

TANZANIA / JUDGMENT

SBC TANZANIA LIMITED VERSUS MALLYA RULING

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IN THE HIGH COURT OF TANZANIA DODOMA SUB- REGISTRY AT DODOMA LABOUR REVISION
NO. 14927 OF 2024 (Arising from Labour Disputed No. CMA/DOM/DOM/42/2023/01/ 2024)
BETWEEN SBC TANZANIA LTDAPPLICANT VERSUS
PRISCUS VICENT MALLYA.....RESPONDENT

RULING

Date of last order: 31/10/ 2024 Date of the Ruling: 28/11/ 2024 LONGOPA, J.: This is revision application originating from Labour Dispute No. CMA/DOM/DOM/42/2023/01/2024 before the Commission of Mediation and Arbitration of Dodoma at Dodoma (“CMA or the Commission”). The Respondent was an employee of the Applicant, SBC TANZANIA LIMITED as Customer Representative (CR) and finally was promoted to the position of Area Sales Manager for unspecified period commencing on 15.09.2007 to the date of termination. The Respondent’s employment was terminated by 1|Page the Applicant basing on gross negligence and dishonest after he was found guilty of the allegations tabled before him. The Notice of Application and Chamber Summons are prefaced under sections 91 (1) (a) and 91(2) (c), 94 (1)(i) of the Employment and Labour Relations Act, 2004, Rules 24(1),24(2)(a),(b),(c),(d),(e),(f),24(3)(a),(b),(c) and (d),28(1),(c, d, e) of the Labour Court Rules, 2007 (GN No.106 of

2007) whereas the applicant is praying for call of records of the CMA of Dodoma at Dodoma from dispute no. CMA/DOM/DOM/42/2023/01/2024 so that the award dated 17th day of May 2024 be revised and set aside by issuing the following orders, namely: First, an order quashing and setting aside the CMA’s order declaring that termination of employment of the Respondent from service of the Applicant was unfairly terminated and replacing the same with an order that termination was fair; Second, an order quashing and setting aside the CMA’s orders which ordered the Applicant to pay the respondent money at TZS. 29,566,006/= . It is the orders of the Commission for Mediation and Arbitration (CMA) that aggrieved the applicant hence preferring an application for revision on 25 th June 2024. 2|Page The applicant enjoyed the legal services of Ditrick Mwesigwa, learned advocate from VK &Company Advocates while the respondent enjoyed the services of Mr. Godwin Ngongi, learned advocate. The revision was disposed by written submissions to which both parties complied with scheduling orders. According to the applicant, the application for revision

has been supported by an affidavit of John Aloyce Lekule, the Human Resource Manager of the applicant whose contents were adopted to form part of the submission. It was stated that the Respondent's employment was terminated by the applicant basing on gross negligence and dishonest after using Peter Malale- the Customer representative's account and withdrew money without any authorization from the applicant. The respondent also entered and operated Peter Malale's account while on annual leave and caused loss of TZS 1,800,000/=. He also took cash from his subordinate Haruna Salehe without justifiable reasons. All these acts were contrary to rule 16(6)(6) of SBC Tanzania Limited Staff Hand Book which was admitted as Exhibit D1. 3|Page Further, it was argued that the applicant proved that the respondent had committed gross negligence and dishonest after conducting a fair hearing. It was submitted that the respondent was terminated as required under section 37(2)(a)(b) and (c) of the Employment and Labour Relations Act, 2004 that the termination of respondent had valid reason and fair procedure was adhered to. According to the applicant's affidavit there are three legal issues for determination: First, whether in circumstance where reasons for determination are stated by the employer and evidence was led to prove the said decision, it was proper in law for the CMA to conclude that there is no valid reasons for termination with giving reasons why the stated reasons are not valid. Second, whether Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules 2007 must be observed in check list fashion by the employer. Third, whether non-giving the employee an opportunity put forward mitigating factors before a decision is made entitles an employee 12 months' salary. 4|Page On the first ground, the applicant is complaining that it was improper for the CMA to conclude that there was no valid reason for termination of the respondent without giving reasons as to why reached such conclusion. It was alluded that the applicant presented plausible evidence through DW1, DW2 and DW3, together with exhibits admitted as D1, and D6 in the CMA's records. In short, the trial Arbitrator neither analyzed nor evaluated the evidence tabled by the Applicant during the hearing of this dispute. The applicant summed up that on page 6 of the Award the Commission recorded and acknowledged the evidence of the Applicant through DW1, DW2 AND DW3 as follows: DW1-JOHN LEKULE, informed the Commission that the reason for termination of the Respondent's employment was cause of loss of the Applicant company and taking money from the co-workers who were under his supervision. DW1 went on to inform the Commission that the loss caused was 16,000,000/= DW1-further tendered exhibit D3 which is an explanation letter. It was further stated that DW2- Peter MALALE, testified that his account while on annual leave was operated by the Respondent and causing a loss of 1,800,000/=. Also, DW3-Haruna Salehe informed the 5|Page Commission the Respondent forcefully took 200,000/= from him because he sold the products outside his agreed area. It was appellant's view that the Commission went on to state on record that vide PW1- the Respondent acknowledged to have been terminated on the reasons that caused loss of 1,800,000/= and taking 200,000/= as fine of selling outside the DW3' area of sales-reference is made to the 1st paragraph of page 5 of the award. Thus, according to the applicant, with all that evidence on record, it was improper for the trial arbitrator specifically at page 8 of the Commission's Award to

decided that the applicant had no valid reason to terminate the Respondent. It was the applicant's submission that the respondent breached the Applicant's Regulations, namely Regulation 16(6)(6) contained in the SBC Tanzania Limited Staff Hand Book which was admitted as exhibit "D2" which is *pari materia* with rule 12(3)(a) and (d) of G.N. No. 42/2007. Thus the acts of the Respondent using the accounts of Customer Representative (CR) Peter Malale-DW2 while Peter Malale was on annual leave without his knowledge caused loss of TZS.1,800,000/=. Again, the Respondent took 6|Page cash of TZS 200,000/= from his subordinate Haruna Salehe-DW3 without justifiable reasons. The Respondent being the Area Sales Manager was duty bound to act in good faith towards the employer. In the case of TPB Bank Plc vs Justin Stephen Nandonde, Revision No. 830 of 2019 HCTZ-at Dar es Salaam (Unreported), the Court at pp.7-9 held that gross negligence and gross dishonest amounts to misconduct which justifies termination. The court emphasized that at page 7 the Court observed that: "it was held that therefore in view of the foregone there was gross negligence of the Respondent employee as evidence in in record shows and hence a misconduct. There was breach of the Bank rule as shown in Human Resource Policy in the Human Resource Manual of the applicant 2009 and also breach of the common law because ...in common law the employee must act in good faith towards the employer. An employee who is guilty of misconduct breaches the common law duty to act in good faith towards the employer." The Court also in page 8 reiterated that: "No doubt that gross dishonest under the Code of Good Practice GN 42 of 2007, Gross dishonest is provided under Rule 12(3)(a) of the Code(supra) as misconduct, which 7|Page justifies termination. As such, at page 9 the Court concluded that the evidence available at CMA proceedings proves that respondent misconducted in terms of Exhibit 5. Therefore, there was sufficient reason to warrant termination. It is the applicant's firm view that the finding by the arbitrator that there was no reason to terminate the respondent is not right. As such, it was argued that the answer to the first issue as to reason for termination by the Commission has no legal justification since the evidence of DW1, DW2, DW3, PW1 and exhibit D3 were not disputed by any witness including the Respondent never disputed on the reason for termination. It is our submission that the Applicant complied with section 37(2)(a), (b)(i), (ii) of the Employment and Relations Act, 2004. It is under this legal issue the arbitrator did not give reasons for departing from the evidence placed on record hence reaching to unfair decision on the side of the applicant. The applicant was of the view that the reason for termination was valid. With regard to the second issue, the applicant submitted that it subscribes to the principle of law that termination of employee must be fair 8|Page in terms of section 37 (2) of the Employment and Labour Relations Act,

2004. The applicant reiterated that in the instant case the termination of the respondent was fair both substantively and procedurally. The guidelines/checklist listed under rule 13 of Employment and Labour Relations (Code of Conduct of Good Practice) Rules, 2007, G.N 42/2007 gives an optional to the employer to dispense with requirement depending on the circumstance of each case. What is required is rules of natural justice. The applicant cited Rule 13(11) of G.N 42/2007 which provides that "In exceptional circumstances, if employer

cannot reasonably be expected to comply with these guidelines, the employer may dispense with them.” It was reiterated that at page 8 of the Award, it is on record that the respondent was given show cause letter which was admitted as Exhibit D3 and reply within 48 hours. The Respondent was invited to the disciplinary committee for hearing, the invitation letter was admitted as exhibit D4, the respondent was finally heard and explained right of appeal. Thus, it was therefore not right for the respondent to state that he was not given an opportunity to defend himself and opportunity to mitigate. The respondent 9 | Page was given all the opportunity to a fair hearing even during disciplinary hearing as evidenced by exhibit-D5. The applicant reiterated that the current legal position that the requirements envisaged under Rule 13 of G.N 42/2007 that they should not be taken as a checklist fashion rather to ensure the process to adhere to a fair hearing was emphasized in the case of Mantra Tanzania Limited vs Daniel Kisoka, Revision No.267 of 2019, HC Labour at DSM (Unreported) at pp.7-8 the court held as follows: “What is important is not application of the Code in the checklist fashion, rather to ensure the process used adhere to the basic of fair hearing in the labour context depending on the circumstances 7 of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 12(11) of the Code.” Also, in the case of Metal Products Ltd Vs. Mohamed Mwerangi & 7 Others, Revision No. 148/2008 (Unreported) Madam Rweyemamu, J. (as she then was) pointed out that the various stages itemized under Section 38 are not meant to be applied in a check list fashion. That means 10 | P a g e the procedures provided under Rule 13 of GN 42/2007 are not to be followed on a checklist fashion, the employer may depart from some of the procedures depending on the circumstances of each case. Therefore, basing on that position, this court finds that the applicant adhered to the principles of fair hearing. The Court thus departed from the Arbitrators finding that the procedures for terminating the respondent were unfair. The applicant concluded this issue by restating that it was not proper for the honourable arbitrator to order compensation to the respondent basing on the fact that the respondent was not given an opportunity for mitigation. On the third issue, it was submitted that CMA erred to order compensation to the respondent all of his entitlements simply relying on the fact that he was not given an opportunity for mitigation. The respondent’s salary was TZS 1,723,805 per month as per exhibit D7. If one computes TZS. 1,723,805 x 12 months is equal to TZS. 20,685,660 but CMA stated that 12 months’ salary is TZS 29,566,006/= 11 | P a g e The guidelines/checklist listed under rule 13 of GN 42/2007 gives an optional to the employer to dispense with requirement depending on the circumstance of each case. What is required is rules of natural justice. The applicant stated that it is very aware that Rule 13(7) of GN 42/2007 requires when the employee is found guilty of an offence be given an opportunity to mitigate. However, the rules have given an avenue to the Employer in certain circumstances to dispense application of the said procedures in a checklist fashion as per rule 13(11) of GN 42/2007. The claim of non-giving the employee an opportunity to mitigate amounts to procedural irregularity but does not invalidate the guiltiness of the employee and does not invalidate the fact that the employee was fairly terminated in terms of a valid reason as per section 37(2)(a)(b) of the ELRA,

2004. The applicant cited the principle in the case of Mohamed Shaban Chiguru and Sayona Drinking Limited, Labour Revision No. 63 of 2022 HCTZ at MWANZA (Unreported) p.24 held as follows: “Since the Applicant was fairly terminated in terms of a valid reason and unfairly terminated in terms of procedure the applicant cannot be paid the full 12 | P a g e amount of his unexpired term of contract because he committed a serious misconduct” It was applicant’s submission that the applicant has demonstrated that there was a valid reason for termination and the issue of non- mitigating has no legal repercussion as the respondent was given all possible opportunities for fair hearing-representation, show cause letter and disciplinary hearing. It was the applicant’s prayer that this honourable Court be pleased to call for records for the Commission for Mediation and Arbitration of Dodoma in Dispute No. CMA/DOM/42/2023/01/2024 revise the same and make the following orders that: one, an order quashing and setting aside the CMA’S order declaring that termination of employment of the Respondent from the service of the Applicant was unfairly replacing the same with an order that termination was fair; two, an order quashing and setting aside the CMA’s orders which ordered the Applicant to pay the Respondent money TZS. 29,566,008/=; and any other relief that appears just and appropriate to grant in favour of the applicant. 13 | P a g e On the other hand, it was submitted for the respondent that in respect of allegation that the respondent contravened Rule 16(6) (6) of the SBC Tanzania Limited Staff Handbook (Exhibit D.1.) by using Peter Malale’s account and withdrew the money causing loss of TZS 1,800,000/=, this allegation was no substantiated before CMA despite the applicant having such duty to prove. It is on that account CMA found that termination was unfair. Further, on the first issue regarding whether in circumstances CMA was entitled to conclude that there were no valid reasons for termination, it was argued that CMA was proper to conclude that there was no valid reasons for termination of the respondent. The respondent referred this Court to page 9 of the CMA Award where the Arbitrator stated that “ni wazi kuwa hakukuwa na uchunguzi wa makosa zaidi ya hasara ya wauzaji ambapo zilipelekea kuandikwa barua ya makosa mlalamikaji, pia katika Kielelezo D5 na D4 (Hearing Form and Invitation letter) bado zinaeleza kuwa makosa ya mlalamikaji Kutokana na kutajwa na Peter na Haruna siyo uchunguzi ambapo mlalamikaji alikuwa akituhumiwa nazo.” 14 | P a g e It is reiterated that CMA reached into conclusion that the respondent was terminated without valid reasons basing on weak evidence adduced by the applicant which failed to prove the allegations against the respondent. Thus, according to respondent CMA critically evaluated and analysed evidence tabled by the applicant before CMA and found that there was no proof of the respondent committing gross misconduct. There was no proof before the CMA that respondent did enter, use Peter Mlale’s account and withdrew the money without authorization causing loss of TZS 1,800,000/=. No evidence to that effect was tendered in CMA. According to respondent despite the SBC Tanzania Limited Staff Handbook being tendered in the CMA, the applicant did not prove by way of evidence that respondent breached the contents of the said regulation. The respondent distinguished the principle in TPB Bank PLC vs Justin Stephen Nandonde’s case as in that case the respondent admitted the charges he was facing and the evidence led was sufficient to prove charge of gross

misconduct which meant that the charges were proved. However, in the instant case the applicant failed to prove the charge of gross misconduct against the respondent. 15 | P a g e

The respondent reiterated that during the hearing of the witnesses before the CMA all the witnesses were cross- examined. It was in that cross examination, DW 1 stated categorically that there was nothing to substantiate on the use of account that caused loss. DW 1 stated that he only knew about the respondent having committed the gross negligence as he heard from Peter Malale that his account has loss. Further, DW 1 stated that no investigation was not conducted to establish the commission of disciplinary offence by the respondent. Thus, the respondent argued that CMA was correct to find out that there were no valid reasons for the respondent to be terminated from employment. In respect of the second issue, the respondent stated that Rule 13(11) of GN No 42/ 2007 requires that exceptional circumstances must be explained to the employee by the employer as it is not automatically that employer may dispense with the same without assigning reasons for not complying with the requirements. It was argued that given the applicant's conduct to issue a letter to show cause (Exhibit D3), an invitation letter (Exhibit D4) and finally hearing meant that the applicant opted to comply with guidelines as per the requirement of the law. 16 | P a g e

The respondent objected that the respondent was not terminated fairly both substantively and procedurally as there were no valid reasons to terminate the respondent and that the applicant skipped investigation of the charges and prepare the investigation report of charges for which the respondent faced. DW 1, HR Manager categorically testified that there was no investigation report was prepared thus the applicant violated mandatory provisions hence rendering the termination invalid. The respondent cited the principle in *Novati Rupia vs Tanzania Zambia Railway Authority*, Revision 786 of 2018 (Unreported), where the High Court of Tanzania at Dar es Salaam at pages 8-9 held: In the same vein I fully agree with applicant representative that the procedure in terminating the applicant's employment violated the provisions under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No 42/ 2007. The relevant rule provides for mandatory requirement for the employer to conduct proper investigation lack of which renders the whole proceedings invalid. In this matter the arbitrator relied on evidence of DW 1 and DW 2 who testified for the respondent. There is no any evidence which probed 17 | P a g e that investigation was conducted and its report was tabled before the disciplinary committee and the CMA for consideration....” The respondent distinguished the principle in *Mantra Tanzania Limited versus Daniel Kisoka* on opting out some procedures as the applicant never informed the CMA on those exceptional circumstances that rendered failure to adhere to Rule 13(11) of the GN 42 of 2007. According to the respondent there was no fair hearing as the respondent would have given formidable defence is he knew the basis of the charges from the disciplinary investigation report. At this juncture, the respondent cited a principle in the case of *Geita Gold Mining Company Limited versus Eunice Mgore*, Labour Revision No 39 of 2021 (TANZLII) High Court at page 20 noted that: “it is manifest from the foregoing discussion that it is the investigation report which is the basis of the foundation of the charge levelled against the respondent who was subjected to the disciplinary hearing without getting

ample opportunity to go through the report and prepare her defence during the disciplinary hearing.” 18 | P a g e According to the respondent was not afforded the right to be heard as enshrined in Article 13 of the Constitution of the United Republic of Tanzania and it is against the requirements of labour laws in Tanzania. The respondent cited Finca Microfinance Bank Limited versus Jilala Hussein, Labour Revision No 28234 of 2024, High Court of Tanzania at Dodoma; and Anthony Masanga versus Penina (Mama Mgesi) and another (Civil Appeal 11 of 2014) [2015] TZCA 556 (18 March 2015) TANZLII. On the last issue, the respondent stated that the Hon Arbitrator was correct to find out that termination was invalid for lack of valid reason and procedural unfairness. The amount awarded by the CMA Arbitrator, according to the respondent, was correct as per provisions of Section 40(1)

- (c) of the Employment and Labour Relations Act, 2004 thus this application for revision has no merits. Having heard the parties in detailed manner, I have dispassionately considered the rival submissions of the parties, the notice of application and the chamber summons and available records from the Commission for 19 | P a g e Mediation and Arbitration (CMA) both the Award and proceedings to find out the validity of the application or otherwise. Out of the three legal issues raised by the applicant for determination by this Court relate to two main aspects. First, the validity of the reason for termination which caters for the first issue. Second, the procedure for termination, its validity and effect thereof. It caters for 2nd and 3rd legal

issues.

The first and foremost aspect to be addressed is the right to fair hearing which appear to be the foundational aspect in this application. It is a settled constitutional principle that fair hearing is fundamental right within the constitutional and legal frameworks of the United Republic of Tanzania. The right to fair hearing is founded within the provisions of Article 13(6)(a) of the Constitution of United Republic of Tanzania, Cap 2 R.E. 2002 provides for the right to fair hearing. It states that: 20 | P a g e

- (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:
- (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned. Generally speaking, the right to fair hearing entails three main aspects. First, no one should condemned unheard. Second, none should be a judge in his own cause. Third, the right to reason for the decision. In the M.B. Business Limited vs Amos David Kasanda & Others (Civil Application No.429/17 of 2019) [2023] TZCA 17405 (13 July 2023) (TANZLII), at pages 7-9, the Court of Appeal stated that: It is a well-established principle of natural justice that before any decision is reached parties should be accorded a right to be heard unless provided otherwise by the law. 21 | P a g e It is further a well-established principle of law that any

decision reached in contravention of the basic right to be heard cannot be left to stand even if the same decision would be reached had the party been heard. Further, in *Elia Kasalile & Others vs The Institute of Social Work* (Civil Appeal 145 of 2016) [2018] TZCA 364 (4 April 2018) (TANZLII), the Court of Appeal at page 25 and 29 stated that: Even in this case, the respondent's termination of the appellants' employment without giving them the opportunity of being heard, violated the Constitutional right on principles of natural justice, therefore, it was void and of no effect. We find that the suit involved all the 21 appellants; and that since the appellants were not charged and heard before being terminated from their employment, it is obvious that the respondent violated the cardinal principle of right to be heard. Consequently, the appellants' termination was void and of no effect. 22 | P a g e

Fair hearing in context of termination of employment should be demonstrated at all the time prior to issuance of termination letter, and in case of challenging the termination of employment, the reason must be demonstrated before the Commission for Mediation and Arbitration that such valid reason existed and was proved at the time decision to terminate the employment was made. Fairness of the reason caters for the main part of the fair termination in the sense that it is expected that employer would only terminate employment of employees whose acts or omissions are so serious to warrant termination of employment. It is not expected that petty offences would lead to termination of employment as it is associated with the constitutional right to work and right to fair remuneration. Termination of employment has effect of negatively impairing the person's ability to livelihood thus interfering with contractual relationship between the parties. This was a principle in *STANBIC Bank T. Limited vs Iddi Halfani* (Civil Appeal No.139 of 2021) [2023] TZCA 17496 (11 August 2023) (TANZLII), at page 27, the Court expounded that: 23 | P a g e It is trite law as re-echoed in *MAHMUD v BANK OF CREDIT AND COMMERCE INTERNATIONAL SA*

- (1998) AC 20 that an employment contract is subject to an implied term that the employer may not, without reasonable and proper cause, conduct himself/herself in a manner likely to destroy or seriously damage the relationship of confidence and trust between them. This common law position is in line with the ILO Convention No. 158 of 1982 which was domesticated through Sub - Part E of Part III to the ELRA. The same provides that the employment of a worker shall not be terminated unless there is a valid reason, and that the worker shall not be terminated on misconduct or non-performance before he is provided an opportunity to defend himself against the allegations. It is on that reason Rule 12(3) (a) to (d) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No 42 of 2007 envisages. It lists some of the acts amounting to disciplinary offences 24 | P a g e capable of attracting termination of employment. These include: (a) gross dishonesty; (b) willful damage to property; (c) willful endangering the safety of others; (d) gross negligence; (e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer. In the instant application, the respondent was charged of gross negligence and lack of trustworthy/ dishonest. It is lucid that generally the basis of termination falls within the reasons that ordinarily attract termination of employment. The respondent stood charged for the offences of gross

negligence and lack of trustworthy/ gross dishonest. Under the law, the reasons if proved are capable of warranting termination of employment. It is on record that there is important documentary evidence which might have bearing to the valid reasons for termination and procedure. First, Exhibit D.3 which is the Letter to Show Cause dated 9th October 2023 that invited the respondent to explain the issues that respondent was mentioned by two CRs that parts of their shortages have been caused by the respondent. Second, Exhibit D 4 which is the Invitation into Disciplinary 25 | P a g e Hearing to be held on 18th November 2023 in Morogoro dated 15th November 2023. Three main allegations were raised namely: being mentioned by CR Peter Malale on the use of his account occasioning loss of TZS 1,800,000/=; mentioned by Haruna Salehe that TZS 200,000/= was taken from him as penalty for selling in urban market; and increased trend of shortages in Dodoma urban and sub urban market whereas several CRs ran with cash. Third, Exhibit D 5 is the Hearing Form dated 18th November

2023. Exhibit D 5 summarizes all the proceedings in the disciplinary hearing. A critical review of the record indicates that Exhibit D 6 which is the Termination of Employment Contract states that the respondent pleaded guilty to gross negligence allegation and gross dishonest whereas the Disciplinary Committee found the employee guilty on the allegations of gross negligence as well as dishonest based on the evidence and testimonies tendered before it. This appears to be overstatement without any credible and reliable supporting evidence. 26 | P a g e Presence of valid reason is critical in substantiating existence of fair reason for termination of employment. To establish validity of termination of respondent's employment, it is crucial to find out from available records if the same was proved before termination of employment. Two main documents i.e. documentary exhibits can shed light, namely the termination of employment contract (Exhibit D 6), and the Hearing Form (Exhibit D5). It is on record that termination of employment contract (Exhibit D6) states the respondent was pleaded guilty and Disciplinary Committee finding that respondent was guilty. It is expected that Exhibit D5 would reveal the existence of proof that such gross negligence and dishonest. Exhibit D 5 reveals that Disciplinary Hearing was conducted on 18/11/
2024. First, allegations were three: being mention by CR Peter Malale having caused loss of TZS 1.8 million; being mention by CR Haruna of taking TZS 200,000/= when caught selling at urban markets; and the increased shortages in Dodoma including Customer representatives (CRs) running with cash. Second, Exhibit D5 provides that respondent did not accept all the allegations. Third, in summary of evidence and main points 27 | P a g e of evidence is silent on witnesses who testified in favour of the employer. Fourth, despite no witnesses being called and no evidence tendered, the Disciplinary Committee concluded that gross negligence and dishonest was committed. In totality, Exhibit D5 does not explicitly or implicitly reveal that the respondent admitted to any of the allegations. Furthermore, of all the exhibits tendered there is nothing from the respondent indicating that he confessed or admitted to have committed the disciplinary offence. It is settled view of this court that in the circumstances, there was no disciplinary hearing in the ordinary

meaning of hearing. Paragraph 6 of the Hearing Form (Exhibit D5) requires that the Disciplinary Hearing Committee should summarize evidence and main points of evidence including the names and designation of witnesses giving evidence. There was none of the persons allegedly mentioned the respondent appeared before the Committee to substantiate the allegations. In the circumstances, no evidence regarding reason for disciplinary action was adduced. Indeed, the respondent was never availed opportunity to meet and question the witnesses of the applicant as none appeared and the record is conspicuously silent on appearance of the witnesses. 28 | P a g e It is this court's finding that the Disciplinary Hearing as reflected in Exhibit D.5 was a mere sham. It appears that the applicant had made decision already to terminate the employment of the respondent without hearing him. The reason for this finding is simple as in absence of witnesses, there is no way could the Disciplinary Committee find guilty of the respondent. The allegations ought to have been proved by evidence. At page 10 of the CMA proceedings, DW 1 stated that "pia mashahidi waliitwa na walithibitisha mbele yake akiwemo aliyechukuliwa kiasi cha shilingi laki mbili (Shs. 200,000/=) na Peter Malale ambaye akaunti yake ilitumika. Na baada ya kusikiliza mashahidi Kamati ilipendekeza kusitisha ajira yake kwa kukosa uaminifu." Exhibit D5 was tendered to substantiate the assertion made by DW 1 before the Commission for Mediation and Arbitration. It should be stated at this juncture that contents of Exhibit D 5 do not support oral testimony of DW 1. Hearing means the parties are availed opportunities to bring witnesses and documentary evidence to prove their case, the opponent party is availed opportunity to cross-examine each of those witnesses, that 29 | P a g e party is given opportunity to present its evidence against the allegation before a decision is arrived. Testimonies of DW 2 (Peter Michael Malale) on pages 20-25 of the proceedings and that of DW 3 (Salehe Yusuph) on pages 26-28 are conspicuously silent to have appeared before the Disciplinary Committee as witnesses of the employer against the respondent. It means therefore that they were never called to appear before the Disciplinary Committee to substantiate the allegations against the respondent. Further, there is no document whatsoever of all tendered Exhibits that have an iota of indication that the respondent pleaded guilty to the allegations/ disciplinary charges. There was no hearing in actual meaning of hearing as no witnesses nor documentary evidences were tendered, the respondent was not availed opportunity to cross examine, the respondent was not availed to call witnesses nor defend himself, and the Committee did not avail opportunity to the respondent to put forward mitigation prior to the proposed penalty being imposed. 30 | P a g e The guidance on validity of reason can be sourced from the principle in the case of Tanzania Cigarette Public Limited Company vs Msafiri Kibanga (Civil Appeal No. 257 of 2022) [2024] TZCA 800 (22 August 2024), at page 29 the Court observed criteria that: Looked closely, to determine the fairness of termination by misconduct, Rule 12(2), (3) (a) to (f) of the Code of Good Practice requires the Employer or Arbitrator or Judge, as the case may be, to consider first, whether or not the employee contravened a rule or standard regulating conduct relating to employment. Secondly, to consider whether the employee was aware of that rule or standard. Thirdly, as the case may be, the employer, Arbitrator, or Judge should determine whether termination is an

appropriate sanction. Fourthly, Rule 12 (3) lists acts or misconducts that justify termination, which include gross dishonesty. 31 | P a g e It is safe at this juncture to state that having considered the evidence on record including the Disciplinary Hearing From (Exhibit D 5), there is no evidence that allegations against the respondent were proved by any tangible and cogent evidence. Thus, there was no valid reason for termination of the employment of respondent's evidence as termination was based on unproved allegations. It is a settled that suspicious however it is does not establish guilty of the accused. For instance, in the case of Adinardi Iddy Salim & Another vs Republic (Criminal Appeal No. 298 of 2018) [2022] TZCA 9 (11 February 2022), at page 24, the Court of Appeal stated that: It is settled law that suspicion however strong is not enough to find the accused guilty of an offence charged. Instead, suspicion entitles an accused to an acquittal, on a benefit of doubt. The termination of the respondent's employment was therefore without valid reasons as there was no proof of the allegations levelled 32 | P a g e against the respondent before the Disciplinary Committee Hearing. It was only based on allegations that were not proved. The Arbitrator having analysed all necessary parameters in pages 6-8 of the Award arrived to a correct legal position that there was no valid reason for termination of respondent's employment. I concur that was the correct finding based on the law and available evidence. The first legal issue therefore on complaint against the finding of CMA that there was no valid reason for termination collapses for lack of merits. On the procedural fairness and effect thereof cater for both the 2nd and 3rd ground of revision. It is the law of this jurisdiction that termination must be fair procedurally. Where a valid reason for termination exist, the employer should ensure that he adheres to procedural requirements. Among others, for a procedure to be valid and fair, it must be demonstrated that there was strict adherence to the contents of Rule 13 of the Employment and Labour Relations (Code of Good of Practice) Rules, GN No 42/2007. For ease of reference the relevant provision pertinent to 33 | P a g e answer the matter before this Court is hereby quoted in verbatim. It states that: 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. 34 | P a g e

- (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
- (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 provisions require the following aspects to be adhered to: First, there must be an investigation to warrant hearing to be conducted. Second, the employee should be informed properly and, in a language well understood to that employee. Third, employee should be afforded reasonable time to prepare for the hearing of the disciplinary charges. Fourth, hearing should be done within reasonable time. Fifth, evidence should be tendered in the disciplinary hearing and opportunity to challenge 35 | P a g e such evidence should be availed to the employee in form of cross examination. Sixth, the where the employee is found culpable of the offence, he should be afforded opportunity to put up mitigation before the proposed penalty is imposed/recommended. In the instant application, there was no investigation conducted to establish the reason for conducting a disciplinary hearing against the respondent. Also, there was no proper hearing as no witnesses were called to testify, the respondent was not afforded opportunity to cross examine and no documentary evidence was tendered. Further, the applicant failed to afford opportunity to the respondent to put up mitigation before the decision was made. All these violations of the procedural requirements guiding the disciplinary hearing is clear indication that procedural fairness of the termination was not observed. The evidence of DW 1 indicates there was no evidence before the Tribunal nor at Disciplinary Hearing on the investigation report. There is no evidence that witnesses were called. Further, there was no evidence that respondent failed to supervise other employees under his supervision, no 36 | P a g e evidence that he was negligent to occasion alleged loss of TZS 16,000,000/=. Indeed, DW 1 admitted that there is no evidence that respondent was at any time given the SBC Staff Handbook that it was alleged he violated. Moreover, DW 1 stated that respondent was not afforded opportunity to mitigate before the proposed sentence of termination of employment was recommended. Neither of DW 1, DW 2 or DW 3 proved before CMA that there existed any reasons whatsoever to dispense with the requirements of the law on procedural requirements. It is the opinion of this court that all these procedural requirements are there to ensure that there is fair hearing of the employee before adverse decision is imposed on that employee. Thus, none observation of the procedural requirements reflects there was no procedural fairness in termination of the employment of the respondent. The procedural violation was so fundamental that it is finding of this court that there was nothing cogent and tangible to warrant noncompliance with procedural requirement. It is this Court's determination that determine the second legal issue in affirmative that the aspects covered in Rule 13 must be strictly observed. 37 | P a g e The principle in the case of Ramadhan Masoud vs Bank of Africa (Civil Appeal No. 345 of 2021) [2024] TZCA 867 (10 September 2024) (TANZLII), at pages 12-13, the Court stated that: Since

the present matter relates to termination due to misconducts, the relevant provisions of the Code are rules 8, 9, 12 and 13. This Court has had an opportunity in the cases of *National Microfinance Bank v. Victor Modest Banda* (Civil Appeal No. 29 of 2018) [2020] 7ZCA 35 (26 February 2020; TANZLII); *National Microfinance Bank v. Leila Mringo and Others* (Civil Appeal No. 30 of

- 2018) [2020] T7CA 240 (20 May 2020; TANZLII); and *Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)* (Civil Appeal No. 343 of 2019) [2020] TZCA 310 (19 June 2020; TANZLII) to consider the provisions of the above Code in relation to the duty of an employer to comply with fair procedures for terminating an employee for misconducts. We stand guided by the settled position of 38 | P a g e the law emerging from the above cases whilst mindful of section 57 of the Labour Institutions Act, Act [Cap. 300 R.E. 2019] as interpreted by this Court in, among others, the case of *CGM Tanzania Ltd v. Justine Baruti*, Civil Appeal No. 23 of 2020 (Civil Appeal No.23 of 2020) [2021] TZCA 256 (15 June 2021; TANZLII). In those cases, the Court was of the settled view that for an employer to prove that termination was fair, she must, under rules 12 and 13 of the Code and in terms of section 39 of the ELRA, prove that; one, the employee committed a serious misconduct; two, the procedure for fair termination under the Code was complied with and; three, the sanction imposed was justified and has consistently been applied to other employees who committed the same misconduct. In *Severo Mutegeki and Another* (supra), we particularly emphasised that, what constitutes a fair termination is, by and large, regulated by rule 13 of the Code which prescribes criteria and procedures regulating lawful 39 | P a g e termination. According to that case, the provisions of rule 13 of the Code underpin the duty to act judicially in accordance with the rules of natural justice before an adverse action or decision is taken against an employee facing allegations of misconduct. In the case of *Severo Mutegeki & Another vs Mamlaka Ya Maji Safi na Usafi Wa Mazingira Mjini Dodoma* (Civil Appeal No. 343 of
- 2019) [2020] TZCA 310 (19 June 2020) (TANZLII), at page 10, the Court of Appeal stated that: In terms of the provisions of section 37 (2) of the Employment and Labour Relations Act, termination is adjudged unfair if the employer fails to prove that: One, the validity of reasons for termination; two, that the reason for termination is fair and three, that the termination was conducted in accordance with a fair procedure. 40 | P a g e As per available evidence on record, the employer did not comply with the procedural fairness without any justification evident on record. Thus, there was procedural irregularities on the hearing of the disciplinary offences against the respondent thus there was clear violation of procedural fairness. Thus, the principle in *STANBIC Bank T. Limited vs Iddi Halfani* (Civil Appeal No.139 of 2021) [2023] TZCA 17496 (11 August 2023) (TANZLII), at page 31, where the Court of Appeal stated that: It was common cause before us that the ELRA, the Code of Good Practice and the appellant's Disciplinary Code & Procedure outlined a mandatory procedure for termination of employee's services which were never followed. The non-compliance of the law and procedure was, in our view, fatal to the process of termination. On the amount of compensation, the argument advanced by the applicant

that it was an error on part of the Arbitrator to order compensation of TZS 29,566, 006/= instead of TZS 1,723,805/= per month as per exhibit D7 which would compute to TZS 1,723,805 x 12 months is 41 | P a g e equal to TZS. 20, 685, 660/=is misconception that is not backed up by the law. It is misplaced argument. Section 40(1) (c) of the Employment and Labour Relations Act, Cap 366 R.E. 2019 provides explicitly on the compensation where there is unfair termination. It states that: 40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –

- (c) to pay compensation to the employee of not less than twelve months remuneration. The law uses a term remuneration not salary in stating the computation of the compensation payable. Exhibit D. 7 indicates that entitlement per month was TZS 2, 463, 834/= comprising of basic salary, responsibility allowance, meal allowance, housing allowance and special skills allowance. In totality that was the remuneration of the respondent on monthly basis according to Exhibit D7 entitled outstanding salary. 42 | P a g e Indeed, remuneration is defined under Section 4 of the Employment and Labour Relations Act as follows: “remuneration” means the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee. It is on that account Exhibit D 7 all the payments that were entitlement of the respondent per month are stated to be outstanding salary for that particular month. As such, I concur with the submission of the respondent that the amount was correctly arrived at by the Commission for Mediation and Arbitration. The compensation being based on remuneration has been articulated by the Courts in Tanzania. For instance, in the case of Kiboberry Limited vs John van der Voort (Civil Appeal 248 of 2021) [2022] TZCA 620 (7 October 2022) (TANZLII), at pages 11-12, the Court of Appeal stated that: In the beginning, it is settled that remedies for unfair termination are governed by section 40 of the Employment and Labour Relations Act, Cap. 366 ("the ELRA"), which provides thus: "40. -(1) If an 43 | P a g e 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. In the instant case, the parties do not dispute the award of remuneration for 15 months at the rate of TZS. 3,300,000.00 monthly amounting to TZS. 49,500,000.00 made pursuant to section 40 (1) (c) of the ELRA. The third legal issues must also collapse as there was nothing in violation of the law on part of the Commission for Mediation and Arbitration to warrant interference with the findings in terms of compensation. The CMA arrived at amount that is correctly backed up by the law governing the compensation where there is unfair termination of employment. 44 | P a g e In the STANBIC Bank T. Limited vs Iddi Halfani (Civil Appeal No.139 of 2021) [2023] TZCA 17496 (11 August 2023) (TANZLII), at pages 22-24, the Court of Appeal reiterated the need to adhere to both procedural and substantive fairness. It stated that: It is trite law that even where there exists substantive grounds to justify termination, the law requires the employer to observe certain procedural strictures to ensure compliance with

the principles of natural justice in terminating services. The employer is bound to provide an employee with details of the accusation to enable him/her respond to the charges, allow the employee to be represented by a trade union representative or fellow employee of his choice during hearing, and also provide an employee with decision of the disciplinary hearing either terminating or serving his services. Where the employer fails to observe the foregoing, the resultant termination is deemed unlawful. It is important to observe that under Section 39 of the Employment and 45 | P a g e Labour Relations Act, the onus of proof or justifying the lawfulness of the termination both substantively and procedurally lies with the employer. In the instant case, the employer violated both substantive and procedural requirements as the employment of respondent was terminated unlawfully without a valid reason and without due regard to procedure set out in the law. In totality of the events, it is well settled opinion of this Court that the application for revision should fail as no tangible and cogent legal issues exist to interfere with Award of the CMA. As such, the application for revision stands dismissed for lack of merits. It is so ordered. DATED at DODOMA this 28th day of November 2024. E.E. LONGOPA JUDGE 28/11/2024. 46 | P a g e

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