IN THE HIGH COURT OF TANZANIA

LABOUR COURT

AT DAR ES SALAAM

REVISION NO. 266 OF 2015

BETWEEN

KNIGHT SUPPORT (T) LIMITED..... APPLICANT

VERSUS

IBRAHIM BWIRE..... RESPONDENT

(ORIGINAL/CMA/DSM/KIN/847/10/178)

JUDGMENT

21/09/2015 & 18/12/2015

Mipawa, J.

The revision application to revise the CMA[1] decision and award in CMA/DSM/KIN/847/10/178 "*Mgogoro wa Kikazi*" Msigwa Esq. Arbitrator was filed by the applicant employer Knight Support (T) Ltd.[2], under section 91 (1) (a) of the Employment and Labour Relations Act[3], and section 9 (1) (c) of the same Act as amended by Written Law (Miscellaneous Amendment) Act[4] and Rule 24 (1) (2) (3), 28 (1) (e) of the Labour Court Rules[5].

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[1] CMA refers to the Commission for Mediation and Arbitration established under section 12 of the Labour Institution Act No. 7 of 2004 Cap 300 R.E. 2009

[2] Revision No. 266 OF 2015 Knight Support (T) Ltd. V. Ibrahim Bwire

[3] Act No. 6 of 2004 Cap 366 R.E. 2009 the ELRA

[4] Act No. 10 of 2010

[5] Government Notice No. 106 of 2007 GN. No. 106 of 2007 the Rules

Briefly the respondent Ibrahim Bwire was employed by the applicant employer as a Security Guard on 24/04/2004 and terminated on 20/11/2009 for alleged abscondment from duty for five consecutive days. Before the Commission, the respondent employee evidenced that the days which he was accused of abscondment from work, he was admitted at Mwananyamala Hospital where the doctors treated him of acute Malaria from 13/11/2009 through 18/11/2009. It was on the very date of 13/11/2009 when the applicant employer accused the respondent employee that he absconded from work. He was given at hospital excuse duty for seven days. He tendered exhibit P1 sick sheet given by the employer and discharge certificate or sheet exhibit P2. The respondent employee after being discharged from Hospital he returned the exhibits P1 and P2 to the employer and were received by a Sector Manager one Mtiginjola at the evening of 18/11/2009.

When the excuse duty elapsed, the respondent employee reported at work on 25/11/2009 as told by the duty officer Mr. Siera. On 26/11/2009 the respondent employee was told to handover to the administration and then he was requested to sign on certain documents to show that he attended a disciplinary hearing as a condition for being given a letter of termination by the applicant employer. He refused to sign the documents which could have showed that he attended the disciplinary hearing and all what was in the document (s) could be true. He refused to sign because the alleged disciplinary hearing was held by the applicant employer when he was admitted at Mwananyamala Hospital and it was the applicant employer himself who referred him to Hospital through the sick sheet.

That the applicant employer had investigated at Mwananyamala Hospital and told by Hospital personnel that the respondent employee was admitted for five days and discharged with an excuse duty certificate.

The employer applicant through his Human Resource Officer one Pascal Mayokolo told the CMA that the respondent employee failed for six days to report at work and hence disciplinary action was taken against the respondent employee after the Human Resources department had informed the administration that since the respondent was given the sick sheet by the health department at place of work for treatment at Mwananyamala Hospital the applicant evidence continued, the respondent employee was not seen at place of work. The applicant employee tendered exhibit D1 a statement alleged made by the employer that he was arrested by the police and therefore could not attend work. However the exhibit was disputed and rejected by the respondent employee as the handwriting on the document was not his handwriting. The applicant employer the proceeded to terminate the respondent employee.

The Commission for Mediation and Arbitration in its award ruled that the termination of the respondent employee was both substantive and procedural unfair ***ab initio***, on substantive fairness the learned arbitrator found that Dr. Anjela of Mwananyamala Hospital admitted the respondent employee vide file no. OB 10-13-11-2009 and directed that the employee be excused form duty ED for seven days. He was admitted for five days and discharged exhibit P2. He was admitted from 13/11/2015 and discharged on 18/11/2015 the employer applicant through his witness DW1

had also confessed that officials of the applicant made a follow up at Mwananyamala Hospital and were told by the doctors that the respondent was admitted and discharged with an excuse duty ED.

Hence the disciplinary hearing alleged to be held on 13/11/2009 the date when the employee respondent was admitted in Hospital and condemning the employee that he absconded while in fact the employer provided the sick sheet, was an abuse of the process and therefore there was no valid reason for termination of the respondent's employment.

The procedure which followed before terminating the respondent was fundamentally flawed. He reasoned that:-

> *...Pamoja na ukweli kuwa mwajiri alimpeleka mrufani (employee) hospitali hakuwa makini kujua amelazwa au ametibiwa au kujua anavyoendelea. Kwa mujibu wa kielelezo D1 barua ya kuachishwa kazi, mwajiri anahesabu utoro wa mlalamikaji kuanzia tarehe 13/11/2015 siku aliyompeleka mgonjwa hospitali kwa kuwa tu hakurudisha sick sheet ya mgonjwa...*

The Learned Arbitrator also found that the employer was duty bound to make a follow up at Mwananyamala Hospital to see if his employee was treated or not and if treated what had happened. The employer could have found that the employee respondent was admitted on the very day he took the sick sheet from the employer. Hence terminating the employee was unfair fundamentally.

On procedurally fairness the learned arbitrator found that since there was no misconduct actually committed by the employee respondent, the procedure that followed before terminating his employment was not fair. The arbitrator awarded twelve months salary for substantive and procedural unfairness termination and other benefits clearly showed in the award.

At the hearing of the revision by way of written submission, the applicant was represented by M/S Mbogoro Advocate while the respondent appeared in person. The applicant raised two grounds of revision ***videlis*** (vis):-

i. That the Commission for Mediation and Arbitration failed to take into consideration the exhibits tendered by the applicant as part of the evidence hence poor evaluation of the evidence.

ii. That the Commission for Mediation and Arbitration acted on bias by considering the evidence of one part (respondent) on making its decision or providing on award.

Submitting on the first ground, the applicant argued that the respondent was absent form work without permission form his employer form 13/11/2009 and he did not inform his employer of his whereabout. That when he came back, he wrote a letter explaining that he was arrested by the police and remanded in police custody, the applicant tendered a letter alleged to be written by the respondent as exhibit D1.

The applicant further submitted that during arbitration hearing the respondent gave a different and conflicting story that he was absent for seven days as he was sick and admitted at Hospital. That the Commission failed to consider the evidence tendered by the applicant that the respondent was deceiving the Commission by giving false statements of his whereabouts. The applicant further tendered exhibit D2 that the disciplinary hearing was decided and proceeded in the respondents absence and he was therefore terminated.

In reply to the first ground of revision the respondent in his written submission argued that he never absconded from work but on 13/11/2009 he fell sick and sought permission from the applicant employer and was allowed to go to Mwananyamala Hospital for treatment where after examination he was admitted for one week form 13/11/2009 up to 18/11/2009 and the applicant was aware because he allowed the respondent by giving him a sick sheet for that purpose. The respondent tendered the sick sheet as exhibit P1 and the discharge sheet from Hospital as exhibit P2 to prove the fact that he was sick and admitted and thence he never absconded from work as alleged.

On the disciplinary hearing committee the respondent submitted that, the applicant employer deceived the Commission by providing the purported disciplinary hearing contrary to the truth that it was not conducted and the applicant employer forged the signature of the respondent at the alleged disciplinary hearing.

In disposing the first ground of revision it is my settled opinion that the applicant employer as rightly found by the learned arbitrator that he was aware that the respondent employee was admitted at Hospital through a sick sheet issued by the applicant employer exhibit P1 where Dr. Anjela of Mwananyamala Hospital opened a file no. OB 10-13-11-2009 and treated the respondent, admitted him and offered seven days excuse duty. There discharge certificate from Mwananyamala Hospital exhibit P2 which showed patient no. 5114 Ibrahim Bwire was admitted from 13/11/2009 and discharged on 18/11/2009 after being treated of neumonia and acute malaria. He was in addition given seven days of excuse duty. The learned arbitrator duly considered all the exhibits of the respondent which thwarted the purported exhibits of the applicant employer to wit, a disciplinary hearing at the time when the respondent was admitted at Hospital, the employer purporting NOT to know the whereabouts of the employee, while it was the employer himself who provided the SICK SHEET to the employee respondent.

The Learned Arbitrator considered the evidence of both parties and exhibit for example he considered the evidence of the employer's witness D1 who confessed before the Commission that the applicant's employer's officers went to Hospital where the respondent employee was admitted and found that he was admitted at Mwananyamala Hospital for the days alleged he had absconded. The employer's witness confessed that he was told by Hospital personnel that the respondent employee was admitted and discharged with an excuse duty.

I entirely and respectfully agree with the learned arbitrator that the employee was permitted for treatment and it was absurd for the employer to count the employees abscondment in his termination letter form 13/11/2009 the date the employee was admitted at Hospital (Mwananyamala Hospital) the arbitrator correctly found that:-

> *...Pamoja na ukweli kuwa mwajiri alimpeleka mrufani hospitali hakuwa makini kujua amelazwa au ametibiwa au kujua anavyoendelea... hata baada ya siku tano za kulazwa alipofuatilia alipewa taarifa kuwa ameruhusiwa na amepewa ED. Hadi hapo dhana ya utoro isingekuwepo kwa kuwa... aliaga alikuwa mgonjwa... uhalifu unaotajwa ... ni utoro kazini kuanzia tarehe 13/11/2009 ahdi 19/11/2009 ... ushahidi unaonyesha mwajiri alitoa sick sheet tarehe 13/11/2009 mrufani akabitiwe hospitali ya Mwananyamala ... alipofika alilazwa kuanzia tarehe 13/11/2009 hadi 17/11/2009 tarehe 18/11/2009 mlalamikaji aliruhusiwa kwa masharti asifanye kazi kwa siku saba, msamaha unaoishia tarehe 24/11/2009. ... Hapa nia mbaya llionekana Mkuu wake alipotoa sick sheet tarehe 13/11/2009 na siku hiyo hiyo aliripoti utoro kwa Wakuu wake...*[6]

On the above discussion with respect to the learned counsel for the applicant, the first ground of revision is unmeritorious i.e. not merited and

[6] CMA arbitration award in Mgogoro wa Kikazi Na. CMA/DSM/KIN/847/10/178 between Ibrahim Bwire and Knight Support (T) Ltd. Per Msigwa Esq. Arbitrator at pp. 8,9

it is equally dismissed. In the second ground of revision the applicant avers:-

> *...That the Commission for Mediation and Arbitration acted on bias by considering the evidence of one part (respondent) on making its decision or providing an award...*

The applicant employer submitted on this ground that, the arbitrator at page 4 and 5 stated that the respondent did not tender any exhibit before the Commissioner. That the Commission for Mediation and Arbitration favoured the respondent by awarding him Tzs. 8,499,005.50 claims that were not in the referral form (CMA Form No. 1) and in CMA Form No. 1 the respondent prayed to be paid the following:-

- *Terminal benefits.*
- *Compensation.*
- *Salary arrears.*
- *Leave allowance.*
- *Bill of medical treatment.*
- *Night payment.*

He submitted that at pages 12 -13 of the award, the Commission awarded the respondent even claims that the did not ask the CMA deliberately awarded the following to the respondent:-

> *I. Mlalamikaji amlipe mrufani mishahara kamili ya kila mwezi kuanzia Novemba, 2009 mpaka*

tarehe 31 Desemba, 2013 sawa na 105,000.00 x miezi 50 = 5,250,000.00

The applicant averred that the respondent does not deserve to be paid salaries from November 2009 to December 2013 due to the fact that the respondent at that time was not working for the applicant. The respondent, he submitted did not earn the right to be awarded salary arrears because from December 2009 to December 2013 he was not working for the applicant:-

II. Fidia ya kuachishwa kazi sawa na mishahara ya miezi kumi na miwili (12) = 1,260,000/=

On the twelve months compensation awarded to the respondent by the Commission, the applicant submitted that, there was valid reason for respondent to be terminated because he was absent from work for seven days and therefore the respondent did not deserve to be awarded compensation for unfair termination.

In disposing this second issue I should state ***in limine*** (at the outset) that there was no bias on part of the arbitrator that he considered the evidence of the respondent only, the record shows that the arbitrator duly considered the evidence of both parties before reaching the decision for example the arbitrator considered that:-

...Kimsingi hakukuwa na kosa lolote ambalo upande wa mlalamikiwa umebainisha mrufani kutenda ambao ni uhalifu wa kanuni za kazi. Naridhika pasipo shaka kuwa hata vielelezo vilivyotolewa na shahidi DW1 kielelezo D5

- *barua ya maelezo ya mrufani kutofika kazini imegushiwa, kwa sababu mrufani hawezi kusema alikamatwa na kuwekwa rumande tarehe zile alizolazwa ndio sababu ya kutofika kazini... sielewi kwa nini mwajiri alipata nafasi ya kuandika sick sheet kuruhusu mlalamikaji kwenda kutibiwa halafu baadaye kufuatilia iwapo alifika kutibiwa, na baada ya kupewa uthitibisho alilazwa na sasa ameruhusiwa kwa kupewa ED, aliendelea kuamini mgonjwa yule yule alikuwa mtoro tangu siku ya kwanza*[7]...

The above excerpt from the CMA award clearly indicates that the learned arbitrator considered the evidence and exhibits of both parties and at the end of the day he concluded that the was no valid reason for terminating the respondent and therefore the procedure was not followed for example the employer did not conduct any investigation to ascertain whether there are grounds for hearing to be held[8]:-

> *...Hakukuwa na sababu za msingi kwa Mujibu wa Kanuni ya 12 Tangazo la Serikali Na. 12 la 2007 kwa vigezo nilivyotaja. Pili kulikuwa hakuna taratibu zozote halali zilizofuatwa katika kusikiliza shauri hili kwa Mujibu wa Kanuni ya 13 (1) GN. 42/2007*[9]...

There were no valid reason (s) to terminate the employment of the respondent who was admitted at hospital on the alleged dates and went to

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[7] *ibid* pp. 10, 11

[8] *ibid* see also Rule 13 (1) GN. 42/2007 "the employer shall conduct and investigation to ascertain whether there are grounds for a hearing to be held

[9] *ibid*

hospital for the permission of the employer applicant as rightly found by the learned arbitrator and the record speaks for itself. Hence the learned arbitrator after finding that termination of the respondent was substantively and procedural unfair correctly awarded the respondent employee a compensation of twelve months salary (12) as per section 40 (1) (c) of Act No. 6 of 2004[10]:-

> *...If an arbitrator or Labour Court finds a termination is unfair the arbitrator or Court may order the employer:-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) To pay compensation to the employee of not less than twelve months remuneration[11]...*

On the ground that the learned arbitrator erred in law for awarding the employee respondent or to use the applicant's words "*favoured the respondent*" by awarding him (employee) claims which were not in the referral form styled CMA Form No. 1, with respect to the applicant it has been the trend of this Court to follow the law put in the cases of **Said Mohamed Nzegere V. AARSLEFF Bam International[12]** that nowhere the CMA Form No. 1 should confine the arbitrator or Court so as to only

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[10] The Employment and Labour Relations Act Cap 366 R.E. 2009 Section 40 (1) (c) reads "if an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer a... b...(c) to pay compensation to the employee of not less than twelve months remuneration

[11] *ibid*

[12] Revision No. 36 of 207 Labour Court sitting at Sumbawanga

grant what is in the CMA Form No. 1 filed by the party in an employment dispute[13].

This Court also held **in A-One Products and Bottlers Ltd. V. Abdallah Almas and 25 others[14],** Nyerere, J. that:-

> *...Basically there are employment benefits which this Court or Arbitrator may grant without being pleaded by a party referring an employment dispute to the CMA these benefits includes benefits provided for under section 44 of the Employment and Labour Relations Act[15]...*

We, with respect, differ from the holding of Mandia, J. (as he then was) in **Power Road (T) Limited V. Haji Omari Ngomero**[16] a copy provided by the applicant which the Learned Judge held that there is no provision in the Employment and Labour Relations Act[17] or in the Labour Institution Act[18] ...allowing the mediators and arbitrators to make changes ***suo mottu*** on what appears on referral form (i.e. CMA Form No. 1) the applicant therefore in relying to the above case argued that:-

> *...In that position then the CMA was not supposed to lead itself and award the respondent claims that were never pleaded in the first place (i.e. in CMA Form No. 1) and that the applicant has been taken by surprise*

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[13] *ibid* per Mipawa, J.
[14] Revision No. 201 of 2015 LCDH (unreported)
[15] *ibid* per Nyerere, J. at p. 6 of the typed Judgment
[16] Revision No. 36 of 2007 LCDH unreported
[17] *op. cit* note 3
[18] Act No. 7 of 2004 Cap 300 R.E. 2009

... because the right to respond to this claim was not given thence unfairness on the part of the applicant[19]*...*

With great respect I do not think that in granting claims which are not claimed by the party in the respective CMA Form No. 1 and which are rights of the employee in accordance with the law, to be granted to him upon the finding of unfair termination the act amounts to making changes ***suo mottu*** on what appears on the referral form i.e. CMA Form No. 1, with respect I do not think so. Rather I rightly think that an arbitrator or Court on ordering compensation made under section 40 complies with the requirement of subsection (2) of section 40 of the Employment and Labour Relations Act[20]:-

> *...An order for compensation made under this section shall be in addition to, any other amount to which the employee may be entitled in terms of any law of agreement...*

And as held by this Court that there are employment benefits which this Court or arbitrator may grant notwithstanding the fact that they were not claimed (eg. Employment benefits under s. 44 of the ELRA).

In CMA Form No. 1 (pleaded by the party) which the arbitrator or Court finds that termination was unfair and the awarded claim is genuine and according to law, the move does not mean to substitute the CMA Form No. 1 but rather to grant what the employee is entitled in according to the

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[19] Applicant's written submission
[20] *op. cit* note 3

law. Here it comes the difference between the Labour Legislation and Rules and the Civil Legislation in Civil suits like the Civil Procedure Code in which the **Court cannot grant what is not pleaded in the "*plaint*".** In my view CMA Form No. 1 should not be strictly interpreted as "*plaints*" are in the normal Civil Cases and the Civil Procedure Code. For example in the Court of Appeal Case of **Juma Jaffer Juma V. Manager PBZ Ltd., and Said Khamis Hemed El - Gheity** (Respondent)[21] the Court reiterated that:-

> *...The parties and the Court are bound by pleadings and issues framed and proceed to deliberate on such issues. This issue was not before the Trial Court and hence it was not dealt with, the first appellate Judge therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place...*[22]

For the sake of achieving social justice which according to the words of Elleen Baldry and Ruth Maccaustand in their paper tilled "social justice in development 2008" social justice is about fairness beyond individual justice[23]. The CMA Form No. 1 is a product of Labour Legislations and rules passed by the legislature which aim to attain the purpose and specific objectives which is social judge which is also intended to achieve Industrial Harmony and peace at place of work vis-à-vis legal justice with its products like plaints in the Civil Procedure Code and the like. Hence the different between social justice and legal justice as clearly spelt out by Professor

[21] CAT Civil Appeal No. 7 of 2002 at Zanzibar coram Lubuva, J.A., Munuo, J.A. and Nsekela, J.A. pp. 16, 17 (unreported)

[22] *ibid* at p. 17 per Nsekela, J.A.

[23] Unpublished paper 2008

Surya Narayan Misra in his book titled **Introduction to Labour and Industrial Law**[24] (1994) that:-

> *...Social justice is different from legal justice. The different is not of objective but aim at dispensing justice. The different is due to reasons:-*
>
> *(i) Social justice aims at doing justice between classes of society, and not between individual.*
>
> *(ii) The method which it adopts is not unorthodox compared to the method of municipal law, justice dispensed according to the law of master and servant based upon the principle of absolute freedom of contract and doctrine of laisser faire, is legal justice.* ***Social justice is something more than mere justice, it is a philosophy super imposed upon the legal system*** *[emphasis mine]...*[25]

To conclude I hold that the Commission considered the evidence and exhibits of both parties tendered before it and evaluated according to the practice in Labour Legislation which guides the Courts or arbitrators to achieve its objectives of the Labour Legislation. I reject the contention of the applicant that the arbitrator did not consider the exhibits tendered by the applicant as part of evidence and hence poor evaluation of evidence, regard being had also the fact that "*Labour Legislations simplifies and streamlines procedure as far as a dispute resolution procedure are*

[24] Prof. Sirya Narayan Misra Introduction to Labour and Industrial Law 14th edition Central Law Publication Darbhanga Colony (1994) Alahabad

[25] Prof. Surya *ibid*

concerned". Perhaps to strengthen my argument I should borrow the words of Prof. Ahmadullah Khan I his book titled "**Commentary on Labour and Industrial Law**"[26] which I entirely and respectfully subscribe:-

> *...Precisely ...the proceedings before Labour Courts is not hampered by the strict rules of common law and therefore certain procedural laws like laws of evidence, or Civil Procedure Code are not applicable to such proceedings. In fact in most of the cases, Industrial Courts are competent to adopt any procedure which in their opinion would help Courts to come to a just and fair conclusion. In view of the foregoing discussion, it can fairly be discerned that* ***labour law is unique in its origin, humane in its purpose pious in its theory and liberal in its application and interpretation*** *[emphasis mine]...*[27]

In the final analysis however I don't found any genuine ***raison d'etre*** by the learned arbitrator to grant the respondent fifty (50) months salaries from November 2009 when he was terminated to 31 December 2013 when the dispute was finalized by the Commission, because dragging of the dispute in the Commission for nearly fifty months was not a faulty of the applicant employer rather the Commission itself at no apparent reasons finalized the case after the expirely of nearly fifty months. It would be unjustice to condemn the applicant pay the respondents fifty months'

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[26] Prof. Ahmadullah Khan (PhD) New Edition, Asia Law House Hyderabad

[27] Prof. Khan *ibid* at p. 4

salary and I quash and set aside that order of payment put as no one (first) in the CMA award.

The respondent is also not entitled for leave payments to the year 2012/2013 save only in the years he was working with the applicant but leave was not granted.

The respondent is entitled for other payments as listed by the learned arbitrator in the award that is no. 2 *fidia ya kuachishwa kazi sawa na mishahara ya miezi 12 Tzs. 1,260,000/=, (3) fidia ya likizo, (4) malimbikizo ya posho ya siku alizofanya kazi.* The whole of paragraph or item (4) employment benefit including one month salary in lieu of notice, severance payments etc.

In the event the present application for revision is dismissed save to the extend described supra (above).

I.S. Mipawa
JUDGE
18/12/2015

Appearance:-

1. Applicant: Mr. Peter Kaozya, Advocate
2. Respondent: Present in person

Court: Judgment has been read today in the presence of both parties as shown in the appearance above.

I.S. Mipawa
JUDGE
18/12/2015