

TANZANIA / JUDGMENT

Judgement Labour Case No

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT MOSHI LABOUR REVISION NO. 3864 OF 2024 (C/F Labour Dispute No. CMA/KLM/MOS/ARB/26/2023 in the Commission for Mediation and Arbitration at Kilimanjaro) WS RISK PROTECTIVE SERVICE LIMITED..... APPLICANT VERSUS PROPSEER DAUD SABORE.....RESPONDENT

JUDGEMENT

27th August & 30th September, 2024 MONGELLA, J. Dissatisfied with the Award of the Commission for Mediation and Arbitration for Kilimanjaro (CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/26/2023, the applicant decided to move this court under Section 91(1) (a) and (b); 91(2)(b) and (c); and; 94 (1)

- (b) (i) of the Employment and Labour Relations Act, 2004 [Cap 366 R.E 2019] (ELRA) and Rule 24 (1); (2) (a), (b), (c) , (d), (e) and (f);
- (3) (a), (b), (c) and (d) and; 28 (1), (c), (d) and (e) of Labour Court Rules, 2007, GN No. 106 of 2007. He is seeking for this Court to call for and examine the proceedings of the CMA in the above-mentioned dispute in order to satisfy itself as to its correctness, legality or propriety and irregularity; and thereafter to quash and Page 1 of 24 set aside the said Award due to improper procurement and irregularities. The applicant's application was backed by the affidavit of one Jacon Lukwaro, a principal officer of the applicant. The respondent expressed his opposition vide his own sworn counter affidavit. The background to the matter is to the effect that: the respondent was employed by the applicant as security guard on 06.12.2013. It was asserted that on 12.05.2023, which was among the days he was in his annual leave; the respondent went to his work station at TPC limited. Allegedly, this was due to the fact that he was called by the compliance officer at Workers' Compensation Fund, who required him to submit certain medical chit from TPC hospital owing to an injury he had sustained at work in the past. He was however unable to complete the process causing him to spend the night in the company precincts so that he could resume the next day. The respondent, who allegedly resided in same room with one Shabani Athumani (DW3) and Saidi Athumani, requested keys from the said Shabani so that he could rest in the barracks. It was further alleged that when DW3 came into the room, he found smoke and a bad smell coming from the room. The respondent was in the room by then. Upon asking the

respondent on where the smoke and smell came from, he answered that he did not know. Shabani then reported the matter. The operation manager one, Anthony Lucas (DW2), conducted investigation on the matter and issued an incident report thereof. He also recorded statements from Page 2 of 24 one, Saidi Athumani, DW3 and the respondent. In the incident report, he recommended that the respondent be called to a disciplinary hearing owing the incident. The respondent was served notice to attend the disciplinary hearing. The hearing was conducted and he was found guilty. He appealed, but his appeal was dismissed. The applicant officially terminated his employment on 26.06.2023. Aggrieved by said termination, the respondent filed a complaint at the CMA, which found in his favour and awarded him: TZS. 508,000/= as payment of one month's salary in lieu of notice; TZS. 1,270,000/= as severance pay; TZS 6,096,000/= being 12 months' salary as compensation. It as well ordered for him to be issued a certificate of service. Aggrieved by the CMA decision, the applicant preferred this application advancing four legal issues as featured in his affidavit, to wit;

- a. Whether there was proper analysis and examination of evidence tendered by the applicant;
- b. Whether the Arbitrator wrongly ruled that the applicant did not give opportunity of mitigation to the respondent;
- c. Whether the Arbitrator wrongly ruled that the applicant failed to observe the requirements of Rule 13(1) of GN Page 3 of 24 42/2007 by failing to conduct an investigation to show whether there were grounds to conduct hearing; and
- d. Whether the Arbitrator erred in law in holding that the applicant terminated the respondent without fair reasons and fair procedure. The application was argued by written submissions whereby the applicant was presented by Ms. Caritas E. Malawa, learned Advocate and the respondent by Mr. Manase Gideon, his personal representative. Ms. Malawa commenced her submissions with a brief account of the dispute. She further proceeded to adopt the applicant's supporting affidavit as part of her submissions. On the 1st issue, Ms. Malawa asserted that in the CMA award, the Arbitrator stated that there was no direct evidence that the respondent burnt unknown materials causing an unpleasant smoke. She faulted such finding arguing that during hearing, the applicant paraded three witnesses who proved the offence. She referred to the testimony of DW2, the investigator of the incident, saying that this witness testified that to have gone to the room where allegedly the respondent burnt the unknown materials and indeed found smoke therein. She submitted that DW2 then wrote a report to his supervisor, which was presented at the disciplinary hearing and at the CMA, it was admitted as Exhibit D13. Page 4 of 24 The learned counsel further faulted the Hon. Arbitrator for failure to evaluate the statement of one, Shaban Athumani, which was admitted as Exhibit DW-2. In her stance, Exhibit DW-2 was corroborated by the respondent's statement which admitted as part of Exhibit DW-2. She contended that in both statements, it is stated that on the material day of the incident, the respondent visited the barracks where he was living with his fellow employees and that was after requesting for a key to take out his personal belongings. In her view, there was no dispute that the respondent entered the

room on the material day before any other person. In addition, she referred the testimony of DW1 who also entered the room after the said complaints. She argued that DW1 also testified to have found the room with smoke which caused unpleasant smell and the respondent was in the room. Taking into account the testimonies of the three witnesses as argued above, Ms. Malawa held the stance that the case was proved on balance of probabilities which is the standard of proof in labour disputes. To that effect, she referred Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007. Further, she argued that when the standard of proof is on balance of probabilities, the party bearing the burden must demonstrate that their version of events is more likely to be true. That, the evidence presented must show that at least there is a greater than 50% chance that their claims are correct. That, if one side's evidence is more plausible, then the decision is to favour such party. Page 5 of 24 Challenging the CMA Award further, Ms. Malawa contended that the Hon. Arbitrator failed to analyse the respondent's appeal to the Country Manager which was admitted as Exhibit D-7. She contended that in the said exhibit, the respondent alleged that he was never warned on the said offence. In her point of view, what the respondent stated in Exhibit D-7 was an indirect admission of the offence, but denial of punishment. Commenting on the manner in which the court is to deal with the evidence on record, Ms. Malawa further contended that it is trite law that in arriving at its decision, the court must not only summarize the evidence, but also objectively evaluate the gist and value of the evidence of both parties, weigh it and give reasons for its decision. She claimed that failure to do so would amount to a serious misdirection and result into miscarriage of justice. On those bases, she faulted the Hon. Arbitrator for only summarizing the evidence on record, but failing to decide which evidence sufficiently established the applicant's guilt. Submitting on the 2nd issue, Ms. Malawa found the Hon. Arbitrator to have erroneously held that the respondent was not accorded an opportunity to make any mitigation. Referring to the minutes of the disciplinary hearing, admitted as Exhibit D-5, she contended that the respondent's mitigation features on the last page of the said minutes. She further faulted the Hon. Arbitrator for failing to observe the said minutes as they formed an accurate depiction of what transpired in the disciplinary hearing. She considered the Page 6 of 24 omission to observe the minutes as undermining the integrity of the process leading to unjust outcome as evidenced in the Award. Deliberating on the 3rd issue, Ms. Malawa was of view that investigation was conducted and the same is evident on record as per the report tendered as Exhibit D-3. Further, she argued that the report also contains statements of persons deemed important by the investigator, including that of the respondent. Explaining the purpose of investigation as enshrined under Rule 13 (1) of GN No. 42 of 2007, she contended that the same is to ascertain whether there are grounds for hearing to be conducted and that is done through inquiry. Explaining the process of investigation, Ms. Malawa averred that investigation of an employee entails a thorough examination of facts and circumstances surrounding alleged behaviour including gathering evidence, interviewing witnesses and reviewing relevant documentation. In her view, this helps to ensure all parties involved have a clear understanding of the situation and helps to establish factual basis for proceedings. Emphasizing further on what an investigation entails, she referred the Court to the case of

Paschal Bandiho vs. Arusha Urban Water Supply Sewerage Authority (AUWSA) (Civil Appeal No. 4 of 2020) 2022 TZCA 42 (21 February 2022) TANZLII, quoted with approval in 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. Page 7 of 24 Ms. Malawa insisted that the Award was unfair to the applicant as the Hon. Arbitrator ignored the fact that investigation was inducted, an investigation report was tendered and witnesses testified. She believed that the investigation report and testimonies offered by the witnesses served as crucial evidence that could have significantly influenced the outcome of the case.

Addressing the final issue, Ms. Malawa asserted that the applicant proved that there was valid reason to terminate the respondent. She explained the alleged valid reason being acts of wilful neglect endangering the safety of others and properties. She said that this misconduct is provided under Rule 12(3)(c) of GN No. 42 of 2007. As to the requirement of valid and fair reason for termination, she referred the case of Severo Mutegeki & Another vs. Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini Dodoma (supra). As to fairness of procedure, the learned counsel alleged that procedures set under Rule 13(1) to (12) of GN No. 42 of 2007 were observed. Ms. Malawa concluded her submissions by praying for the CMA Award to be quashed and set aside and the Court to grant any relief it deems fit. The application was opposed. Adopting the respondent's counter affidavit, in his reply submissions, Mr. Gideon begun by summarizing his version of the origin of the dispute. He then generally submitted on the issues whereby he found the CMA Award just. Page 8 of 24 According to him, the CMA considered the evidence of all witnesses as well as exhibits tendered. He alleged that the applicant failed to prove that the respondent's termination was justified in accordance with Section 39(1) of the ELRA. He insisted that the applicant failed to prove existence of the flame and its magnitude. He challenged that, what seemed to be proved was the alleged bad smell, but the same was also not described. Further, he contended that the respondent was on leave from 14.03.2023, which was to end on 03.06.2023 and had travelled to Arusha for his leave. That, on the material day of 12.05.2023, the respondent was required to report to his work station at TPC to fill WCF forms owing his previous injury while at work. That the respondent took keys from his roommate one, Shabani Athumani (DW3) and when he opened the room, he was met with the bad smell. Mr. Gideon challenged the applicant for failure to establish who lit the fire or burnt incense in the room. He referred the testimony of DW2, the investigator of said incidence, saying that DW2 testified that upon arriving at the scene in company of five of his fellows he found smoke and bad smell. That, there was no any fire seen. Mr. Gideon continued to submit that when DW2 was questioned as to who was responsible for the smoke, he replied that he was unaware of who committed the said act. That, DW2 further stated that it was not true that DW3 was affected by the smell rather that DW3 had admitted to suffer from asthma, as stated in the Award. In his view, the testimony of DW2 Page 9 of 24 shows that the offence alleged against the respondent was not established. Regarding fairness in procedure, he had the stance that the CMA rightly found that the procedure was not fair. Cementing on the CMA findings, he mentioned a number of procedural flaws allegedly committed by the applicant in dealing with the respondent's case. The same are: one, that, the applicant had

an ill intention to terminate the respondent by all means and never investigated the allegations against the respondent Two, that, the respondent was not issued any copy of the report. Three, that the applicant never served the respondent a formal charge so that he would know the allegations levelled against him. Four, that the respondent was also not afforded the opportunity to defend himself in writing. Five, that, the applicant never called any witnesses at the disciplinary hearing to prove whether there was any fire and its magnitude or the level of smoke, nor was an expert called to explain the bad smell that was mentioned. Six, that, the doctor who treated DW3 was not called to prove that he was affected by the smoke or bad smell on the material day, nor were medical sheets admitted at the disciplinary hearing. About DW3's treatment, he challenged that it was only after terminating the respondent's employment that the applicant sought medical sheets and brought the same to the CMA. Seven, that the applicant never served the respondent with hearing form at the disciplinary hearing nor inform him of his right to appeal after the hearing. Thus, he said, the applicant violated Rule 13 (1), (2), (3), (4) Page 10 of 24 and (5) of GN No. 42 of 2007 and Section 37(2), (a), (b) and (c) of the ELRA. Still supporting the CMA Award, he contended that the CMA fairly conducted the matter before it whereby it accorded both parties the right to present their opening statements; to call witnesses and tender exhibits and even present their closing statements. Thus, it justly arrived at its decision. Mr. Gideon finalized his submissions by praying for the application to be dismissed for lack of merit and for the CMA decision to be upheld. Ms. Malawa commenced her rejoinder by adopting her entire submission in chief. She then challenged the respondent for failure to address any of the arguments or grounds raised by the applicant. She contended that, instead, the respondent raised new arguments which were not part of the applicant's submissions rendering the applicant's submissions remaining uncontested. In her view, the uncontested submissions in the Court record are deemed accurate and accepted. She added that the applicant's submissions should be considered as correct and uncontested representation of the matter between parties. She believed the failure to contest the application implies the respondent conceded to the applicant's submissions thereby reinforcing the validity and strength of the applicant's position in the case. Page 11 of 24 Despite her remarks as above, Ms. Malawa proceeded to respond to the respondent's submission. She considered lacking merit the respondent's submissions in paragraphs 1,2,3,4,5 and 6. Explaining her position, she contended that the representative gave a general denial to the respondent's misconduct and simply averred that the CMA decision was correct, but did not substantively explain or address the applicant's grounds. She held the view that the respondent failed to refute her arguments on CMA's failure to evaluate the evidence on record. In contrast, she claimed to have thoroughly detailed how the disciplinary hearing was conducted and presented compelling evidence supporting her claims and comprehensively critiqued the CMA's handling of the evidence. She further alleged to have presented authoritative decisions to back her submissions. With regard to applicability of the authorities she alleged to have presented, she contended that the doctrine of precedent is fundamental in ensuring consistency and predictability in law as it binds courts to follow established rulings in previous cases. She added that the principle is

part of our jurisprudence and deviating from the same would be undermining the rule of law and can lead to uncertainty and unequal application of justice. She thus prayed for the Court to consider the precedents referred to. Referring to paragraph 7 of the respondent's submissions, she contended that the same did not address the applicant's grounds, but rather contained several inaccurate statements she wished to clarify. On that, she averred that the contents of Paragraph 7(a) Page 12 of 24 were incorrect. That, in her submission in chief she elaborated in detail what constitutes an "investigation" and how it was done by the applicant in respect of this matter. That, it was the investigation that resulted into the conduct of the disciplinary hearing against the respondent. She added that witnesses were also called at the disciplinary hearing and at the CMA. That, she also cited judicial authorities on how investigations should be handled and treated. She further alleged that the contention that the respondent was not given the investigation report was misleading. Expounding, she contended that the essence of an investigation report is to provide a comprehensive and objective account of the facts and evidence surrounding the alleged misconduct. That, the report typically summarizes witness testimonies, documents, and other relevant information gathered during the investigation, and it serves as a basis for determining whether disciplinary action is warranted. In addition, she challenged that it is not a legal requirement to serve the charged party the investigation report. Arguing further, she submitted that the details of the allegations against the respondent were in the Charge Sheet which was duly served upon the respondent. That the same had all sufficient details which allowed the respondent to adequately prepare for the hearing and present his defence. She contended that the report was also tendered during the disciplinary hearing and the respondent was free to view and question any aspect on it. Page 13 of 24 Addressing the complaint that the respondent was not served with a proper charge, Ms. Malawa asserted that the claim is new, incomprehensible and inconsistent with the procedural history of the case. She maintained her position that this issue was neither raised nor determined by the CMA, nor was it presented in any of the respondent's prior filings before the CMA or this Court. Challenging its credibility, she pointed out that the respondent's presence at the disciplinary hearing could not be possible if he had not been summoned. As to the contents of Paragraphs 7(c), (d) & (e) she held the view that the same contain unfounded and misleading statements. Elaborating her averment, she contended that the record of proceedings submitted to the CMA included the testimonies from all key witnesses at the disciplinary hearing. That, the extent of the misconduct, particularly in relation to the applicant's safety and security standards as outlined in the applicant's policies, was thoroughly addressed and substantiated through evidence. In addition, she averred that a misconduct that breaches established policies clearly warrants sanctions. Therefore, she called for the arguments presented in this paragraph to be disregarded for lack of merit. Ms. Malawa reiterated her submission in chief in respect of the standard of proof being "on the balance of probabilities," whereby the evidence accepted is one more likely to be than not. In her view, this standard is lower than that of criminal cases which is "beyond reasonable doubt" this demanding a higher degree of Page 14 of 24 certainty. She contended that the respondent seeks for higher standard required in criminal cases which is not appropriate in

the context of this case. She contended further that it was clear beyond doubt that during the disciplinary hearing and even at the CMA, the respondent's extent of guilt was established, exceeding the balance of probabilities. That, that is reason why the applicant was surprised by the CMA Award, hence this revision. Ms. Malawa further claimed that Mr. Gideon merely reproduced the list of documents filed by the parties at the CMA. She claimed to have not contested on whether the parties were afforded the right to file exhibits, but rather on the CMA's evaluation of the exhibits. Ms. Malawa finalized her submissions by reiterating the applicant's prayer for this Court to quash and set aside the CMA Award and issue any other relief which it deems fit and just to grant. Upon considering the submissions of both parties, as well as, the CMA record, I am of the view that the raised grounds fall into two major issues, which are: one, whether the respondent was terminated for a valid and fair reason; and two, whether the procedure for his termination was fair. In my considered view the allegations on whether the evidence of both parties was properly evaluated by the CMA would fall on both issues. In the same line, even the question under the third issue as to whether the Page 15 of 24 investigation of the matter was conducted. With this stance, I am of the settled view that in his reply submission, Mr. Gideon did address the issues addressed in the grounds for determination only at a different standpoint. Thus, Ms. Malawa's contention that the respondent failed to address the issues advanced for determined is misconceived. The law is settled that when the dispute is on fairness of termination, the employer bears the burden to prove that the same was fair. This is well stipulated under Section 39 of the ELRA, which provides: "39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair. Further, as argued by Ms. Malawa, the standard of proof is on balance of probabilities as instructed under Rule 9 (3) of GN No. 42 of 2007. Termination of employment is only termed fair if done for a valid and fair reason and under fair procedures. This is well stipulated under Section 37(2) of the ELRA. This position is the focal point is assessing fairness of termination of employment. The Court of Appeal substantiated such basic facts in the case of Paschal Bandiho vs. Arusha Urban Water Supply Sewerage Authority (supra), whereby it stated: "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 Page 16 of 24 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 - see: section 37

- (2) (a), (b) and (c) of the ELRA. As to the standard of proof, rule 9 (3) and (5) of the Code of Good Practice requires an employer to prove, on balance of probabilities, that the reason was not only fair but sufficiently serious to justify termination." In the matter at hand, to prove that the termination was fair, the applicant paraded three witnesses being; DW1 one, Mseli Hassani Balazi, the vetting officer; DW2 one, Anthony Lucas, an investigator for TPC limited and DW3 one, Shabani Athumani Juma, a security guard. The applicant also tendered 14 exhibits. The witnesses' evidence including facts disclosed in the admitted exhibits, was to

the effect that on the fateful day of 12.05.2023, the respondent who was on his annual leave came to his work station at TPC Limited. That, around 17:00hrs he called one Saidi Athumani requesting for keys to their shared room in the barracks. That, the key was sent to him and he went into the room. Later on, DW3 came into the room where he found the respondent inside. He claimed to find the room in smoke and bad odour to the extent of failing to sleep therein. As a result, DW3 sought to be accommodated by his other fellow guards. DW3 then called one Said Athumani and informed him of the situation he found in their room. The said Said Athumani also came later around 22hrs and found the smoke and odour. Having found Page 17 of 24 no other option on where to stay, he decided to open all windows and the door and even clean out the room before sleeping therein. The next day or rather the same day the matter was reported to the Field officer on duty and eventually, DW2 was called to investigate the matter. DW2 took statements from DW3, Said Athumani and the respondent. DW2 then informed one George Mwakagile, the operation manager vide email issued on 13.05.2023 that it was true that the respondent burnt unknown incense in their room and there was still a bad smell in the said room. DW2 also issued an Incident report, which was admitted as Exhibit D3. In the report, it was recommended that the respondent be called to a disciplinary hearing. The respondent was issued a notice to attend a disciplinary hearing fixed to be held on 15.06.2023. The notice informed him of his right to call a representative. He was charged with Neglect or failure to comply with any instructions relating to safety or welfare or procedures of work. It read "Wilful violation of Health & Safety Regulations and/or the Company Regulations and or Security Procedures; When you burnt unknown stuff which resulted to smoke and unpleasant smell which disrupted your fellow colleague from sleeping on 12th May 2023." When the hearing was conducted, the complainant was one Musa Loewo. Witnesses called included DW3, DW2 and Said Athumani Juma. The proceedings were recorded in the hearing and the minutes/proceedings thereof admitted as Exhibit D5. The respondent was found guilty as reflected in the hearing Outcome Page 18 of 24 admitted as Exhibit D6. He appealed as reflected under Exhibit D7, but the appeal was dismissed as reflected under Exhibit D8. The respondent was eventually terminated as reflected in the termination letter issued on 26.06.2023 and admitted as Exhibit D9. The respondent testified as a sole witness. He averred that on the material day he came to his work station following instructions he received from the compliance officer of Workers Compensation Fund on 11.05.2023. That, the said officer had instructed him to take some medical forms to the hospital he had been treated when he suffered an accident before. He took the forms on the same day. On the next day of 12.05.2023, he came to Moshi to get the forms filled. He was however unable to complete the task, thus decided to stay in the barracks. He requested for the keys from Said Athumani. When he went into the room he found the stench in the room. However, he still slept in the room. He further claimed to have been accused of engaging in witchcraft by Mr. Saidi. He as well testified on the procedures taken thereafter. Upon observing the evidence of both parties, I am of the view that, as found by the CMA, the evidence was insufficient to prove that the respondent was indeed guilty. Both, SM3 and the mentioned Saidi Athumani appear to contradict themselves in their statements and their evidence before the CMA as to when exactly the incident was

reported. At one point they alleged it was on the same day and on the other, they alleged it was the next day. There was no other evidence adduced by any of the witnesses as to when exactly the incident took place or what situation was exactly Page 19 of 24 found therein. The entire ordeal was imprecise. The witnesses alleged that there was smoke and a bad odour but such odour was never identified. Even as they alleged that there was smoke in the room, there was no evidence of there being a fire. The investigation would have assisted on identification of the source of the odour. However, it seems there were no efforts made to identify the nature of the smell and its effect on the safety of the premises and other employees. It appears to me that the applicant had premised the investigation on the respondent being liable for committing the alleged act rather than what exactly caused the smell if there was any. Still, even with the investigation, they were unable to prove that it was the respondent who caused the bad odour. Mere statements of DW3 and Said Athumani could not prove that the respondent committed the alleged act considering that the room was used by several persons. In addition, I find that the respondent was not caught in action, but merely found in the room with knowledge of his colleagues. Whether or not he was not expected to be in the premises since he was on leave, I find this being an entirely different matter. The question at hand is with respect of him being responsible for the alleged act. I am of the considered view that the applicant had well noted that there was insufficient evidence of there being a violation of health and safety regulations, which is why DW3 brought the allegation that he had required medical intervention due to the smoke and bad odour in the room. DW3 went as far as to tender his medical chits for treatment at Kilimanjaro Christian Medical Centre (KCMC) Page 20 of 24 on 12.05.2023. However, such fact and supporting documents did not feature in his statement during the investigation or in his evidence at the CMA. Even the alleged incident report lacked such details. Further, the law is clear under Rule 12(1)(a) of GN No. 42, that in termination of an employee for misconduct, the employer must prove that the employee violated a rule of standard regulating conduct relating to employment. In the record, I find no proof that the misconduct with which the respondent was charged with was an actual existing regulation set by the applicant. The uncertainty in relation to existence of the offence appears to be what prompted the respondent to challenge the offence as not being among those warranting termination. This is well reflected in his appeal against the outcome of the disciplinary hearing. In foregoing analysis, it is hereby found that the applicant did not prove valid and fair reason to terminate the respondent's employment. As to fairness of procedure, Rule 13 of GN. No. 42 of 2007 has set several procedures to be observed by an employer prior to and when conducting disciplinary hearing. Of close relevance in this matter are Rule 13 (1), (2), (3), (4), (5), (7), (8) and (10) which I will produce hereunder, for ease of reference: "13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held. Page 21 of 24

- (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 or 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 finalized 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 employee 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.
- (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 mitigating factors before a decision is made on the sanction to be imposed
- (8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with Page 22 of 24 written notification of the decision, together with brief reasons.
- (10) Where employment is terminated, the employee shall be given the reason for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act.” In the record, it appears that investigation was conducted, as per Exhibit D3, although the same was poorly done. The respondent was also notified of the allegation against him and his right to representation as evidenced by Exhibit D5. He was given ample time to prepare for hearing as he was notified on 09.06.2023 and the hearing held on 15.06.2023. The hearing was finalized the same day. He was given the opportunity to respond to the allegations and question witnesses. The decision was also communicated to him. However, upon perusing the records mainly the hearing form and outcome, it appears that the respondent was not accorded the opportunity to put forward any mitigation factors after being found guilty. What the applicant classified as mitigation was merely a question put to the respondent by the chairman of the disciplinary committee on his defence in case, he is found guilty. Such is reflected at the last page of the hearing form, which was admitted as Exhibit D5. This was not mitigation. As clearly provided under Rule 13 (7) of GN No. 42 of 2007 mitigation is conducted upon the employee being found guilty and not prior to that. Page 23 of 24 I am of further of view that even if the reason happened to be valid and proved to exist, in the circumstances there were better ways to reprimand the respondent as provided under Rule 12(2) (4) of GN No. 42 of 2007 as clearly, no one was injured in the alleged incident. I find that this was the reason he lodged an appeal following the outcome of the disciplinary hearing whereby he complained of never being given a warning before on the alleged misconduct. In my view, this was not an admission of guilt as reasoned by Ms. Malewa, but rather an attempt to challenge his sentence of course, without prejudice to his

denial of having committed the offence in the first place. In the premises, I find the procedure was also unfair. Considering my findings hereinabove, I hereby uphold the findings of the CMA. The application is found to lack merit and consequently dismissed. Being a labour matter, I make no orders as to costs. Dated and delivered at Moshi on this 30th day of September, 2024. X L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 24 of 24

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