

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB - REGISTRY AT
MOSHI LABOUR REVISION NO. 12135 OF 2024 (Arising from Award of Kilimanjaro Commission
for Mediation and Arbitration in Labour Dispute No. CMA/KLM/MOS/ARB/12/2022 dated
17/04/2024) BETWEEN ISDORY KING'ANIRO MTEMISIKA.....APPLICANT AND
THE TRUSTEES OF TANZANIA NATIONAL PARKS.....1ST RESPONDENT THE ATTORNEY
GENERAL2ND RESPONDENT

JUDGMENT

6th Feb. & 17th March 2025 A. P. KILIMI, J.: The applicant ISDORY KING'ANIRO MTEMISIKA was employed by the 1st respondent as a Park Ranger at Tarangire National Park. On 23/2/2012 he was transferred from Tarangire National Park to Kilimanjaro National Park. Six months later on 10/9/2012 he received a letter and a charge informing him that an audit had been done and it was discovered that two years back on 11/10/2010 when he was working at Tarangire National Park he was handed eight (8) elephant tusks by his fellow ranger by the name of John Makuru for the purpose of keeping the same in the armoury but he did not do so. Consequently, he was charged with the offence of maliciously misappropriation of the property of his employer contrary to Rule 89(6) of the TANAPA Staff Regulations G.N. No. 337 of 2011 read together with Rule 12(3)(a) (d) of the Employment and Labour Relations (Code of Good Practice) of 2007. The applicant was later on 03/10/2013 summoned to appear before the disciplinary committee for a hearing on the allegations against him on 17/10/2013. The applicant attended together with his representative. After the hearing he was found guilty and was then issued with a termination letter in which he was informed that his employment was terminated as from 17/10/2013. The applicant exercised his right of appeal but even after the appeal was heard the decision of the disciplinary committee was upheld. Undeterred by the decision the applicant referred the matter to the CMA where he complained of unfair termination of his employment and after the compulsory mediation failed the matter proceeded to arbitration wherein it was ruled that his employment was fairly terminated and proceeded to dismiss the complaint forthwith. Still undaunted, the applicant has preferred this application for revision of the award of the Commission for Mediation and Arbitration 2 (CMA) under section 91 (1) (a) (2) (b) (c), and 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap 366 R.E. 2019 'the ELRA' 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, 2007. ‘The labour rules’ The applicant is praying this Court to revise and set aside an award by Commission for Mediation and Arbitration (CMA) at Moshi in Labour Dispute No. CMA/KLM/MOS/ARB/12/2022 on the ground that the Commission had acted in exercise of its jurisdiction with material irregularity and that there has been an error material to the merit of the case involving injustice. The applicant also prays for this court to grant any other necessary orders deemed fit and just to grant. The application is supported by an affidavit duly sworn by the applicant. On the other hand, the application is opposed by the respondents who have filed a joint counter affidavit sworn by Mr. Richard Patrick Kafwita, the Principal officer of the 1st respondent. At the hearing of this matter, the applicant had the representation of Mr. Evans Robinson Nzowa, learned advocate whereas both respondents were represented by Ms. Khadija Matewele and Ms. Rozina Kway both learned State Attorneys, with the leave of the court the matter was agreed 3 to be disposed by way of written submissions, schedules to that effect were accordingly complied with and their effort is well commended. It was Mr. Nzowa’s submission in challenging the award that the arbitrator erred in law and facts in holding that the respondent had no fair reason to terminate his employment while the allegations against him were never proved. Expounding on this point, he submitted that the applicant received a charge sheet and a letter from his boss the chief Park Warden Kilimanjaro National Park requiring him to submit his explanation on the charged offence but when he requested to be supplied with a copy of the armoury register, was not availed to him. The counsel added that, despite of that based on what is displayed on exhibit T1 there is no doubt that the said 8 tusks were received and put in the armoury. Challenging evidence of respondents’ witness who conducted audit, the counsel submitted that during cross examination the auditor who testified as DW1, was asked as to the period which he conducted the said audit but his answer was that he did not remember. Apart from that he did not even tender the said report or the Armory Register which he claimed that the applicant did not enter the details of the said 8 tusks, thus the counsel was of the view that, failure by the employer to avail the said copy 4 of the Armory register is proof that the allegations against the applicant were fabricated. Faulting the charged offence to the applicant, Mr. Nzowa submitted that according to clause 11 of the hearing form (exhibit T8), the applicant was alleged to have violated Rule 89(6) of TANAPA Staff Regulations G.N. No.337 of 2021 read together with Rule12(3)(a)(d) of the Code of Good Practice GN. No.42/2007. Expounding what is provided in the cited provisions Mr. Nzowa submitted that the charge of dishonesty and gross negligence cannot be committed in a single transaction. He maintained that because dishonesty implies intention on the part of the employee while negligence however gross does not imply intention on the part of the employee. He thus contended that based on the evidence tendered the employer failed to prove the commission of any of the offence be it dishonesty or negligence because according to exhibit T1 the said 8 tusks were put in the Armory. Still protesting the prove of charge against the applicant, it was Mr. Nzowa’s argument that the employer failed to call two important witnesses that is John Makuru and the author of the letter to show cause one Martin T. Loibooki at the disciplinary hearing or at the CMA. He then urged this 5 court to draw adverse inference against the employer. He

substantiated his submission by referring to the case of Hemedi Said vs. Mohamed Mbilu

(1984) TLR. 113. Moreover, still insisting that the termination was unfair, the counsel for applicant argued that the charge against the applicant was differently drafted in different documents. To prove his point Mr. Nzowa referred to exhibit T2, exhibit T6, exhibit T7, exhibit T8 and exhibit T9 which shows different offences drafted against applicant, thus he was of the view the applicant was terminated for allegations he was not summoned to answer before the disciplinary hearing which caused the termination to be substantively unfair. He then concluded that the employer had no fair reasons to terminate the employment of the applicant thus the termination was substantially unfair. In respect to the second ground of revision which was regarding fairness of the procedure, Mr. Nzowa submitted that the respondent tried somehow to follow the fair procedure but she violated some fundamental procedures which rendered the entire process procedurally unfair. Arguing the point, he submitted that the employer did not conduct investigation at all. He argued that it was mandatory under Rule 13(1) of the Code of Good 6 Practice to conduct investigation to ascertain whether there were grounds for hearing to be conducted. The counsel advanced that to prove the same was not conducted; the applicant was never involved or given a copy of the investigation report. He then maintained that failure to conduct an investigation or conducting investigation without involving the employee or failure to avail a copy of investigation report to the employee was fatal and renders the whole exercise invalid, thus renders the termination substantively unfair. To support his assertion above Mr. Nzowa referred to this court to the cases of Kiboberry Limited vs. John Vandervoot Civil Appeal No.248 of 2021 and Knight Support (T) Limited vs. Chrisprinus S. Kaloli Revision No.35 of 2009. (Both unreported). Still on the same point of failure by the employer to conduct investigation, Mr. Nzowa submitted that the omission also violated Rule 82(1) of the Tanzania National Parks Staff Regulations, 2011 G.N. No.337 of 2011 which he said requires for a preliminary investigation to be conducted before instituting disciplinary proceedings against an employee. Attacking the authority of the chairperson of the disciplinary hearing committee, Mr. Nzowa argued that she had no powers to terminate the employment of the applicant as she was not the appointing and disciplinary 7 authority in terms of TANAPA Staff Regulations G.N. No. 337/2011 which stipulates the disciplinary authority. He then urged this court to see that the chairperson of the disciplinary committee had violated Rule 77(b) of the Tanzania National Parks Staff Regulations. Additionally on unfair termination, Mr. Nzowa argued that the employer failed to take action within a reasonable time hence deemed to have waived her right to terminate the employment of the applicant. Expounding his point, the counsel submitted while recalling the dates that the incident if any is alleged to happen on 11/10/2010, the applicant was served with a notice to show cause (exhibit. T2) and a charge sheet (exhibit. T6) on 10/9/2012 almost two years from the date of the incident. Then the applicant was formally charged by a letter dated 3/10/2013 (exhibit. T7), this was again a year from the date he was served with a notice to show cause on 10/9/2012. Thus, the counsel maintained that this was against the Code of Good practice which requires for a hearing to be held and

finalized within a reasonable time. To bolster his point the learned counsel referred the case of Tanzania Ports Authority vs. Dr. Maimuna Mrisha Rev. No. 454 of 2015. 8 Lastly, it was Mr. Nzowa's conclusion that the termination was procedurally unfair and prayed for this court to re-instate the applicant but since the applicant has already attained the retirement age, he prayed for monetary reinstatement up to the date the applicant attained the retirement age. Responding to the above submission Ms. Khadija Matewele, learned state Attorney submitted that; the applicant had failed to show the errors committed by the arbitrator, so she supported the award issued by the arbitrator. Contending on the first ground of revision that the arbitrator erred in law and facts in holding that the respondents had no fair reason to terminate the applicant, Ms. Matewele submitted that the arbitrator was right in law and facts in holding that there was a fair reason. Explaining her reasons she stated that the applicant was terminated for misappropriating eight (8) Elephant Tusks which was in contravention of Rule 89(6) of the National Parks Staff Regulations, Government Notice No.337 of 2011 read together with Rule 12(3)(a)(d) of the Employment and Labour Relations Act(Code of Good Practice), GN. No. 42 of 2007 which provides for 9 Dishonesty and Negligence as offences which may constitute serious misconduct and lead to termination of an employee. Justifying her contention above, Ms. Matewele argued that in his submission the applicant has not been able to point out the errors on the face of record rather he narrated the story as if he was in the trial tribunal. She went on submitting that the reason was proved to be fair by the respondent's witnesses (DW1) and (DW2) who proved through exhibit T1 which was a part of a ledger book showing clearly how the applicant received the eight elephant tusks from John Makuru and both of them signed. The learned State Attorney further argued that the ledger book contained clear expressions of how the applicant came to keep the eight tusks from John Makuru property which he failed to account for its whereabouts. It was thus her submission that the evidence proved not only fairness of the reason but also the validity of the allegation that the applicant committed a gross misconduct worth for termination from service. Expounding the above assertion, the learned State Attorney submitted that the 1st respondent did prove through exhibit T1 that the last time the tusks were seen in possession of the applicant, but was never seen in the store. She argued that there is a difference between what was written and what was exactly seen physically. The learned State Attorney conceded that it was true that it was written the 8 tusks were put in the store but it was also physically proven not to be kept there and that amounted to the offence. She further submitted that by admitting to have been given the 8 tusks and being the last person in possession and later the tusks were not seen, there was no other person to be held responsible. In respect to the issue of failure by the respondent witness (DW1) to bring Armory Register as evidence, it was Ms. Matewele's submission that every party to a case has a right to bring the evidence that thinks will bring weight in his testimony and that DW1 did tender the documents which are T1, T2, T3 and T4 which he thought connects the allegations against the applicant to commit the offence. Traversing the issue raised by the applicant's counsel on the offence charged, the learned State Attorney contended that in that regard the applicant has raised new facts which were not issues

discussed at the CMA. This is none rather than the offence that the applicant was charged with did not fall under the ambit of Rule 89(6) of the TANAPA Staff Regulations. She argued that the applicant ought to have raised this issue before the 11 CMA. But further the learned state Attorney continued that the issue was not true because the offence charged was “Kujitwalia mali ya Mwajiri kwa makusudi” and that the rule provides for a situation, “where an employee misuses or misappropriate funds, resources or wilfully damages...” Therefore, since the applicant did misappropriate the resources which were the 8 tusks entrusted to him and later not found, she said this amounted to gross misconduct as per the rule. She thus argued that this ground lacks merit because the charges were read and understood by the applicant. With regards to the issue of Negligence and dishonesty being in the same charge, it was Ms. Matewele’s submission that the two offences of negligence and dishonest can be seen together in one person as was also seen by the arbitrator. She contended that the South African case referred by the applicant disputing the fact was distinguishable and not binding to our courts. Responding to the second ground as to whether the arbitrator erred in law and fact in holding that the respondent had complied and followed a fair procedure in terminating the employment of the applicant. Ms. Matewele submitted that she is in agreement with the arbitrator that the employer did follow fair procedures. She clarified that the procedure that 12 applicant was given charges in Swahili language on 4/9/2012 (exhibit T6); She said the charge contained details of the offence alleged to have been committed; the applicant was given more than 48 hours to prepare for hearing which was conducted on 17/10/2013; before the disciplinary hearing the applicant was summoned in advance on 3/10/2013 as per exhibit T7; That the applicant responded to the summons and he was represented by Taru Nusura Mohamed as per exhibit T8; Then after the hearing the chairperson found the applicant guilty of the charged offence and he was also given a right of appeal which was exercised by the applicant by filing hearing form No. II as per exhibit T4. Reacting on the issue as to the authority of the chairperson of the committee to terminate the employment of the applicant, Ms. Matewele submitted that the chairperson had the authority and so termination was fair. Responding to the issue of time that was taken by the employer to take action after discovering the offence, it was her submission that time varies from case to case. She argued that reasonable time depends on the nature of the offence and that in this case the investigation was arduous and that is why it took some time to complete. She further argued that 13 each matter ought to be dealt with in their peculiar circumstances that is why no specific time has been fixed except applying reasonable time. Thus, she was of the view that all the cited cases by the applicant’s counsel were distinguishable from the present case. Lastly addressing on prayer by the applicant regarding monetary reinstatement, Ms. Matewele submitted that by the time the applicant was testifying before the CMA he was 62 years old hence already attained the retirement age. She therefore argued that the prayer by the applicant was overtaken by events and thus unmaintainable in law. Further, she submitted that the monetary reinstatement was a new prayer which was never sought at the CMA and a remedy which is not provided under the labour law. Arguing her point she stated that it is well known that reliefs not specifically

pleaded and proved in the CMA cannot be granted at revisional stage. She supported her argument with the cases of Magnus K. Lauren vs. Tanzania Breweries Limited, Civil Appeal No. 25 of 2018

[2021] TZCA 578 and Jordan University College vs, Mark Ambrose, Civil Appeal No. 267 of 2020 [2024] TZCA 433. Nonetheless, she concluded her submission by praying this court to uphold the CMA decision and dismiss the application for want of merit. 14 Rejoining to the above, Mr. Nzowa reiterated his submission in chief and added briefly that exhibit T1 was very clear that the said 8 tusks were measured and given numbers and were put in the armoury but the 1st respondent did not bring any evidence to show that the 8 tusks were not put into the armoury. He further submitted that the Armory register is the only document which could have shown whether the said 8 tusks were put in the Armory or not and the same is in the custody of the 1st respondent. Taking regard that the applicant had requested to be availed with a copy of the said register but was never given and the respondent did not even bother to tender it at the CMA. He then concluded by responding regarding the prayer for reinstatement that it is not a new prayer thus, he maintained the applicant be reinstated monetary until the date of retirement. Having passed through the records of the CMA, affidavits and submissions for and against the application, I find the major issue need to be answered is whether this application for revision deserves to be granted. Now, in answering that I am called to review the CMA Award to see if there is any irregularity leading to errors material to the merits of this case involving injustice. Since the applicant complained of unfair termination, I will be examining the award in line with the claim raised by 15 the applicant and applicable law which provides for two important aspects as provided for under section 37(2)(a)(b)(c) of the ELRA which are first, the validity and fairness of reasons for the termination, and second fairness of the procedure of applicant's termination. After my entirely scanning of the proceedings, affidavits and submissions made, I have made the following observations in respect to the first issue as to whether there was a fair reason for termination. When determining this issue, the Arbitrator referred to the fact that the applicant was handed over the alleged 8 tusks and the fact that the applicant was the one who was entrusted with the duty to keep all the trophies in the armoury and was handed to him for such purpose. Then Learned Arbitrator reasoned at page 10 of the award that since the applicant received them in order to keep in the armoury but failed to do his duty, which led to the loss of the said properties of his employer. For easy reference, I reproduce it hereunder: "Kama mtunza ghala, mlalamikaji alikuwa na wajibu wa kutunza mali zote anazo kabadhiwa kw a ajili ya kuingizw a kw enye ghala alilo kabadhiw a na m w ajiri w ak e lak ini alishindw a kutim iza w ajibu w ake hali iliyo 16 pelekea upotevu wa mali na hasara kwa mlalamikiwa wa kwanza." [Emphasis supplied] Then learned Arbitrator went on observing that since the applicant did not deny to have received his employer's property and also did not prove where the said property was kept, and taking regard the same were not found at the only place where they were supposed to be kept under his watch, hence it was her finding that the reason for termination was valid. In my view in accordance to the evidence and rival

submissions recorded above, it is common ground that the applicant was accused of misappropriating the property of his employer which is 8 elephant tusks which were handed over to him by virtue of being an armoury keeper. For purpose of clarity, I find apposite to quote the particulars of the charge which was drafted in Swahili language available on exhibit T6; “ Bw. Isdory Mtemsika, Askari Daraja la I akiwa askari mtunza ghala la silaha na nyara (bohari) katika Hifadhi ya Taifa Tarangire na ambaye alikua na wajibu wa kutoa, kupokea na kuhifadhi silaha na nyara katika ghala hilo, mnamo tarehe 11/10/2010 majira ya saa 3:30 17 asubuhi alikabidhiwa jumla ya meno manane

- (8) ya tembo na askari mwenzake aitwaye John Makuru, mali ya mwajiri wake kwa ajili ya kuhifadhi katika ghala la silaha na nyara lakini yeye hakuyaingiza m eno hayo katika ghala hilo na hadi tarehe ya hati hii ya mashtaka meno hayo hayajaonekana na hivyo kumsababishia hasara mwajiri wake.” [Emphasis supplied] Now, based on the evidence above the misconduct alleged was misappropriation of employer’s property that is the 8 elephant tusks which was handed over to him for purposes of keeping the same in the armoury. To prove the alleged misconduct the employer who is the 1st respondent in this court had witnesses, the first being Christopher Frank Mtibili, the Internal Auditor who testified as DW1 and the second one was Peter Nyerere Matitu the human resource and administrative officer who testified as DW2. According to DW1 being an internal auditor his testimony as recorded on page 12 of the CMA proceedings on the second paragraph was to the effect that he conducted an audit at Tarangire National Park in which, it was discovered that the applicant was handed eight (8) Elephant tusks by 18 one Mr. John Makuru his colleague. That they did not see where the applicant handed the said tusks or if he did put them in the armory. However, to prove the same DW1 tendered a handing over ledger (exhibit T1) and before tendering he showed the learned Arbitrator, the date of handing over, who handed to applicant and their signature. Also, for purpose of reference I find appropriate to reproduce the said part in exhibit T1; “11/10/2010 M ENO YOTE M ANANE YAM EI NGI ZW A K ATI K A STOO YA AM AR I NA K UP I M W A NA K UP OK ELEW A NA CPL - I. MTEMI 11/10/2010 Mimi John Makuru nimekabidhi CPL - I Mtemisika meno manane (8) ya tembo ambayo yalikuwa kwenye paa ya nyumba ya stoo kwa ajili ya kuyakausha, Mimi nikiwa mlinzi wa mchana nakabidhi kwa mtunza stoo ili aw eze kuyaingiza ndani ya stoo na tayari yam eshapim w a uzito na kupew a nam ba. Sahihi ya Mpokeaji signed 09:30 AM Sahihi ya Mkabidhi signed 09:30 AM” [Emphasis supplied] 19 However, when you look keenly the above exhibit T1 immediately before the above wording of handing over, the said ledger shows Corum which shows date, items handed, amount, signature of the person handing over, signature of the receiver, time of handing over, signature of the receiver and then the time of receiving. According to the said Corum it shows that on the same date of 11/10/2010 they received inter alia 8 elephant tusks and both John Makuru and applicant signed. I have considered the above evidence, apparently the applicant is not disputing in respect to the said tusks being handed to him, however the document speaks itself that the same were put into the store as said by the applicant that; after being handed over by the said John Makuru, they both measured, registered them and

put into the armoury as T1 depicts above. Without prejudice of the above finding that the said tusks were put into the armoury, there was a point to be considered which was subject to discussion above, and this is availability of armoury register which proves that those tusks were registered in the said armoury. It is undisputed that the first respondent is the custodian of the said ledger/register, he did not tender it at the CMA, according to CMA 20 proceedings at page 15 when DW1 was asked about the said registered he had this to say and I quote what transpired at page 15; “Swali: umesema kuna ledger nyingine iko wapi hiyo? Jibu: ofisini Swali: Hukuona umuhimu wa kuleta? Jibu: Niliwasilisha kwenye ofisi ya Tume Arusha. Swali: Hukuona umuhimu wa kuleta hapa? Jibu: Sifahamu.” The applicant in his defence insisted that the same was important to be tendered in court, and his effort to be availed of the copy failed despite of twice request, the applicant at page 32 of the CMA typed proceedings tendered his letter requested for the said ledger which was not objected by the respondents and admitted as M2. I have considered that the applicant at the time he charged was more than two years already passed, also by then he was already transferred to another duty station, obvious as a human being he cannot recall each and everything, moreover being transferred to another station was not able to access information from the said register, thus in my view the said register was important to refresh his memory. Therefore, as said since the first respondent was a custodian and did not supply to him, I am of considered 21 view the same amounted to denial of fair hearing hence breached Constitutional Right provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which read as follows; - “When the right and duties of any person are being determine by the court or any other agency the person shall be entitled to a fair hearing” According to the deduction of the above article of the Constitution, the fact that the said register was neither availed to the applicant nor the first respondent did not say the same was not available or not in existence in his custody. I am settled that the appellant was denied a fair trial, hence the appellant was prejudiced. As alluded above, the applicant in his defence did not deny having been handed over the said 8 Elephant tusks by Mr. John Makuru rather he acknowledged the fact and added that after being handed over the same, each tusk was measured and then were given specific numbers and then put in the armoury. After examining the above evidence, I constrained to agree with the learned counsel for the applicant that this was important witness to be called. Now the question which follow to which part was necessary 22 witness? To my view was necessary for both parties. But in respect to the respondents the fact his evidence appears in exhibit T1, despite the fact exhibit T1 speaks as to where those tusks were kept, this witness could have informed the CMA where he left the said tusks after handing over, was it inside the armoury or outside. Therefore, since is trite law that failure to bring a material witness entitles the court to draw adverse inference. In view thereof I hold adverse inference against the respondents. It is trite law that failure to bring a material witness entitles the court to draw adverse inference on part of the respondents Besides the above scanty evidence, the audit report which discovered the alleged misconduct was also not brought as evidence during the arbitration proceedings to prove what DW1 did as a professional Auditor, it is true that the said report was not refuted by applicant when orally said by DW1, but I think the said report

if had it been tendered could have answered questions such as who were interrogated, which documents were inspected and whether applicant or one John Makuru were interrogated, taking regard all these were not said by DW1 in his testimony. 23 I am mindful that, who alleges must prove, but in labour law the employer in proving that there was fair procedure of terminating his employee, is not required to prove the acts or conducts of the employee which led to the breach of his duty as charged beyond reasonable doubt but only under the test of the balance of probabilities as stated in the Employment and Labour Relations (Code of Good Practice) GN. 42/2007, Rule 9 (3), (see also Section 112 of the Evidence Act (Cap 6 R.E 2022)). For analysis depicted above, the applicant stated that the said 8 tusks were received by him and put in the armoury as indicated in the respondent's exhibit T1. Therefore, in the absence of any other tangible evidence from the respondents which contradicted it or evidence to show that the same was taken by the applicant from the armoury or caused negligent to be taken by any person, taking regard usually the armoury is a place severely protected by guards. And in regard that neither evidence tendered to the contrary nor evidence showing that applicant worked as exhibit keeper at the same time as the guard of said armoury or evidence to show that he was only armoury keeper and nobody was allowed to do such a duty. In my considered view of the above endeavoured cannot make the applicant responsible as alleged by the first respondent. 24 It is an established principle that, if termination of employment by employer is not based on a valid reasons and fair procedure, in law, it is unfair termination as provided under Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004, this provision provide as follows; "37(2) - a termination of employment by an employer is unfair if the employer fails to prove:-

- (a) That the reason for the termination is valid;
- (b) that the reason is a fair reason:-
 - (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer" [Emphasis is mine] The import and tenure of the above wording of the law requires employers to terminate employees only with a valid reason and not from the employers' wishes. It is important to note that the above provision of giving reason is backed up by international law under Article 4 of the 25 International Labour Organization (ILO) Convention on Termination of Employment No. 158 of 1982 which provides; "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" (See also *Maleza Security Services Ltd. Vs. Samson Andrew and Paul Makwinya* [2013] LCCD 3. Back to the reasons advanced by the CMA above and the reasons advanced by both Disciplinary committee and Appellate body when related for the foregoing analysis of evidence endeavoured, I cannot uphold their reasons, since the allegation that applicant failed to exercise his duty which led to the loss of first respondents' properties was never proved. Thus, the reason advanced by CMA and Disciplinary Committee was not valid. Having

observed as above I am settled the first ground is answered in affirmative. The next point which was subject to discussion in the limb of failure to follow fair procedures in terminating the applicant from employment. In this respect the applicant has complained of basically three requisites 26 which flawed the procedure, the first is to the effect that the 1st respondent did not conducting investigation contrary to rule 13(1) of the Code, second is that the hearing was not conducted within reasonable time and third is the authority of the chairperson of the disciplinary committee to terminate applicant's employment. According to rule 13 of the Employment and Labour Relation (Code of Good Practice) Rules, GN 42 of 2007 provide very clear the procedure for termination of employment. The first sub-rule in this Rule requires the employer to conduct an investigation to ascertain whether there are grounds to charge the employee, the said sub-rule states; "The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held." Moreover, the same requirement of the law is also reflected under Rule 82(1) of the Tanzania National Parks Staff Regulations, 2011 G.N. No. 337 of 2011, this rule provides; "82-(1) Where it is necessary to institute disciplinary proceedings against an employee, the Disciplinary Authority shall make 27 preliminary investigation before instituting the disciplinary proceedings" When deciding on this issue the arbitrator in her decision at page 11 relied on exhibit T8 which was a Hearing Form and also referred at item 9 where she said it was indicated therein that Mr. Christopher Mtibili (DW1) did carry out an audit in which the misappropriation of the trophies was discovered and that the applicant did not object that evidence. Hence, she found the issue to lack merit. In my view I think despite it was not objected, the issue is whether the investigation was conducted as the law provides above. As alluded above the said disciplinary hearing was prompted by auditing report conducted by DW1, however the said report which discovered the alleged misconduct was not tendered as evidence at CMA to prove the testimony of DW1 on how he conducted it. As I said above the same could have shown who were interrogated, which documents were inspected and whether applicant or one John Makuru were interrogated. Nonetheless, the said alleged misconduct is said to have been committed on 11/10/2010 however since there is no record of the said audit report tendered in evidence; it is not clear on when exactly was the 28 audit carried out. Even when DW1 was asked about when was the audit done during the hearing of the matter at the CMA as seen on page 15 of the typed proceedings, he responded that he did not remember but it was either in 2011 or 2012. Thus, in the circumstance it was not proved as to the time when the alleged misconduct was discovered in absence of the audit report. Moreover, as alluded above, no evidence that in the said report the said DW1 who made it interrogated the applicant to know where the alleged tusks were kept by him as armoury keeper, also no evidence that the said audit report was availed to the applicant to know what was detailed therein against him. Thus, the mere testimony of DW1 without proof of document of that report to show the findings and how it was reached cannot prove that the investigation was properly conducted. Therefore, in my considered as rightly said by the applicant counsel the failure above renders improper investigation to charge the applicant, consequently I hold the procedure was flawed and hence renders termination of the applicant unfair (See Fredrick Mizambwa vs Tanzania Ports Authority, (supra) and

Kiboberry Limited vs John Vandervoort (supra), Tanalec Limited vs Gilbert Alfred Sagali 29 (Revision Application 124 of 2021) [2022] TZHC 14770 (TANZLII) and Tbp Bank Plc vs Poster Mahaba (Consolidated Labour Revision No. 324 of

2021) [2022] TZHC 716 (TANZLII) to mention a few. Another point which was raised and discussed above is the time taken to prosecute the applicant, the applicant alleged that was contrary to the provision of rule 13 (4) which entails that the hearing shall be held and finalized within a reasonable time. It is undisputed that the alleged misconduct was done on 11/10/2010, the applicant was served with a notice to show cause (exhibit. T2) and a charge sheet (exhibit. T6) on 10/9/2012 which was almost two years. Also as rightly argued by Mr. Nzowa the applicant was formally charged by a letter dated 3/10/2013 (exhibit. T7), this was again a year from the date he was served with a notice to show cause on 10/9/2012. As rightly said by Ms. Matewele, I also agree with her that the issue of reasonable time depends on investigation which depends on the circumstances and nature of the offence, thus it is true that each matter ought to be dealt with in its peculiar circumstances. But in my view since the investigation was completed on 10/9/2012 and the applicant supplied with notice to show cause and charge sheet, in my view the time from then 30 to the date of knowing the charge and the date of hearing as depicted in exhibit T7 and T8 cannot make the first respondent remain absolute, thus the said time spent I hold was not reasonable. I am saying this because I think the intention of enacting the said provision is to stop quickly unscrupulous employees to continue working as employees in order to avoid further sabotage to their employer if they have bad conduct. From what I have discussed above, I find suffice for disposal of this matter, therefore for other remaining point raised in my view has been rendered redundant and inconsequential. Thus, it is now my finding that the applicant was unfairly terminated after the respondent failed to prove that there was a valid reason and also failed to observe the mandatory procedure of fair termination as depicted above. In the premises, I find the application at hand has merit. Consequently, the CMA's award should be quashed and set aside. The final issue to be settled after deciding as above is what relief the applicant is entitled to. Since it is my finding above that the termination of applicant was unfair both substantively and procedurally. I have considered CMA Form No. 1 filed by the applicant at CMA the relief sought by the applicant is to be reinstated without affecting employment benefit. Thus, 31 upon the above finding of unfair termination the remedies available are stipulated under section 40 of the ELRA. Which provides that:- "40 (1) if an Arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer: -

- (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
- (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

- (c) to pay compensation to the employee of not less than twelve months' remuneration.”
- Arguing on support of the relief sought, the applicant’s counsel prayed re-instatement should be affected from the date of termination and therefore since the applicant has attained the age of retirement, he should be paid his remuneration from the date of termination until he attained the age of 60 years in terms of monetary reinstatement. Refuting on the above prayer, Ms. Matewele submitted that by the time the applicant was testifying before the CMA he was 62 years old 32 hence already attained the retirement age. She therefore argued that the prayer by the applicant was overtaken by events and thus unmaintainable in law. Further, she submitted that the monetary reinstatement was a new prayer which was never sought at the CMA and a remedy which is not provided under the labour law. Further she insisted that it is well known that reliefs not specifically pleaded and proved in the CMA cannot be granted at revisional stage. She supported her argument with the cases of Magnus K. Lauren vs. Tanzania Breweries Limited, Civil Appeal No. 25 of 2018 [2021] TZCA 578 and Jordan University College vs, Mark Ambrose, Civil Appeal No. 267 of 2020 [2024] TZCA 433. I am in agreement with the contention by the respondents’ Attorney that since the applicant was aged 62 years old when he testified at CMA obvious, he knew that he cannot be reinstated at that age, however the definition of reinstatement as provided by the section 4 of ELRA is very clear and for easy of reference I quote; “Re- instatement means that the contract of employment has revived with all its incidents and that the employee is entitled to all his rights during the period of absence from actual service.” 33 [Emphasis supplied] According to the Applicant Termination Letter (exhibit T9) which was tendered by DW2 at CMA, evidenced that applicant was terminated from employment on 17/10/2013 being a Park Ranger Grade One. Therefore, in my interpretation of the above provision, the fact that the applicant was not yet attained the age of retirement according to the law, which is obvious. Then the applicant is entitled to all his rights as employee in service from the above said date of termination until when he attained retirement age as per his employment tenure structure. Thus, I order the same be paid to the applicant accordingly. For the foregoing reasons and in considering my finding above, I proceed to find this application for revision meritorious and is hereby allowed. As said above the CMA decision and orders are hereby quashed and set aside. It is so ordered. DATED at MOSHI this day of 17th March 2025 34 X JUDGE Signed by: A. P. KILIMI Court; Ruling delivered this 17th day of March, 2025 in the presence of Ms. Hadija Matewele Learned State Attorney for all Respondents and Applicant present in person. Sgd; A. P. KILIMI JUDGE 17/03/2025 Court: Right of Appeal duly explained. Sgd; A. P. KILIMI JUDGE 17/03/2025 35

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