

TANZANIA / JUDGMENT

JUDGMENT ADAM KITALI

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27 March 2025

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA SUB - REGISTRY AT MBEYA LABOUR REVISION NO. 11026 OF 2024 CASE REFERENCE NO. 202405141000011026 (Originating in Labour Dispute No. CMA/MBY/MBY/ARB.01/2023 of the Commission for Mediation and Arbitration for Mbeya) ADAM PETER KITALI APPLICANT VERSUS SGA SECURITY TANZANIA LIMITED COMPANY RESPONDENT

JUDGMENT

12th February& 27th March 2025 NONGWA, J. From the records, in 2014 the applicant was employed by the respondent as the radio controller, he served on that position until 2020 when was promoted to CIT coordinator. In 2022 was terminated on reason of gross misconduct albeit gross dishonest by preparing forged payment forms which occasioned loss of Tzs. 15,018,000/=. Upon investigation, disciplinary hearing was conducted and the applicant was terminated from employment. Unhappy with termination, the applicant referred a claim of unfair termination, Labour Dispute No. CMA/MBY/MBY/ARB.01/2023 before the Commission for Mediation and Arbitration for Mbeya (CMA). The 1 respondent paraded seven witnesses and fourteen documentary evidence while the applicant was the sole witness. At the conclusion of hearing, the CMA found termination was both for valid reason and followed fair procedure. Aggrieved with the CMA award, the applicant has filed this application for revision made under section 91(1)(a) (b), 2(b)(c) of the Employment and Labour Relation Act [Cap 366 R: E 2019] “the ELRA” and rules 24(1)(2)(a)(b)(c)(d)(e)(f)(3)(a)(b)(c)(d),28(1)(c)(d)(e) of the Labour Court Rules G.N. No. 106 of 2007. The issue for determination is found under paragraph 5 of the applicant’s affidavit that;

1. Whether the respondent had valid reasons to terminate the Applicant from employment.
2. Whether there was fair procedures before terminating the Applicant from employment.
3. Whether the Arbitrator was justified by relaying on exhibit DY3 on ruling against the applicant while the same was not read before the Commission of Mediation and Arbitration. When the application came up for hearing the applicant was under legal representation of Mr. Faraja Msuya, learned counsel whereas for the respondent appeared Mr. Dioniz John Mwasi, also learned counsel. 2 Parties choose to file written submissions in support and against the application. Mr. Msuya started his submission with procedural defects in the

disciplinary and CMA proceedings. He submitted that the applicant was denied opportunity to cross - examine some of witnesses during the disciplinary hearing that is Enock Zimlinda, Catherine Msamelwa, CPL Emmanuel Shayo and other police officers who testified. Counsel said, that was violation of rule 13(5) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. 42 of 2007 (the Code of Good Practice) and supported with the case of Kennedy Malunde Chokala vs Mobisol UK Limited, Lab. Rev. No. 29/2021, High Court at Mbeya) (Unreported). Another procedural area was that the disciplinary hearing was biased as it constitutes some members who had personal interest in the matter and mentioned Adam Shantiwa, who was a co-accused but constituted the board of disciplinary committee. Further submission was that the disciplinary committee terminated the applicant instead of recommending appropriate sanction to the employer. Mr. Msuya went on to submit that the applicant was not supplied with investigation report before he attended the disciplinary hearing. On 3 this cited the case of Higher Education Student's Loan Board vs Yusuf M. Kisare, Consolidated Lab. Rev. No. 755/858 of 2018 (Unreported). He added that the applicant was not afforded chance to mitigate. Submitting on whether there was valid reason for termination, Mr. Msuya stated that the allowance payment form alleged was requested by the applicant was never paid, he referred to evidence of DW3 at page 14 and 15. Further that DW5 denied to know the applicant but Adam Shantiwa who filled escort allowance forms. Another complaint was that no disciplinary action was taken against his co-accused, referring to DW3. Further that there was no proof of forgery of signature and referred to the case of Unilever Tea Tanzania Ltd vs Thomas Okello Atito, Labour Revision No. 256 of 2019 [2020] TZHCLD 439 (16 October 2020; TanzLII). Counsel contended that the amount alleged pocketed by the applicant was not proved through audit report. He argued the applicant did not admit to the offence during disciplinary hearing as alleged and he never signed the allowance forms. That exhibit DY3 was not read after admission. In rebuttal, Mr. Dioniz submitted that after the information of the alleged offence, the investigation was conducted, the applicant served 4 with charge, notice of hearing and attended disciplinary hearing which was in compliance with rule 13 of the Code of Good Practice. Further that the applicant was given opportunity to cross -examine witness and defend himself. Counsel referred the court to exhibit DY8 disciplinary hearing form. In essence counsel said the applicant did not utilize the opportunity to cross - examine. On failure to charge co-accused including Shantiwa, it was submitted that the investigation report did not connect him with any offence. He argued that although the said Adam Shantiwa used to prepare allowance forms only those prepared and signed by the applicant were discovered to be forged ones. On bias of the disciplinary committee, it was submitted that the chairman Antony Kalinga was not the investigator or prosecutor, he just chaired the committee and gave recommendation to Ebeneza Kaale. He contended that applicant was aware of the allegation, had time to prepare and defend himself and accorded right of appeal. On whether investigation report was served to the applicant, counsel referred to evidence of DW2 and DW3 and stated it was supplied to the applicant but was quick to point that non-issuance of the report to the applicant was not fatal bearing that all procedures was 5 followed and the applicant admitted to the offence. He referred to the case of Paschal

Bandiho vs Arusha Urban Water Supply Sewarage Authority (AUWSA), Civil Appeal No. 38402 of 2022

[2023] TZCA 17834 (14 November 2023) and Tanzania Cigarette Public Limited Company vs Msafiri Kibanga, Civil Appeal No. 257 of 2022 [2024] TZCA 800 (22 August 2024; TanzLII). Further that rule 13 of the Code of Good Practice makes it not mandatory to supply investigation report. On whether there was valid reason for termination, Mr. Dionis submitted by referring to evidence of DW1 Ally Mwangata who said was given only 10,000/= out of 40,000/= to which was entitled. DW3 Catherine Msalelwa who said allowance form were issued by the applicant. On selection of charging the co-accused, it was submitted that Gibson Mwaitulo and Adam Bryson were all charged and terminated from employment and their disputes was resolved by the CMA. Further that even DW3 was punished. On proof of the offences, counsel submitted evidence of DW5 was clear that never met the applicant before disciplinary hearing. Further that through investigation report it was proved that Tzs 15,810,000/= 6 are those which the applicant filed forged allowance forms, adding that the applicant admitted to the offence. On proof that signature of police was forged, counsel stated exhibit D9 proved that the signature was forged which was in tandem with what was observed by DW2 during his investigation. On failure to read exhibit DY3, it was submitted the CMA under section 88 of the ELRA is not bound by legal formalities of admission of documents. I have considered rival submissions and record of the CMA, the claim being unfair termination, section 39 of the ELRA requires an employer to prove that the termination of an employee was fair. Termination is considered unfair if the employer fails to prove that: (a) the reason for termination is valid; (b) such reason related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer is fair; and (c) the employment was terminated in accordance with a fair procedure. The standard of proof under rule 9 (3) and (5) of the Code of Good Practice is on balance of probabilities, that the reason was not only fair but sufficiently serious to justify termination. 7 Starting with procedure for terminating employment. When the question arises whether the employer has committed the offence, rule 12(1) of the Code of Good Practice, provides; '12(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;
- (b) if the rule or standard was contravened, whether or not
- (i) it is reasonable; (ii) it is clear and unambiguous; (iii) the employee was aware of it, or could reasonably be expected to have been aware of it; (iv) it has been consistently applied by the employer; and

- (v) termination is an appropriate sanction for contravening it.' The above is clear that there must be rules or standard regulating conduct relating to employment which must meet the test laid under rule 12(1)(b) which forms the basis of the charge against the employee. When the employer has to make decision which sanction be imposed on 8 the employer for the alleged misconduct, then has to comply with rule 13 of the Code of Good Practice, it provides; '13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held;
- (2) where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.
- (3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative of fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.
- (4) The hearing shall be held and finalised within a reasonable time, and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.
- 5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employees shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses if necessary.
- (6) N/A 9
- (7) Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed.' The above provision mandatorily required the employer to conduct investigation on the alleged offence. After investigation, charge the employee by showing the rules or standard contravened and the same be served to the employee to respond within reasonable time. Then the employer has to prepare disciplinary hearing in which has to present evidence proving the allegation and the accused must be given fair hearing including cross - examining witness. In this matter there is no dispute that investigation was conducted per evidence of DW2 and not disputed by the applicant. Further that the applicant was served with hearing notice form. Any disciplinary hearing starts with a chargesheet in which the alleged offence and the rule or standard contravened must specifically be prescribed. I have perused the record of the CMA together with oral evidence by the respondent and found no oral or documentary evidence that the applicant was served with the chargesheet and prepared any response to the charge upon which hearing was conducted. The only available 10 evidence is notice of hearing form, exhibit DY5 which shows the applicant was called to attend the disciplinary hearing and defend of the offence of gross dishonest. However, it is not shown which rule or standard was contravened by the applicant in consonance with rule 12(1) of the Code of Good Practice. Speaking of the importance of charge in labour matter in Magreth Method

Mapunda vs National Museums of Tanzania, Civil Appeal No. 251 of 2019 [2022] TZCA 698 (9 November 2022; TanzLII) the court stated; ‘Charge is a foundation of the disciplinary proceedings whereby an employee must be informed about the nature of the disciplinary offence and the contravened provision so as to enable the employee to prepare his/her defence prior to the hearing and determination of his/her fate. This is embraced under Rule 12 (1) of the Employment and Labour Relations Act (Code of Good Practice) G.N 42 of 6 2007.’ In this matter there was no charge against the applicant. Connecting from the above is the complaint that the applicant was not served with investigation report. Mr. Dioniz was not forthcoming on this, he submitted the applicant was supplied and made a U-turn that it was not fatal. Starting with the requirement to supply the investigation report and argument that rule 13 of Code of Good Practice does not impose requirement of the report to be supplied to the employee. The 11 argument is not supported by law, in the case of Kiboberry Limited vs John van der Voort, Civil Appeal No. 248 of 2021 [2022] TZCA 620 (7 October 2022; TanzLII) in which the court stated; ‘Given the foregoing, we go along with Mr. Njooka that the appellant ought to have conducted and produced an audit report to substantiate the alleged misappropriation. We also find it significant that although, according to the appellant's Human Resources Manager, Magdalena Sabaya (RW1), the appellant, through its director, Erick Costa, conducted a full- fledged investigation into the allegations against the respondent after he was suspended from duty, the said report was never availed to the respondent, nor was it produced at the hearing before the CMA. The report, according to RW1, was the basis of the disciplinary proceedings against the respondent. As we held in Severo Mutegeki (supra), the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity. The tenets of rules of natural justice and fair hearing requires the opposite party to know the nature of the case he is facing and possible evidence against him so as to prepare his defence adequately. In this matter although the applicant was questioned by the investigator, the investigation report was not supplied to him to know the nature of the 12 case he was facing and kind of evidence to be adduced against and make informed defence. The applicant has complained that was not given opportunity to cross - examine witnesses. In reply it was stated he was afforded and relied on exhibit DY8. I have perused exhibit DY8 which shows five witnesses testified for the respondent. My scrutiny of the hearing form supports the submission of Mr. Msuya that the applicant did not cross - examine some witnesses, that is DW1 Enock Zimlinda and DW4 Catherine Msalelwa. Disciplinary hearing form shows only chairman cross

- examined. It is not shown if the applicant was given such opportunity and failed to utilize it. Faced with the same situation in the case of Arthur Mgongo vs KCB Bank Tanzania Limited, Civil Appeal No. 286 of 2021 [2024] TZCA 1205 (16 August 2024; TanzLII) the court stated; ‘Essentially, the purpose of rule 13(5) of the Code of Good Practice is to provide an employee a fair hearing of the allegations raised against him at the Disciplinary Committee. Therefore, if an employee is denied a right to know the substance of the employer's evidence and to examine the employer's witnesses or to go through documentary evidence intended to be

tendered against him, that is a fatal irregularity which vitiates the proceedings towards the termination.’¹³ It is the law that the testimony affecting a party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of cross-examination. In EX-D.8656 CPL Senga s/o Idd Nyembo & Others vs Republic, Criminal Appeal No. 16 of 2018 [2020] TZCA 381 (7 August 2020; TanzLII) it was stated; ‘We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony under oath or affirmation (as the case may be) or not. This right is a fundamental one to any judicial proceedings and thus the denial of it will usually result in the decision in the case being overturned.’ The fact that the applicant did not cross examine some witness it cannot be said the imports of rule 13(5) of the Code of Good Practice was complied with and there was fair hearing. There is also complaint of bias, it has been submitted Adam Shantiwa was a co-accused during investigation but became a member during disciplinary hearing. In reply it was submitted was cleared by the investigation report. Indeed, after going through the disciplinary hearing form exhibit DY8, the committee was constituted of Richard Moshi indicated as the 14 complainant, Weston Mboya and Adam Shantiwa as members. Thus, it is evidence that Richard Moshi was the prosecutor and the judge of his own case. According to the good practice in hearing at the Disciplinary Committee, it is prudent to draw line in pursuing some matters separately so as to avoid biasness and conflict of interests to ensure that the Committee is embraced with the neutral and sober persons who will not be compromised in any way during the proceedings and in reaching the ultimate decision. See Ramadhan Masoud vs Bank of Africa, Civil Appeal No. 345 of 2021 [2024] TZCA 867 (10 September 2024; TanzLII) and (supra). From the submission of Mr. Dioniz, it appears the chairman was Anthony Kalinga though not featuring in exhibit DY8 and it the one who tendered the proceedings of disciplinary hearing which to me is unprocedural. From what I have discussed above, there was no fair hearing on part of the applicant in the disciplinary committee. For purpose of completeness, whether the respondent proved valid reason for termination. Per exhibit D5 the applicant was charges with gross dishonest, mainly that he prepared the forged allowance payment forms. It has been submitted by Mr. Msuya that forgery of signature was not proved. Mr. Dioniz reply was based on exhibit DY9 alleged to be report of proof on forgery of signature.¹⁵ Proof of signature is provided for under sections 47 and 49 of the Evidence Act, Cap 6 that is on admission by the writer or by evidence of a witness or witnesses in whose presence the document was written or signed. Further the signature may be proved by opinion of the handwriting expert, evidence of persons who are familiar with the writing of a person who is said to have written a particular writing. Also, it may be through comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person as provided under section 75 of the Evidence Act. In this matter there was no evidence how it was discovered that the signature of H.1832 PC ABDALLAH MAHUNDA, G.4656 CPL EMMANUEL ERNEST, G.8875 CPL DANIEL NORBART and G.5082 CPL ANDREW KIZITO were forged. Nor there was evidence on expertise in the filed of proving signature, who conducted and by which means and methods. Hence it was not proved that signature of the said police officers was forged.

Regarding allowance forms which is alleged to have been forged, the same was not tendered in evidence by the respondent, let alone relevant to the case are found in the investigation report, however there was no oral evidence connecting it with the offence the applicant was charged. Further the names of police officers appearing in exhibit DY9 that their signature was forged, the amount requested is Tzs 150,000/= and not 15,810,000 alleged by the respondent. Absence of allowance payment forms on which the offence against the applicant was founded, it cannot be said the offence of gross dishonest was proved on balance of probability as required by rule 9(3) of the Code of Good Practice. Flowing from the above, is the argument that the applicant confessed to the offence by relying on exhibit DY3 and DY5. I have gone through exhibit DY3 and DY7 and found the same are not in consonance. For instance, under exhibit DY7 the applicant was charged with gross dishonest but in exhibit DY3 show admitted for making payment outside the laid procedures. The other response was that he made is that he signed forms of police officers, the offence he was not charged. Even assuming so, names of the police officer whose signature was forged were not disclosed in the investigation report or the applicant told, it was only disclosed in the CMA. On those circumstance the argument that the applicant admitted to the offence is not here or there, if that was the case, the respondent should have invoked rule 13(11) of the Code of Good Practice but she did not, hence was obliged to prove the charge before the disciplinary and the CMA that the applicant committed the offences charged. 17 In the light of the above discussion, I find that the termination of the appellant's employment was contrary to the right to fair hearing and not for valid reason. I thus allow the application and quash and set aside the award of the CMA. As to reliefs, the applicant in the CMA F.1 prayed he be paid notice of termination, Tzs 370,000/=:, severance pay for 10 years Tzs 996,153.8, compensation for unfair termination for 24 months Tzs 8,880,000/= general damage Tzs 59,753,847 and clean certificate of service. I have considered circumstance of the case; the applicant was employed on permanent employment but as I have demonstrated was unfairly terminated. I therefore grant the applicant the reliefs he claimed save for general damage which is reduced to Tsh. 20,000,000/=. The amount of TZS 750,000/= awarded by the CMA remain intact. In the premises, I allow that application and order as follows;

1. The applicant be paid the reliefs claimed, that is; Notice of termination Tzs 370,000/=:, Severance pay for 10 years Tzs 996,153.8, Compensation for unfair termination for 24 months Tzs 8,880,000/=:.
2. General damages at Tzs. 20,000,000/=. 18
3. The amount of Tzs 750,000/= awarded by the CMA shall remain intact.
4. In total the applicant be paid Tzs 31,004,153.8/=:
5. Being labour matter, no order for costs. V.M. NONGWA JUDGE 27/3/2025 Dated and Delivered at Mbeya this 27th March 2025 in presence of Mr. Faraja Msuya learned counsel for the applicant (through Virtual court). V.M. NONGWA JUDGE 19

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Prepared on 13 October 2026 · Esheria