.

Arguing the 3<sup>rd</sup> issue, Mr. Okombo submitted that, respondent was not entitled to compensation of TZS 27,944,038/= because he committed misconducts that led applicant to incur loss. He submitted that, out of 241,085,600/= applicant was paid TZS 21,000,000/=only.

Arguing in support of the 2<sup>nd</sup> issue, counsel for the applicant submitted that, procedures were followed. He cited the provisions of section 37(2) of the Employment and Labour Relation Act[Cap. 366 RE. 2019] and submit that, applicant complied with the said provision. He further submitted that, it was an error for the arbitrator to hold that the procedure was followed but there was no reason for termination. Counsel for the applicant strongly submitted that, applicant complied with procedural fairness hence termination was fair procedurally.

On the 6<sup>th</sup> issue, counsel for the applicant submitted that, respondent comitted misconducts as evidenced by termination letter(exhibit D5) and that, in terms of Section 42(3)(a) of Cap. 366 RE. 2019 (supra), severance is not payable if termination is due to misconduct. He added that, respondent was also not entitled to be paid notice pay because termination was fair both substantive and procedurally. Learned counsel summed up his submissions praying that the application be allowed.

Responding to submissions made in relation to the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> issues, Mr. Masaga, learned advocate for the respondent submitted that, there was no valid reason for termination. Counsel for the applicant submitted that, DW5 testified that they do advertise tender and the winner becomes an agent of the applicant, Kilombero and Msolwa respectively. He went on that, in his evidence, respondent(PW1) stated that he obtained the said LPO from DW6 and that, the later received them from Kilombero Cane Growers Association and Msolwa Ujamaa Cane Growers Association. He further submitted that, respondent testified that he is the one who took the said LPO to DW1. Counsel submitted that, DW6 admitted in his evidence that he is the one who gave respondent the LPO in question. He went on that, DW6 did not disown the said LPO because he (DW6) testified that he deposited some money in relation to the LPO in question. Mr. Masaga submitted further that, respondent was not the maker of the said LPO, rather, the maker were Kilombero Cane Growers Association and Msolwa Ujamaa Cane Growers Association who sent the said LPO to the agent (DW6) and the latter took them to the respondent who, finally, handled them to DW1. Counsel for the respondent submitted further that, respondent did not forge the said LPO hence there was no valid reason for termination. He



added that, in the award, the arbitrator did not insert words that were not stated by both DW5 and DW6.

Regarding the 3<sup>rd</sup> and 6<sup>th</sup> issues, learned counsel for the respondent submitted that, the award of TZS 27,944,038/= is reasonable because that is 12 months' salaries. He added that, respondent was properly awarded notice pay and severance pay. He submitted that, the law is clear that, if termination is due to misconduct, notice and severance are not payable. He argued that, in the application at hand, termination was not due to misconduct because applicant did not prove reasons for termination.

Regarding the 2<sup>nd</sup> issue, Mr. Masaga, learned counsel for the respondent submitted that, procedures were not fully complied with, hence termination was unfair procedurally. Learned counsel concluded his submissions praying that the application be dismissed for want of merit.

In brief rejoinder, Mr. Okombo, learned counsel for the applicant submitted that, in his evidence, DW6 did not state that he gave respondent the LPO in question, rather, DW6 denied knowledge of the said LPO.

I have examined evidence of the parties in the CMA record and considered rival submissions in this application. In disposing this

application, I will start with the issue relating to analysis of evidence and validity of reason for termination. As pointed out hereinabove, it was alleged that respondent forged local purchasing orders purporting to show that they were issued by Kilombero Cane Growers Association and Msolwa Ujamaa Cane Growers Association and that, he defrauded the applicant agro-chemical goods value at TZS 241,085,600/= and TZS 99,749,600/= that were deposited in his personal NMB Bank account. Based on those allegations, it was alleged that, respondent occasioned loss to the applicant. I should point out at the outset that, the abovementioned allegations relating to fraud, which is a crime, were supposed to be proved by the applicant at a higher standard than balance of probabilities that is applicable in civil cases but not beyond reasonable doubt that is applicable in criminal cases. See the case of *Bilali Ally Kinguti vs Ahadi Lulela Said & Others* (Civil Appeal No.500 of 2021) [2023] TZCA 17337 (13 June 2023), *Abraham Sykes vs Araf Ally Kleist Sykes* (Civil Appeal No. 226 of 2022) [2024] TZCA 20 (7 February 2024) and *City Coffee Ltd vs Registered Trustee of Iloilo Coffee Group* (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019). In *City Coffee's case*(supra), the Court of Appeal quoted the decision in the case of *Ratilal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314 wherein it was held at page 316 that:-

*"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

The Court of Appeal further quoted its decision in the case of ***Omari Yusuph v. Rahma Ahmed Abdulkadr*** [1987] TLR 169, at 174 as follows:-

*"... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases... the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof..."*

Having quoted the above cited cases, in ***City Coffee' case*** (supra), the Court of Appeal concluded:-

*"In view of the foregoing, it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."*

The issue in this application is whether, applicant proved allegations against the respondent according to the above required standard.

In order to answer the above issue, one needs to know the charges that were levelled against the respondent. It is undisputed by

the parties that, the charge that was served to the respondent that is the based of termination of his employment had four counts or offences as clearly shown in the charge dated 03<sup>rd</sup> November 2021 also 23<sup>rd</sup> November 2021(part of exhibit D3). The said charge reads in part:-

**Offence 1:**

*Forgery of the Local Purchase Order(LPO) belonging to Kilombero Cane Growers Association (KCGA) with an order number 0034 dated 23<sup>d</sup> January 2019 with value of Tshs. 152,986,000/= which may constitute a gross misconduct...*

**Particulars of the Offence:**

*On the 25<sup>th</sup> January 2019 at 08:00am you did place an order for agro-chemical with a value of Tshs 152,986,000/= to your employer through LPO number 0034 for purporting to belong to KCGA.*

**Offence 2:**

*Forgery of the Local Purchasing Order (LPO) belonging to Msolwa Ujamaa Cane Growers Association (MUCGA) with an order number 0045 dated 24<sup>th</sup> May 2019 with a value of Tshs. 100,679,600/= which may constitute a gross misconduct...*

**Particulars of the Offence:**

*On the 25<sup>th</sup> January 2019 at 08:00am you did place an order for agro-chemical with a value of Tshs 152,986,000/= to your employer through LPO number 0034 for purporting to belong to KCGA.*

**Offence 3:**

*Gross dishonest to defraud the employer's agro-chemical goods amounting to the value of Tshs 241,085,600/=...*

**Particulars of the Offence**

*Between 24<sup>th</sup> April 2019 and 28<sup>th</sup> August 2019 being our sales representative, you dishonestly intended to defraud your employers' agro-chemicals goods amount to the value of Tshs. 141,336,000/= and Tshs.*

*99,749,600/=.* You intentionally presented your order through an email and physically collected the said goods along with a registered vehicle number T341 AUX for both orders which amounting to the total of value of Tshs 241,085,600/=.

**Offence 4:**

*Misrepresentation of funds that belong to the employer amounting to the value 99,749,600/= purportedly to be deposited to your personal NMB Bank account...*

**Particulars of the Offence**

*Between 24<sup>th</sup> May 2019 and 29<sup>th</sup> May 2019 being our sales representative, you did receive through your personal NMB Bank account as you dishonestly misrepresented by convincing a sole proprietary Okota Aggrovet, one among your employers' client to deposit the whole amount into the said personal account of yours."*

In the bid to prove those counts, applicant fronted six witnesses namely; Christopher Mhagama(DW1), Delphina Audax(DW2), Uzia Makene Ruhumbika(DW3), Rehema Essau Kamwela(DW4), Paul Barnabas Makunga(DW5) and Medrad Jordan Okota(DW6).

In his evidence while testifying in chief, Christopher Mhagama(DW1) stated that on 25<sup>th</sup> January 2019 he received an email from the respondent together with LPO showing that Kilombero Cane Growers Association requested to be supplied with agro-chemicals valued TZS 141,336,000/=(exhibit D1). That, he received two LPO for Kilombero Cane Growers Association from the respondent through email and that, upon receiving the said LPO, he forwarded it to the Finance

department where an invoice was created and the said agro-chemicals delivered to the client. He also testified that, on 27<sup>th</sup> May 2019, he received an email from the respondent attached with two LPO for Msolwa Ujamaa Cane Growers Association(exhibit D7). DW1 testified also that, he directed Delphina Audax (DW2) to prepare invoice so that the said agro-chemicals can be delivered to the abovementioned Associations. DW1 testified further that, the aforementioned associations did not pay as a result, from 2019 to 2021, applicant was claiming to be paid though, respondent was saying that the two association has promised to pay. He further testified that, he made follow up and conducted investigation in respect of uncollected debt for 2019 as a result, on 19<sup>th</sup> May 2021 while in Morogoro in company of the respondent, they mate Mendrad Okota(DW6) but the latter, according to information he received from Kilombero, was not a leader of Kilombero Cane Growers Association. He added that, in his investigation report(exhibit D2), he concluded that the LPO that were submitted to the applicant were forged and that, for the period in question, Kilombero Cane Growers Association was already dissolved by the government and that, there was no leader. It was further testified by DW1 that he served the respondent with the notice to attend disciplinary hearing (exhibit D3) and that, respondent attended the disciplinary hearing in company of his

lawyer as evidenced by the Disciplinary hearing Form(exhibit D5). While under cross examination, DW1 testified that he not does recall to have served the respondent with investigation report(exhibit D2) and that, he was not aware that respondent was not afforded time to prepare his defence. DW1 stated further that, respondent was served with notice to attend the disciplinary hearing on 5<sup>th</sup> November 2021 while at Morogoro and that, the disciplinary hearing was conducted on 5<sup>th</sup> November 2021. He also admitted that Okota(DW6) was agent of the applicant. DW1 is recorded stating:-

***"...Suala la kuthibitisha fraud na forgery utaletwa na hao wahusika japo ushahidi upo...shahidi anauthibitisho wa forgery ambapo ni kuna purchase order ya Kilombero Cane Growers Association na purchase order ya Msolwa Ujamaa Cane Growers Association hivyo ni hizo documents mbili na mtu mwingine ndiyo atakuja kuthibitisha ila hapa mimi sina hizo nyaraka...suala la kuweka pesa kwenye account ya Okota accountant atakuja kuthibitisha..."***(emphasis is mine).

In re-examination, DW1 stated that, on 3<sup>rd</sup> November 2021 respondent was served with the Notice to attend the disciplinary hearing as per exhibit D3.

In her evidence, Delphina Audax(DW2) stated that, she is the accountant of the applicant. She stated further that, she received email from DW1 attached with LPO for Kilombero Cane Growers and Msolwa Ujamaa Cane Growers Association. She tendered tax invoice, delivery notes and picking up slips as exhibit D8 collectively without objection.

She testified further that, Kilombero Cane Growers and Msolwa Ujamaa Cane Growers Association were supposed to pay a total of TZS 241,085,600/= within three months but they only paid a total of TZS 21,000,000/= and tendered the bank statement as exhibit D9 to prove the said payment. She also stated that, on 29<sup>th</sup> May 2020 Kilombero Cane Growers Association deposited TZS 5,000,000/= and on 15/3/2021 paid TZS 3,000,000/=. She further testified that, (i) on 28<sup>th</sup> May 2020 Msolwa Ujamaa Cane Growers Association paid on TZS 5,000,000/=, (ii) on 22<sup>nd</sup> October 2019 paid TZS 4,000,000/=: (iii) on 24<sup>th</sup> October 2019 paid TZS 2,000,000/= and (iv) on 30<sup>th</sup> October 2019 TZS 2,000,000/=. While under cross examination, she stated that, her duty is to issue invoice but delivery is done by the store keeper.

In her evidence in chief, Uzia Makene Ruhumbika(DW3) testified that, she received invoices from DW2 and sent them to Pierre and that, the latter gave her an invoice for Kilombero Cane Growers Association dated 25<sup>th</sup> January 2019. She also testified that the said Pierre gave an order that she should load the luggage of Kilombero Cane Growers Association into a lorry with Registration No. T 341 AUX. She further stated that, she was told that the said order is of Rashid Mdoka, the respondent. She also stated that, on the said date, she was given only one invoice for Kilombero Cane Growers Associations and that, that is



the only luggage she delivered on that day. In her own words, DW3 is recorded stating:-

*"... Kwenye mgogoro huu ninachokumbuka nilipewa invoice nikapeleka kwa Piere akanipa maelekezo kwamba invoice ya Kilombero cane Growers Association(KCGA) ya tarehe 25/1/2019 kuwa niende kupakia mzigo kuna gari imefika warehouse kwa kutumia hiyo invoice namba ya gari ni T341 AUX ni aina ya Lori. **Niliambiwa hiyo order ni ya mlalamika anayeitwa Rashid Mdoka.** Nilipokea order ya Kampuni ya KCGA tu na nilipopakia nilirudisha funguo kwa Pierre. Kwa hiyo tarehe mzigo uliochukuliwa ulikuwa ni mmoja tu."*

While under cross examination, DW3 stated that, respondent was not at the warehouse at the time of loading the luggage in the said motor vehicle.

Rehema Essau Kamwela(DW4) was very brief in her evidence that, her duty is to prepare debts and issue reports and that, Msolwa Ujamaa Cane Growers Association had a long standing debt. While under cross examinations, DW4 stated that, it was the duty of the respondent to make follow up and ensure that client pays their debts in applicant's account.

In his evidence, Paul Barnabas Makunga(DW5), the accountant of Msolwa Ujamaa Cane Growers stated that, Okota Agrovat was an agent who worn tender to supply agro-chemicals to Msolwa Ujamaa Cane Growers. He testified further that, they were not directly transacting with

the applicant. DW5 disowned Order No. 0045 (exhibit D7) valued at TZS 100,679,600/= on ground that, in 2017 Msolwa Cane Growers was registered as a Cooperative with registration Number MGR 750 and that, it is not an Association. DW5 stated further that, they have not transacted with the respondent. While under cross examination, DW5 admitted that Msolwa Cane Growers was receiving agro-chemicals from Okota(DW6).

In his evidence, Medrad Jordan Okota(DW6) stated that, he supplies agro-chemical to Msolwa Ujamaa Cane Growers because he (DW6) is agent of the said Msolwa Cane Growers. DW6 also stated that, he writes orders to the applicant and the latter supplies the said agro-chemicals and that he(DW6) pays the applicant after two months. DW6 admitted to have communicated with the respondent in relation to agro-chemicals. While under cross examination, DW6 stated *inter-alia* that:-

*"...Arysta anauza mzigu kupitia LPO ambapo chama cha ushirika kinatupatia Okota LPO's sisi ndio tunatoa order Arysta."*

In his evidence Rashid Juma Mdoka (PW1), the respondent, stated *inter-alia* that, his employment was terminated unfairly because Mendrad Okota(DW6) who was the agent of both Kilombero Cane Growers and Msolwa Cane Growers Association failed to collect debts from those associations and pay the applicant. PW1 also testified that, in

a meeting that was held at Msamvu wherein the participants were DW1, DW6 and himself, DW6 admitted to have delayed to effect payment and promised to make follow up and pay. PW1 stated further that, after the said meeting, he was surprised with closeness relationship that developed between DW1 and DW6. He added that, he only became aware of the investigation report while at CMA. In his own words, PW1 is recorded stating:-

*"...Wateja wa mikopo walikuwa wananunua kupitia kwa wakala na wakala alikuwa na makubaliano na kampuni. Mimi utendaji wangu ulikuwa kupitia wakala ambaye anapokea mzigo kufikisha kwa wateja na yeye alikuwa akifuatilia malipo...Mendrad Okota namfahamu alikuwa kama wakala wa kampuni upande wa vyama vya vya ukulima Kilombero ikiwemo KCGA na MUCGA ambavyo vyote vilibadilika jina. Kampuni ilimrecuite yeye kuwa wakala wa hivyo vyama kwa kuwa vyama havikuwa na utaratibu wa kununua moja kwa moja. Baada ya kikao cha mimi, Okota na Muhagama kilichofanyika Msamvu Morogoro, Okota alikiri kuchelewesha malipo na aliahidi kufuatilia madeni ili akamilishe malipo. Baada ya kikao nilishitushwa na ukaribu wa Mhagama na okota ambapo sikuelewa mpaka nilipoletewa mashtaka. Mimi sikuhusishwa kwenye hatua yoyote kwenye reporti hiyo ya uchunguzi na sikujua kama kuna uchunguzi unafanyika nilikuja kuona report mbele ya Tume..."*

It was further evidence of PW1 that, on 18<sup>th</sup> October 2021 he was served with the notice to show cause on the allegation of forgery and obtaining TZS 59,000,000/= . He added that, on 5<sup>th</sup> November 2021 he was served with the notice to attend the disciplinary hearing(exhibit D3)

and that, the notice was less than 48hours. He went on that, DW6 attended the disciplinary hearing but there was no evidence against him(PW1). PW1 testified further that, though there was no evidence, on 11<sup>th</sup> November 2021, applicant terminated his employment contract.

While under cross examination, PW1 maintained that DW6 gave him one LPO for KCGA and MUCGA and sent them through email to DW1 in the normal procedure. PW1 stated further that, he was not aware that KCGA and MUCGA were dissolved because that was the duty of the agent (DW6). PW1 also stated that, during the disciplinary hearing, Mr. Paulo, the representative of MUCGA asked Okota as where did he (DW6) got the said LPO.

I have decided to point out some how in detail evidence of the parties because, in the 1<sup>st</sup> and 5<sup>th</sup> issues raised by the applicant, the arbitrator is criticized based on failure to analyse evidence.

Now the issue is whether, applicant proved the aforementioned allegations against the respondent to the standard explained in the above quoted cases.

Let me start with the 1<sup>st</sup> count or offence of forgery of LPO No. 0034 dated 23<sup>rd</sup> January 2019 belonging to KCGA with value of TZS. 152,986,000/= (exhibit D1). I have examined exhibit D1 and find that, the said exhibit was signed by Daniel Kumwenda who was not called as

a witness for the applicant. In the entire evidence of the applicant it was not stated that Daniel Kumwenda does not exist or that he was not the chairperson of KCGA. I have also read the internal investigation report(exhibit D2) that was conducted by DW1 and find that, DW1 said nothing in relation to existence of the said Daniel Kumwenda before or after KCGA was dissolved. It is my view that, it was the duty of the applicant to bring evidence to that effect and not just to dump the said LPO in the CMA record as exhibit and claim that it was forged by the applicant. More so, evidence by PW1 that he obtained exhibit D1 from DW6 was not challenged because he was not cross examined on that aspect. More so, in his evidence, DW6 said nothing in relation to exhibit D1. It is my view that, since PW1 was not cross examined on that aspect, his evidence is deemed to be true. See the case of [\*Issa Hassani Uki vs Republic\*](#) (Criminal Appeal 129 of 2017) [2018] TZCA 361 (9 May 2018), [\*Paulina Samson Ndawavya vs Theresia Thomasi Madaha\*](#) (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019) and [\*George Maili Kemboge vs Republic\*](#) (Criminal Appeal 327 of 2013) [2014] TZCA 203 (30 October 2014) to mention but a few. I should point out albeit briefly that, it is not a requirement of the law that a party must cross examine a witness to every statement or evidence adduced. In my view, the party can only cross examine the

witness of the opponent for various reasons. One; to lay a foundation for his or her possible defence or his or her case. Two; to discredit evidence of the witness of the opponent. In my view, if a party thinks that cross examination will not advance his or her case or will not discredit evidence of the witness of the opponent or that, the evidence of the witness is immaterial, then, cannot cross examine the witness. The reason and logic is that, cross examination will add nothing. In my view, failure to cross examine a witness will only affect the one who failed to do so if evidence of the said witness is found to be material to the case. In the application at hand, what PW1 stated was material to the case.

I have stated hereinabove that, in his evidence, applicant did not disclose existence or non-existence of Daniel Kumwenda. It is my view that, DW1 who conducted investigation, was duty bound to reveal both in his evidence and in the investigation report(exhibit D2) his findings on existence or otherwise of the said Daniel Kumwenda. Importantly, during cross examination, DW1 stated that, evidence relating to forgery will be adduced by relevant witnesses as quoted hereinabove. Surprisingly, no witness was called to prove forgery of the LPOs in question.

In addition to the foregoing, in the investigation report (exhibit D2), DW1 stated *inter-alia* that:-

*"...On May 26, 2021, after a visit to the two organizations the Chairman of MUSCGA and accountant of KGCA **told me that**, they did not request Rashid to send Pos to Arysta; neither did they purchase products directly from Arysta- Dar es Salaam office."*

I should point out that, possibly there is typing errors in the names that is to say MUSCGA and KGCA because in the entire report the author was referring to MUCGA and KCGA respectively. That aside, in the said report, DW1 did not disclose the name of the chairperson of MUCGA or the name of the accountant of KCGA. In addition to that, those persons were not called as witnesses. The least I can say is that, that is hearsay hence inadmissible.

As pointed herein above, applicant was duty to call the said Daniel Kumwenda and the accountant of KCGA who disowned exhibit D1 to testify on her behalf. Since that was not done, then, the presumption is, the said person does exist and signed exhibit D1 on behalf of KCGA and was not called by the applicant fearing that he will adduce unfavourable evidence to her side.

Not only that but also, in the investigation report(exhibit D2) DW1 stated that, former chairperson of Kilombero Cane Growers Association challenged the authenticity of the LPO that was submitted by the

respondent hence centre of discussion in this application. In fact, in the said investigation report(exhibit D2) DW1 stated inter-alia that:-

*"However, the former chairperson of the association gave the description of the LPO and denied the authenticity of the LPO done by Rashid."*

It was also open to the applicant to call the said former chairperson of Kilombero Cane Growers Association as her witness. Since that was not done, the possibility is that, applicant feared that evidence of the said person will be unpalatable. There is a litany of case laws that, the court can draw adverse inference when the party to the case fails to call a key witness or fails to disclose important information. See the case of [Lazaro Kalonga vs Republic](#) (Criminal Appeal 348 of 2008) [2012] TZCA 201 (7 December 2012), [Bashiri s/o John vs Republic](#) (Criminal Appeal 486 of 2016) [2019] TZCA 89 (16 May 2019), [City Coffee Ltd vs Registered Trustee of Iloilo Coffee Group](#) (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019) and [Hamza Byarushengo vs Fulgencia Manya & 4 Others](#) (Civil Appeal 246 of 2018) [2022] TZCA 833 (12 April 2022). In addition to what I have discussed hereinabove, I draw adverse inference against the applicant and conclude that, applicant did not prove the allegations in the 1<sup>st</sup> count or offence.



Now, on the 2<sup>nd</sup> offence of forgery of LPO No. 0045 dated 24<sup>th</sup> May 2019 belonging to MUCGA with a value of TZS. 100,679,600/= (exhibit D7). I have examined exhibit D7 and find that, it was signed by Sebastian S. Ndege, the chairman of MUCGA. It was only Paul Barnabas Makunga(DW5), the accountant of MUCGA, who was called as a witness by the applicant. In his evidence, DW5 disowned exhibit D7 on ground that, in 2017 Msolwa Ujamaa Cane Growers was registered as a Cooperative. In his evidence, DW5 said nothing in relation to existence or none existence of the said Sebastian Ndege as the chairmain of MUCGA. On top of that, DW5 did not disclose the name of the chairperson of MUCGA. Again, DW1 said nothing in relation to the said Sebastian S. Ndege and did not disclose the name of the chairperson of MUCGA who disowned exhibit D7 in his investigation. In addition to that, DW6 admitted in his evidence that, he was agent of MUCGA but said nothing in relation to exhibit D7 or the person who signed exhibit D7. In my view, what I have held hereinabove in relation to the 1<sup>st</sup> count or offence applies also to the 2<sup>nd</sup> count or offence. In my view, both the 1<sup>st</sup> and 2<sup>nd</sup> counts were not proved.

In the 3<sup>rd</sup> count, it was alleged that, Between 24<sup>th</sup> April 2019 and 28<sup>th</sup> August 2019, through email, respondent presented orders for agro-chemical goods valued at TZS 141,336,000/= and TZS 99,749,600/= all

total valued at TZS 241,085,600/= and physically collected the said agro-chemicals using Motor vehicle with registration No.T. 341 AUX. I have examined evidence of the applicant and find that, this allegation is connected to the 1<sup>st</sup> and 2<sup>nd</sup> allegation explained hereinabove. In addition to what I have explained hereinabove in relation to the 1<sup>st</sup> and 2<sup>nd</sup> counts, I hold that, there is no evidence proving that respondent is the who collected agro-chemicals relating to LPO No. 0034 dated 23<sup>rd</sup> January 2019 belonging to KCGA or LPO No. 0045 dated 24<sup>th</sup> May 2019 belonging to MUCGA. The only evidence available in relation to delivery of the said agro- chemicals is that of Uzia Makene Ruhumbika(DW3) who testified that, she received invoice for KCGA dated 25<sup>th</sup> January 2019 and that, by the order of one Pierre, who was also not called as a witness, she loaded agro-chemicals into a lorry with Registration No. T 341 AUX. DW3 added that, that is the only agro-chemicals she loaded on that day. DW3 further stated that, she was told that the said order is of Rashid Mdoka, the respondent. It is my view that, evidence of DW3 did not prove the charges levelled against the respondent. The least I can say is that, evidence that the said order is of Rashid Mdoka is hearsay, not worth to be considered. I should also point out that, in her evidence, DW3 did not state to have loaded agro-chemicals belonging to

MUCGA. In fact, there is no witness who testified as to when and how the agro-chemicals belonging to MUCGA was delivered.

I have examined Tax invoice No. 008732 dated 27<sup>th</sup> May 2019 for LPO No.0045 for Msolwa Ujamaa Cane Growers Associations showing Agro-chemicals valued at for TZS 99,749,600/= (part of exhibit D8) and I am of the considered opinion that, applicant issued the said invoice to MUCGA. According to evidence of DW3, she is the one who loaded the said into Motor vehicle with registration No. T341 AUX. I have read delivery note No. DEL8764 dated 27<sup>th</sup> May 2019(part of exhibit D8) for agro-chemicals valued at TZS 99,749,600/= and find that, there is no name of the person who received those agro-chemicals. The said delivery note was only signed but, at the place where the name of the person who received, was not filled. Unfortunately, in her evidence, DW3 did not state as to whom she handled the said agro-chemicals. Definetely, it was not the respondent because, during cross examination, DW3 stated that respondent was not at that place.

I have also read tax invoice No. 008572 dated 25<sup>th</sup> January 2019 for agro-chemicals valued at TZS 141,336,000/= for Kilombero Cane Growers Association(also part of exhibit D8) and Delivery Note No. DEL 8604 dated 25<sup>th</sup> January 2019 relating to order No. SO8708 for agro-chemicals valued TZS 141,336,000/= to be delivered to Kilombero cane

Growers Association and find that the said delivery note shows neither the name of the person who received nor signature. I have also read picking slip dated 25<sup>th</sup> January 2019 (also part of exhibit D8) and find that, it was only signed but there is no name of the person who picked the said agro-chemicals.

I have read the whole evidence that was adduced on behalf of the applicant against the respondent and I am of the considered and firm view that, there is no evidence to show, leave alone, to prove that, respondent collected agro-chemicals valued at TZS 241,085,600/= relating to the LPO in question for Kilombero Cane Growers Association and Msolwa Ujamaa Cane Growers Association. More so, there is no evidence that was adduced on behalf of the applicant showing that Motor Vehicle No. T.341 AUX is owned by the respondent. I therefore find that, applicant did not prove allegations in the 3<sup>rd</sup> count or offence as it was termed.

In the 4<sup>th</sup> count or offence as it was termed in the charge, it was alleged that, between 24<sup>th</sup> May 2019 and 29<sup>th</sup> May 2019, being sales representative of the applicant, respondent, by misrepresentation, convinced Okota Aggrovet, one of the applicants client, to deposit TZS 99,749,600/= in respondent's personal NMB Bank account and that, respondent received the said TZS 99,749,600/= in his personal bank

account maintained at NMB. I have read evidence of all witnesses for the applicant and find that, there is no scintilla of evidence to show that Mendrad Okota deposited the said money in the personal bank account of the respondent. It was expected that evidence to come from DW1 and DW6 but they said nothing.

In addition to the foregoing, allegation that the said money was deposited in respondent's personal account or that, respondent forged the said LPO, is self defeating on the applicant's side. I am of that view because, in her evidence, Delphina Audax(DW2) stated that, out of TZS 241,085,600/= that were supposed to be paid by both Kilombero Cane Growers Association and Msolwa Ujamaa Cane Growers based on the aforementioned LPO, only TZS 21,000,000/=was paid. DW2 tendered the bank statement of the applicant (exhibit D9) to prove the amount that was paid. I have read the said bank statement(exhibit D9) of Account No. 01J1030XXXXX maintained at CRDB Bank PLC in the name of Arystal Lifescience(T) Ltd and find that on different dates, both KCGA and MUCGA deposite money in the said account. I have omitted the last five digits of the said bank account to avoid disclosure of the said number to unintended persons who may, illegally, access it and commit illegal activities. I have examined exhibit D9 ad find that it shows that money was being deposited by both KCGA and MUCGA. The issue is how

did respondent forged the said LPO and both KCGA and MUCGA continue to deposit money in applicant's account. I therefore hold that this offence or count was not proved.

As a matter of completeness, I should point out that, the root of the allegations in 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> offence or counts, is in the investigation report(exhibit D2) that was authored by DW1. In fact, in the said investigation report(exhibit D2), DW1 stated *inter-alia* that:-

*"...It is still very difficult to obtain a disclaimer letter from Kilombero Sugarcane Growers Association because the government has already closed it.*

*However, the former chairperson of the association gave the description of the LPO and denied the authenticity of the LPO done by Rashid.*

*It is also established the invoice was created in the office and goods were sent to the warehouse in Kilombero belonging to Mr. Mendrad Okota where Rashid was involved in the sale of the products to customers in Kilombero.*

*I have established that payments from sale of goods deposited into Rashid's accounts. We have two evidence of deposits into Rashid's accounts as follows;*

- On May 20, 2019, Mendrad Okota deposited TZS 30,000,000(Thirty Million Shillings only) into Rashid Mdoka's NMB account (documents available)*
- On May 25, 2019, Mendrad Okota deposited TZS 16,000,000/=(Sixteen Million only) into NMB bank account owned by Rashid Mdoka(document available)*

*There is also evidence from Msolwa Cane Growers Cooperative Society LTD that payments made to Rashid for sales done to organization. The accountant confirmed this during our meeting.*

*Conclusion.*

*Due to the above information the team wish to recommend the following.*

*1. Thanks immediately recover the loss involved from the staff involved in the matter.*

*2. That disciplinary action be taken over the loss occasioned*

*Yours faithfully.*

*Sgd*

*Christopher Mhagama.”*

I have decided to quote at length part of (exhibit D2) to show the root cause of this application. The above quoted part of exhibit D2 tells all.

In his evidence, DW1, apart from tendering the investigation report(exhibit D2), said nothing in relation to the above quoted part of his investigation report. DW1 did not testify that invoices were created in office and that goods were sent in Kilombero in the warehouse owned by Mendrad Okota(DW6) where respondent was involved in selling the said agro-chemicals to customers in Kilombero. Not only that but also, DW1 said nothing in relation to the allegation that on 20<sup>th</sup> May 2019 and 25<sup>th</sup> May 2019, DW6 deposited money in the respondent's personal bank account maintained at NMB. More so, though in exhibit D2, DW1 indicated that documents are available to prove those allegations, the said documents were not tendered. On his part, DW6 did not state that he received the said agro-chemicals in his warehouse at Kilombero and that, respondent sold the same to customers within Kilombero. In

addition to that, DW6 said nothing in relation to depositing money in respondent's personal bank account due to misrepresentation that was done by the respondent.

Again, neither DW1, the author of exhibit D2 nor DW5, the accountant of Msolwa Ujamaa Cane Growers Cooperative Society testified that respondent was paid money by the said Cooperative Society. Under normal circumstances, both DW1 and DW5 were expected to disclose what was discovered in investigation against the respondent but they didn't.

In his evidence, PW1 stated that, initially he was reporting to DW1 but, due to his good performance, in 2019, he was promoted (exhibit P2) and required to report to the Country Director and not to DW1 who was the National Sales Manager. PW1 testified further that, after his promotion, his relationship with DW1 became bad as the latter thought respondent had a hand in his demotion. In his words Respondent(PW1 ) is recorded stating:-

*" Nimefanyakazi kwa mlalamikiwa kwa miaka 7. Nilikuwa kama Afisa mauzo wa kanda utendaji wangu ulikuwa mzuri na niliwahi fikisha mauzo bilion mbili na ilipofika 31/1/2019 nilipandishwa cheo na country director pamoja na mshahara na kunifanya nireport kwa Director moja kwa moja sio tena kwa Christopher Mhagama ambaye alikuwa National Sales manager... baada ya mimi kupandishwa cheo 2019 mahusiano yetu hayakuwa mazuri kwani aliona mimi ndio nilihusika kwa yeye kushushwa*



*cheo. Alitolewa Makao makuu Dar es Salaam na kuwa zonal sales wa Mwanza. Hilo jambo hakufurahishwa nalo na kule kupishana kwa nafasi kunahusika..."*

I should point out that, respondent was never cross examined on that aspect. That evidence is deemed to be true.

For all what I have discussed hereinabove, I hold that applicant did not prove the allegations against the respondent. I therefore, conclude that applicant had no valid reason to terminate employment of the respondent hence termination was unfair for want of reason.

The allegations and evidence of the parties in this application reminds me what Brendon Thutso says in his book titled "***I saw the Devil***" that:-

*"As I grow up, I realize that the devil is someone or something right here on earth, not just a man in hell with horns, a tail, and three eyes. Anything that blocks your road to progress is the devil. Anything and anyone who disrupts your state of well-being is the devil. If you have toxic friends in your circle who always see the worst in you, depress you, demean your self-esteem, cause you to hate yourself, make you feel like you are not good enough, and disrupt your mental state, they are the devil. If you have traits and vices that affect your well-being and mental state, those are the devil. And if you are blocking your own road to progress, you are the devil."*

I have quoted the above quotation not for purposes of determining who is the devil among the parties in the application at hand, rather, as a reminder, as what can block someone's road to progress. That is that.

That aside, let me turn to fairness of procedure as it was submitted by the parties. It was submitted by counsel for the applicant that applicant complied with procedures for termination while counsel for the respondent submitted that applicant did not.

I have examined evidence of the parties and find that, DW1 testified under cross examination that, on 5<sup>th</sup> November 2021, respondent was served with the notice to attend the disciplinary hearing and that, hearing was on the same date. The same evidence was adduced by the respondent in his evidence. In fact, in his evidence, respondent(PW1) stated that he was not afforded sufficient time to prepare his defence. Though in re-examination DW1 stated that respondent was served on 3<sup>rd</sup> November 2021, I hold that respondent was served on 5<sup>th</sup> November 2021. My conclusion is supported by the hearing form (exhibit D4) that reads in part:-

*"4. Date and time which the employee was informed of the hearing:*

*05<sup>th</sup> November 2021 at 14h00hrs*

*5. Date and time of the hearing:*

*05<sup>th</sup> November 2021 at 14h42hrs"*

It is undisputed by the parties that, termination of employment of the respondent was due to the alleged misconduct of forgery. It is clear from exhibit D4 that, respondent was afforded only 42 minutes from the time he was served with the notice to attend disciplinary hearing and

the disciplinary hearing itself within which to prepare his defence. The period of 42 minutes was unreasonable and contrary to the provisions of Rule 13(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 that provides the minimum period of 48 hours.

It was testified by Respondent (PW1) that he was not involved in investigation and that, he saw the investigation report for the first time at the time it was tendered at CMA. This evidence was not disputed by the parties because, even in his evidence, DW1 stated that respondent was not served with the investigation report. Failure to serve the respondent with the investigation report amounted to denial of right to be heard hence unfair termination procedurally. See the case of [Kiboberry Limited vs John van der Voort](#) (Civil Appeal 248 of 2021) [2022] TZCA 620 (7 October 2022).

For the foregoing, I hold that termination was procedurally unfair.

It was submitted by counsel for the applicant that, respondent was not entitled to be awarded TZS 27,944,038/= and further that, respondent was not entitled to be awarded both notice and severance pay because he committed misconducts. With due respect to counsel for the applicant, as discussed hereinabove, applicant did not prove the

misconducts allegedly committed by the respondent. I therefore hold that, the award of TZS 27,944,038/= that includes both notice and severance pay was justified.

The arbitrator is being criticized that at page 10 line 5 and page 11 line 9 of the award she inserted words that were not stated by applicant's witnesses in their evidence. I have read page 10 line 5 of the award and find that the arbitrator stated:-

*"DW5, Paul Barnabas Makunga, while under oath he stated that he is n accountant of MUCGA since 2017 until now..."*

I have read page 11 line 9 of the award and find that when summarising evidence of Mendrad Jordan Okota (DW6) the arbitrator stated:-

*" In doing business, he usually write orders and send to Arysta Life Science to whom he had contract with."*

I have partionately read evidence of DW5 and DW6 and find that, the criticism levelled against the arbitrator are unjustifiable. The least I can say is that, every decision someone makes is subject to criticism whether positive or negative. But, what matters, in my view, is positive criticism. In fact, the Court of Appeal in the case of **Chandrakant Joshubhai Patel vs Republic** [2004] T.L.R. 218 [CA] Tanzlii Media Neutral Citation (Criminal Application 8 of 2002) [2003] TZCA 37 (29 April 2003) had this to say:-

*"...no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism."*

All what I have discussed hereinabove takes me home and dry and dismiss this application for want of merit.

Dated in Dar es Salaam on this 13<sup>th</sup> March 2024.



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

Judgment delivered on this 13<sup>th</sup> March 2024 in chambers in the presence of Felix Okombo, Advocate for the Applicant and Emmanuel Nkoma, Advocate, holding brief of Charles Masaga, Advocate for the Respondent.



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