

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. APPLICATION NO.30 OF 2021

(ARISING FROM MISC. COMMERCIAL CAUSE NO.23 OF 2021)

**IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL
AWARD DATED 14TH APRIL, 2021**

BETWEEN

JUBILEE INSURANCE CO (T) LIMITED PETITIONER

VERSUS

SALAAMAN HEALTH SERVICES RESPONDENT

Date of Last Order: 06/08/2021

Date of Ruling: 19/08/2021

RULING

MAGOIGA, J.

The petitioner, JUBILEE INSURANCE CO (T) LIMITED by way of petition made under section 70 of the Arbitration Act, 2020 (to be referred herein as the 'Act') read together with Rule 63 of the Arbitration Rules, 2021 and section 95 of the Civil Procedure [Cap 33 R.E.2019] has come to this court challenging the registration and enforcement of the final award issued in favour of the respondent praying that this honourable court be pleased to grant the following orders, namely:



- a. That the final award dated 14th April, 2021 issued by advocate Deogratius William Ringia- sole arbitrator not be registered and enforced as decree of the honourable court until is heard and determined;
- b. That be pleased to set aside the final award dated 14th April, 2021 on account of the grounds of misconduct adduced herein, and the dispute be remitted back for reconsideration before a different Tribunal to be reconsidered according to the principles governing their determination
- c. Costs of the petition
- d. Any other relief or reliefs which this honourable court may deem fit to grant.


The background facts to this petition are imperative to be stated. On 20th day of August, 2009 parties' hereinabove entered into Medical Services Agreement for respondent to provided prescribed medical services which includes; diagnosis of diseases, and prescription of appropriate treatment medication on request to the petitioner's health insurance members and/or employees or their legible dependants. Among the notorious term was that,



the performance of the contract was to be on utmost good faith and any proven fraud was enough to terminate the contract.

Further facts were that, sometimes in March, 2019 the petitioner conducted claim verification of data of invoices submitted by the respondent and in the cause noticed there was fraud and exercising the powers to terminate the contract under clause 18 (c) (i) and (ii) of the agreement terminated the agreement. The petitioner further reported the matter to police for investigations.

On the other hand, the respondent went to court and instituted Civil Case No. 83 of 2019 at Kinondoni District Court claiming several reliefs but same was successfully stayed and parties were directed to refer the dispute for arbitration first as provided in the agreement. According to clause 16 of the agreement, the arbitration was to be conducted by a single arbitrator to be appointed by parties' or in case of failure of the parties' to appoint, by the president of Tanganyika Law Society. Parties never appoint one. The respondent referred the dispute to the Tanganyika Law Society which prompted the president of Tanganyika Law Society to notify parties and appointed Advocate Deogratius William Ringia sole arbitrator who acting on the appointment commenced the arbitral proceedings which culminated into



final award issued on 14th April, 2021 in favour of the respondent, in the following terms, namely:

1. That relief sought in paragraph (a) of the statement of claim is referred back to the Kinondoni District Court for necessary steps depending on the outcome of the pending review;
2. Prayer (b) of the statement of claim is granted to the amount of TZS.450,000,000.00 as general damages for the loss of good will and earnings as stated above;
3. Reliefs sought in the counter claim are hereby dismissed;
4. Costs granted to the claimant to the extent stated to the order on costs

Aggrieved by the orders of the sole arbitrator in its final award, the petitioner has come to this court to challenge the recognition, registration and enforcement of the award on the following grounds, namely:-

- i. The sole arbitrator had no jurisdiction to entertain the matter because the Arbitral Tribunal was improperly and illegally procured;
- ii. The Arbitral Tribunal failed to comply with section 35 of the Arbitration Act, 2020;




- iii. The award was improperly procured in that the Arbitrator failed to consider the law and fact and apply it properly when he held that the respondent is entitled to be paid the general damages without explanations, reasons, or summary of the award thereof. Consequently, the award is vague and ambiguous in respect of the amount awarded;
- iv. The Tribunal exceeded its powers when the Sole Arbitrator awarded general damages to 3 hospitals whereas the respondent never prayed for this in its statement of claim nor in its final submissions;
- v. The Arbitrator misconduct himself by accepting jurisdiction as an Arbitral Tribunal and later returning the matter on specific damages to the District Court, whereas the Court had already stayed the matter awaiting the final decision of the Tribunal;
- vi. That the award is bad in law on its face in that the Arbitrator awarded interest while the interest thereto was too remote and unrelated to the contract between parties;
- vii. The Arbitrator willfully ignored the contents of 7 witness testimonies (3 of whom were not employed or recommended by the petitioner) in favour of 1 sole witness, being the respondent;



- viii. The Arbitral Tribunal failed to deal with all issues raised before it;
- ix. The Arbitrator disregarded the evidence adduced by the petitioner proving claim for fraud.

Upon being served with the petition, the respondent filed a reply to the petition disputing all allegations leveled against the arbitrator. The respondent maintained that, the award was justified and was issued on the weight of evidence adduced by the parties and no way was any relevant law disregarded and that no misconduct was committed by the Arbitrator. Eventually, the respondent prayed that the instant petition be dismissed with costs.

This petition was heard by way of written submissions. The petitioner was enjoying the legal services of joint team of Mr. Martin Mdoe, learned advocate from Dar es Salaam based legal clinic of MM Attorneys and Ms. Winjanet Lema, learned advocate from Dar es Salaam based legal clinic of Stallion Advocates; while the respondent was enjoying the legal services of Mr. Juma Nassoro, learned advocate, from Dar es Salaam based legal clinic of Nassoro & Co. Advocates.



Mr. Mdoe and Ms. Lema in their joint written arguments started by giving the facts pertaining to this petition and came up with three issues, which according to them, suffices to dispose of this petition. These are.

- a. Whether the Arbitrator was properly appointed?
- b. Whether the arbitral proceedings were properly conducted?
- c. Whether the arbitral proceedings were tainted with illegalities and irregularities?

Expounding on the 1st question or issue the learned advocates reproduced the contents of clause 16 of the Agreement which provided as follows:

"Clause 16(a) In the event of meeting referred in clause 15 above either not taking place or having taken place, but the difference, deadlock or dispute remains then the matter shall be referred to arbitration."

(b) there shall be one (1) Arbitrator to **be appointed by agreement between parties or in default of such agreement within fourteen(14) days of the notification of a dispute upon the application of any party to the dispute, the president of the Tanganyika Law Society** such arbitration shall be conducted in accordance with the provision of the law or any other statutory replacement or modification for the time being in force. To the extent

permissible by law, the determination of the Arbitrator shall be final and conclusive upon the parties.” (Emphasis by Advocates)

From the above clause, the learned advocates for the petition observed that, there was only two ways upon which the Arbitrator can be appointed to resolve the dispute between parties; that is, by agreement between parties or by application to the president of Tanganyika Law Society to appoint one. However, the learned advocates for the petitioner were quick to point out that, when Civil Case No.83 of 2019 was stayed on 1st November, 2019 no meeting was called to exercise the first option but the respondent wrote the president of Tanganyika Law Society requesting for appointment of the arbitrator. According to the learned advocates for the petitioner, this was procedurally wrong and failure to follow the prescribed procedure rendered the arbitrator to lack prerequisite jurisdiction. Lack of agreement and writing to Tanganyika Law Society after 7 months from the date when the case was opened was contrary to clause 16 (b) of the agreement.

To cement their argument, they cited the case of **BAHI DISTRICT COUNCIL vs. KAGUO BUSINESS ENTERPRISES CO. LIMITED, MISC. COMMERCIAL CAUSE NO. 18 OF 2012, DSM (HCCD) (UNREPORTED)** in which this court



dealing with issue whereby parties who have committed themselves to arbitral tribunal opted to go for adjudication and the court found out that this was a clear breach and violation of the binding terms and conditions of their agreement as to how to deal with dispute arising from the contractual relationship.

On the above note, the learned advocates for the petitioner concluded that since the appointment of the arbitrator in this petition was done in abrogation of the agreed procedure, then under section 69(1) (a) and (b) of the Act, the arbitrator was devoid of jurisdiction to entertain the dispute.

On the second question or issue whether the arbitral proceedings were properly conducted, it was the strong submissions of the learned advocates for the petitioner that, the proceedings were tainted with illegalities as the arbitrator did not comply with section 35 of the Arbitration Act, 2020 by failure to be impartial for failure to grant or award the petitioner the amount claimed in the counter claim for mere reason that he had already determined breach of contract while the truth was that, it was termination of the contract after respondent committed fraud.

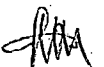
Further arguments for the petitioner were that, though under section 13 of the Arbitration Act, 2020, allows courts to stay proceedings and refers the



matter to arbitration, then, once the matter is referred to the Arbitrator, the Arbitrator is empowered to determine the dispute to its fullest. Therefore, according to the learned advocates for the petitioner, referring again the matter to District Court was wrong for the amount of TZS.117,000,000.00 was to be discussed and determined this amount in arbitral proceedings. Therefore, failure to determine that amount, according to learned advocates, amounts failure to determine all issues before him and as such vitiate the final award.

To cement their arguments, the learned advocates for the petitioner cited the case of MAHAWI ENTERPRISES LIMITED vs. SERENGETI BREWERIES LIMITED, MISC. COMMERCIAL CAUSE NO.9 OF 2018 DSM (HCCD) (UNREPORTED) in which it was held that "...nevertheless, I agree that it is a settled legal position that, a judge or magistrate is obliged to decide on every issue framed, failure of which constitute a serious breach of procedure.

Further pointing irregularities, the learned advocates complained that their evidence from their respective witnesses was not taken into account. An example of such witnesses, according to the learned advocates was the



testimonies of DW3, DW4, and DW5 and concluded that, this failure rendered the award to have been procured on illegality.

On the issue of general damages, the learned advocates challenged the award that, same was not pleaded and that in the absence of actual loss, then the arbitrator was not entitled to award such damages. Their reliance was in the case of ABDALLAH MEGABE SINDOMA AND ANOTEHR vs. THE TANZANIA NATIONAL ROADS AGENCY AND A.G, LAND CASE NO. 3 OF 2019 MUSOMA (HC) (UNREPORTED) in which it was held that, in the instant case, the plaintiffs did not prove actual loss... in view thereof, I am of the view that the court cannot exercise its discretion of granting general damages.

Another decision referred was that of YARA TANZANIA LIMITED vs. CHARLES ALOYCE MSEMWA AND 2 OTHERS, COMMERCIAL CASE NO.5 OF 2013, DSM (HC) UNREPORTED) which restricts the quantification of general damages.

On the foregoing, the learned advocates for the petitioner without court's leave changed their prayers and prayed that:

- a. That this court to declare that the award was VOID and set it aside and same be not registered by this court;



- b. That this honourable court to make an order superseding the Arbitration and of the case to remit and proceed with the suit ;
- c. This court order for costs in favour of the petitioner;
- d. Any other relief that this honourable court deem fit.

In response, Mr. Nassoro join hands with the petitioner's counsel that, an arbitral award can be challenged only on grounds as provided for under sections 69(1) (a) (b) and 70 (1) (2) (a) (b) (c) (d) (e) (f) (g) (h) and (i) of the Act for want of substantive jurisdiction and for serious irregularities affecting the arbitral tribunal, proceedings or the award respectively.

But, according to Mr. Nassoro, the instant petition was only limited to section 70 as stated in paragraph 13 of the petition and the allegations of serious misconducts and not serious irregularities are not provided for unless the words are substituted for serious irregularities. The learned advocate defined **'serious misconducts to mean unacceptable behaviour of a professional person.'** And, as such, the learned advocate for the respondent concluded that, the allegations/facts pleaded in sub paragraph (i) to ((ix) of paragraph 13 to the petition none falls on any unacceptable behaviour of a professional person. According to him, Mr. Ringia who was the sole arbitrator acted at all time fairly and impartially



and observed the requirements of section 35 (1) (a) (b) of the Arbitration Act, 2020.

Mr. Nassoro went on to argue in reply that save for allegations of lacking substantive jurisdiction, the rest issue raised in sub paragraph (i)- (ix) of paragraph 13 of the petition are mere matters of merits of the arbitral proceedings or award. According to Mr. Nassoro, they are not attached to a serious misconducts as alleged by the petitioner but also not attached to serious irregularities as envisaged under section 70 of the Act. To buttress his point, Mr. Nassoro cited the case of THE PERMANENT SECRETARY, MINISTRY OF WATER AND IRRIGATION vs. MEGA BUILDERS LIMITED [2016] TLS 276 at page 291 this court dealing with similar issue under the old provisions of the law which are same as the current Arbitration Act had this to say:

"...the powers of the court to set aside an award is limited to two scenarios, namely, first, where there has been misconduct on the part of the arbitrator, and second, if the arbitration or award has been improperly procured. The rationale for limiting the court intervention in arbitration award is very easy to understand being that it is parties themselves, who have on



their own choice, chosen the alternative dispute settlement instead of court and have pursued it. Therefore, the role of the court is to satisfy itself, if the parties have agreed to go to arbitration, if the arbitration was fairly conducted and parties were accorded a fair and adequate opportunity of being heard. The court does not sit like appellate court of the arbitrator.

The court did not find any credible complaint or allegation that, the arbitrator was corrupt, bias or there was undue influence on his part or the award was procured by fraud in a dishonest manner or through misconduct.

So generally, there is no ground under which the court may exercise its powers and set aside the award. Even if it is found that the arbitrator made a wrong decision that is not misconduct or wrong envisaged by section 16 of the Arbitration Act, Cap 15 as a ground for setting aside an award."

Further the learned advocate for the respondent, implore this court to be guided by the Court of Appeal decision in the case of VODACOM TANZANIA LIMITED vs. FTS SERVICES LIMITED, CIVIL APPEAL NO.14 OF 2016 DSM (CAT) UNREPORTED) which dealt with the issue extensively.



In reply to the three issues framed and argued, Mr. Nassoro on the first issue argued in reply that same was raised before the Arbitrator and was determined based on the provisions of clause 16(a) (b) of the agreement and that if the petitioner was not contented was to apply to for determination of the point under the provisions of section 34 of the Act. According to Mr. Nassoro, the decision of the Arbitrator on the point has not been challenged in the petitioner's petition and has not been disputed in petitioner's written submissions.

In the alternative as to the argument that the Arbitrator lacked prerequisite and substantive jurisdiction because the matter was referred to the Arbitrator after 7 months from the date of institution of the civil case no 83 of 2019 and as such contrary to clause 16, Mr. Nassoro replied that this argument is without merits because clause 16 do not refer the date on which civil litigation is stayed by the court as a commencement date to refer the dispute to arbitration.

Further it the argument of Mr. Nassoro that it was the petitioner who sought and got an order for stay of the proceedings in the District Court otherwise has no clean hands in challenging the process because he had

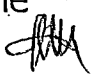


corresponding duty under the clause to refer the matter as soon as possible.

On the case of BAHU DISTRICT COUNCIL vs. KAGUO BUSINESS ENTERPRISES CO. LIMITED (supra) it was the reply of the learned counsel for the respondent that is distinguishable because it was dealing with the decision of the adjudicator while in this petition is dealing with the decision of the Arbitrator. On that note, Mr Nassoro prayed that issue number one be answered in the negative.

On the second issue it was the strong submission of Mr. Nassoro that same is devoid of merits. According to Mr. Nassoro, the petitioner both in her petition and written submissions is not challenging the impartiality of the arbitrator but on the merits of the award. This is because nowhere the petitioner is saying he was not heard but the arbitrator gave each party opportunity to prove her case and the case was conducted in compliance with section 35 of the Act.

On the arbitrator referring the 1st issue to Kinondoni, it was the brief but to the point reply of Mr. Nassoro that, same had already been decided by Kinondoni District Court and the arbitrator could not go into it again because there is pending review on the same point. Powers to refer the



matter is limited to undecided issue and not already decided matter as per section 12(4) of the Act.

On the last issue argued it was the reply of Mr. Nassoro that same goes on merits of the award and is baseless. In this he quoted a passage of what the arbitrator found in respect of the complained witness which is clear their evidence was considered fully but rejected because it was wanting.

On the grant of the general damages, it was the reply of Mr. Nassoro that, is not an irregularity but is on challenge of the merits of the award. According to Mr. Nassoro, what the Arbitrator did is according to law in the exercise of his discretion. In the fine the learned advocate for the respondent prayed that the instant petition be dismissed with costs.

The learned counsel for petitioner did not file a rejoinder as I am composing this ruling.

Before dealing with the three issue or question put forward for the determination of this petition, I wish to state that, under the Act now a party to the arbitral proceedings can challenge an award on two grounds as stated under sections 69 for want of substantive jurisdiction and 70 (1) (2) on serious irregularities. The said sections for easy of reference provides thus:



Section 69 (1) A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to court:-

(a) Challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) For an order declaring an award made by the arbitral tribunal on the merits to be of no effect, in whole or in part, on grounds that the arbitral tribunal did not have substantive jurisdiction.

(2) An arbitral tribunal may continue the arbitral proceedings and make a further award pending an application to the court under this section in relation to an award as to jurisdiction.

(3) The court may, on determination of an application under this section, make any of the following orders:-

(a) Confirm the award

(b) Vary the award

(c) Set aside the award in whole or in part

(4) Leave of the court shall be required for any appeal against a decision of the court made under this section



Section 70(1) A party to arbitral proceedings may, upon notice to the other party and to the arbitral tribunal, apply to the court challenging an award in the proceedings on the grounds of serious irregularity affecting the arbitral tribunal, the proceeding or the award.

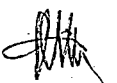
(2) For the purpose of this section, "serious irregularity" means an irregularity of one or more of the following kinds which the court considers has caused or is likely to cause substantial injustice to the applicant:

(a) failure by the arbitral tribunal to comply with section 35;

(b) the arbitral tribunal has exceeded its powers otherwise than exceeding its substantive jurisdiction;

(c) Failure by the arbitral tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the arbitral tribunal to deal with all the issues that were raised before it;



(e) any arbitral institution or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award

(g) the award being obtained by fraud or procured in a manner that is contrary to public policy

(h) failure to comply with the requirements as to the form of the award

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitral tribunal or by any arbitral or other institution or person vested with powers in relation to the proceedings or the award.

(3) The court may, where it determines that there is a serious irregularity affecting the arbitral tribunal, the proceedings or the award:-

(a) remit the award to the arbitral tribunal, in whole or in part, for reconsideration;

(b) set aside the award in whole or in part; or



(c) declare the award to be of no effect, in whole or in part:

Provided that the court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it will be inappropriate to remit the matter in question to the arbitral tribunal for reconsideration.

(4) The leave of the court shall be required for any appeal against a decision of the court made under this section.


Reading from the above two provisions of the Act, and in particular section 3 of the Act which defined the court to mean that the High Court. Then, it is the High court that is empowered to entertain any challenge on the award on the substantive jurisdiction and on serious irregularity. The powers of the court under the section 69 can lead the court to confirm the award, to vary the award and set aside the award based on the complaint proved and the powers of the court under section 70 can lead the court to remit the award to the tribunal in whole or in part for reconsideration, set aside the award whole or in part and declare the award to be of no effect provided it is satisfied that it will be inappropriate to do otherwise.

It is further to be observed and I state that the phrase "**serious irregularity**" is defined under sub section 2 of section 70 to the Act to

mean an irregularity of one or more of the following kinds which the court considers has caused or is likely to cause substantial injustice to the applicant.

As it can be seen and as opposed to the old law, the current legal regime in our jurisdiction has gone far to mention and define in most clear terms the grounds upon which a party can challenge an award. Paragraphs (a) to (i) to sub section 2 to section 70 set down 9 grounds upon which a party can challenging an award on serious irregularity.

Guided by the decision in the case of VODACOM TANZANIA LIMITED vs. FTS SERVICES LIMITED (supra) in which the Court of Appeal of Tanzania strongly observed after citing several cases that petition to the High Court to challenge an award is not an appeal and therefore cannot be disposed of in the form of a rehearing, that it is quite immaterial that the arbitrator may have erred in point of fact or indeed in point of law because it is not misconduct to make a mistake or come to erroneous decision, since parties choose their own arbitrator to be the judge to resolve the dispute between them, they cannot object to his decision either upon the law or the facts, if the award is good on the face of it unless the errors of law manifest on its face.



In my considered view I would like to add that, arbitration agreement do not oust courts' jurisdiction to entertain any dispute in case parties' don't commit to what they agreed and a party cannot use the agreement as shield to avoid court jurisdiction granted by the law or statute.

Now back to the petition, while in this petition the learned counsel for petition had enumerated 9 grounds in paragraph 13 of the petition challenging the award in dispute but in their written submissions reduced them into three issues which revolve around appointment of the Arbitrator, conduct of the proceedings and illegalities and irregularities. In determining this petition after dealing with the three issues will suffice to dispose of this petition because other grounds omitted to be argued are considered ingeniously abandoned.

Having carefully listened and considered the rivaling arguments on the appointment of the arbitrator and having revisited the proceedings and how the said arbitrator was appointed, with due respect to Mr. Martin Mdoe and Ms. Winajanet Lema, learned advocates for the petitioner, this ground is without any useful merits. The reasons I am taking this stance are not farfetched. **One**, it is clear from a reading of clause 16 the subject of the appointment of the arbitrator that the clause casted a corresponding duty to



both parties to apply for appointment of the arbitrator by the president Tanganyika Law Society. In the circumstances, it is unheard one party who had a duty which he did not exercise to complain that the other party has exercised the same. **Two**, as rightly argued by Mr. Nassoro and rightly so in my own view, it is the petitioner who through a letter dated 27/01/2020 clearly shows management meetings was not possible and the next possible remedy was to refer the matter to arbitration as did by the claimant. **Three**, further reading from the clause 16(b) the appointment of arbitrator by was either agreement or in case of failure to agree, by the president of Tanganyika Law Society. The two options were to apply in the alternative and not one after the other because the word use is "or" indicating one does not depend on each other's failure.

It is on the totality of the above reasons that, with due respect to Mr. Martin Mdoe and Ms. Winjanet Lema learned advocated for the petitioner that I found their arguments far from convincing this court to hold otherwise.

From the foregoing, therefore, no doubt, the appointment of the sole arbitrator was in line with the agreement of the parties. That said, the 1st



issue must be and is hereby answered in the affirmative that the arbitrator was properly appointed.

Next is the second issue that whether the arbitral proceedings were properly conducted? On this ground the learned advocates for the petitioner contended that the arbitrator failed to comply with the requirement of section 35 of the Act by failing to be impartial and as such failed to award the counter claim and to determine the matter to its fullest by referring some of the claim to the District court for necessary orders on the claim of TZS.117,000,000.00.

Mr. Nassoro, on the other hand, countered that, reading from the submissions of the learned advocates for the petitioner are challenging the merits of the award because all parties were treated before the final award was issued, so section 35 was complied to the letter, the issue of TZS.117,000,000.00 had already been determined by the District Court and no way the arbitrator could open up a non issue between parties and there is pending review on the same and that powers under section 13 to refers the matter to arbitration do not give an arbitrator powers to deal with question that has already been decided by the court.



Having carefully followed and considered the rivaling arguments and gone through the proceedings before the arbitrator, with respect, I don't think that Mr. Martin Mdoe and Winajanet Lema are right. Section 35 of the Act requires the arbitrator to act fairly and impartially by giving parties' right to be heard which was done in this case. To argue that failure to grant counter claim is what the parliament meant under that section is misconceived on their part. As right argued by Mr. Nassoro, and rightly so in my own view, in this point the learned advocates for the petitioner are arguing on merits of the award and not a denial to be heard and failure to consider evidence on the part of the petitioner. It is further my own considered view that arbitrator was justified by all intents not do deal with a claim that had already been determined by the District court and there is review pending review on the point before the same court. That could render the review and if entertained may bring a conflicting decisions on the same point.

I, therefore, find no merit in this ground that section 35 was not complied with while there is evidence on record that the petitioner presented its case to the fullest. More so, in the circumstances of this case, no issue was not heard save for the claim of TZS.117,000,000.00 which was in its peculiar circumstances to be return for further orders before the District court for



same has already been concluded between parties. To re-open this claim in the arbitral proceedings would be blowing hot and cold on the part of the petitioner.

All dispassionately considered the second issue has to fail for want of any useful merits.

This takes me to the third issue that whether the Arbitral tribunal proceedings were tainted with illegalities and irregularities? The petitioner's concern here is that the evidence of the petitioner's key witnesses' were not taken into account. These are DW-3, DW-4 and DW-5, whose testimony, according to the learned advocates for the petitioner their testimonies were not analyzed to justify the award because they testified to have never received medical services from the respondent's hospitals. This, according to the learned advocates for the petitioner, amounts to failure to consider petitioner's witnesses' evidence.

On the other hand, the learned advocate for the respondent replied that, the submission in this point goes to the merits, which is not a ground to challenge the award. Notwithstanding that, he argued that the evidence of petitioner's witnesses were fully considered and quoted page 14 of the



award, where the arbitrator considered evidence of petitioner's witnesses and observed the following:

"...further to put weight to justify the disengagement, the respondent through witnesses DW2 Dr. Renus Gracian and DW6 David Rumichal Shoo were of the same position as that of DW1 Dipankar Acharya. Further DW3, DW4 and DW5 produced affidavits to justify that the none of their beneficiary had received services from any of the facilities as claimed by the claimant. However, no affidavit of any of the said beneficiary/patients described in the medical forms was presented nor did any of them appeared to testify. This was admitted by DW2 Dr. Renus Gratian at a page 60 of the proceedings."

The above quoted part of the award clearly shows the arbitrator fully considered all petitioner's witnesses as opposed to what was argued as illegality. Not only that but also as correctly observed by Mr. Nassoro, learned advocate for the respondent, and rightly so in my own view, this argument is on merits of the award and not an illegality as argued.

This brings to a conclusion that the no irregularities or illegality has been pointed out on this point to the satisfaction of this court to warrant intervention of the award as granted by the sole arbitrator. Therefore, this ground has to fail.



Another ground argued is the grant of general damages to the tune of TZS.450,000,000.00 on reasons that it was not pleaded and no actual loss was proved and urged this court to set aside the grant of the general damages. To cement this point, the learned advocates for the petitioner cited the case of ABDALLAH MEGABE SINDOMA AND ANOTHER vs. THE TANZANIA NATIONAL ROADS AGENCY AND ATTORNEY GENERAL, LAND CASE No. 3 OF 2019 in which it was held that in the absence of prove of actual loss, the court cannot exercise the discretion of granting general damages.

On the other hand, the learned advocate for the respondent was of the firm arguments that the granting of general damages is at the discretion of the arbitrator. According to him, since the illegal termination covered three hospitals, then in his view, the amount award was reasonable in the circumstances.

Having considered the rival arguments of the learned trained minds of the parties, I find no any irregularities on the part of the arbitrator worth to warrant the intervention of this court. General damages were pleaded and once the termination was found not justified which is not the complaint of



the petitioner, the arbitrator was justified to grant what he did and in my own opinion the amount was fair and reasonable.

In the totality of the above, since the petitioner has failed to prove any of the issues as required under section 69 and 70 (2) of the Arbitration Act, 2020 that the arbitrator had no jurisdiction and that committed any irregularity, I am constrained to find no legal justification to interfere with the decision of the arbitrator and the final award thereof. Consequently, I dismiss this petition with costs in favour of the respondent for want of merits.

It is so ordered.

Dated at Dar es Salaam this 19th day of August, 2021.



S. M. MAGOIGA

JUDGE

19/08/2021