IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 131 OF 2020

BETWEEN

DIAMOND MOTORS LIMITED ..... APPLICANT

AND

SHEIKHA SEIF ..... RESPONDENT

JUDGMENT

Last order 5/10/2021

Judgment 21/10/2021

B. E. K. Mganga, J.

On 3rd October 2016, the applicant employed the respondent to the position of Corporate Assistant Manager for a fixed term contact of two years from 3rd October 2016 to 2nd October 2018. Respondent was posted at Masaki office. The said fixed term contract was signed by the respondent on 26th August 2016. The said fixed term contract of employment that was signed by the respondent was annexed with key duties and responsibilities. It was indicated in the said contract that, duties and responsibilities are indicative in nature and are subject to change as per the business requirement of the company. These duties and responsibilities were of three categories namely (i) personal

Assistance that comprised of 16 duties and responsibilities; (ii) Marketing Communication that comprised of 13 duties and responsibilities; and (iii) sales responsibilities that comprised of 9 responsibilities.

It happened that the relation between the respondent and her immediate supervisor at Masaki office became bad as a result she was transferred to Pugu Road office. After transfer to Pugu Road office, applicant changed the job of the applicant from Corporate Assistant Manager to sales executive on ground that respondent was incompatible with the 1st job. Respondent refused to work as sales executive on reason that it was different from what she was told by the CEO. After that refusal, applicant wrote a letter offering the respondent alternative work and changed her workplace to Buguruni office. In the said letter, applicant indicated some key performance indicators which respondent argued that were not given at the time of entering into contract of employment.

On 3rd October 2017 respondent referred the Dispute to the Commission for Mediation and Arbitration claiming to be paid TZS 132,839,295/= being 12 months' salary for unfair termination, annual leave, terminal benefits and general damages. In her claim in CMA F.1 respondent indicated that, there was constructive termination as the

applicant made the work intolerable and that the dispute arose on 29th September 2017.

After hearing evidence of both parties and submissions thereto, on 25th November 2019, U. N. Mpulla, arbitrator issued an award in favour of the respondent that she was constructively terminated after the applicant has made employment intolerable. The arbitrator awarded the respondent to be paid TZS 46,268,894/=.

Being aggrieved by the said award, applicant filed this application for revision. The notice of application is supported by an affidavit of Laurian Martin, the principal officer of the applicant. In the affidavit, the deponent advanced twelve (12) grounds of revision namely:-

(a) That the Commission erred in law and fact in holding illogically to the effect that the applicant constructively terminated the respondent and proceeded to issue an award against the applicant.

(b) That award of the Commission has been improperly procured for the Arbitrator having failed to properly understand the evidence of the Applicant's witnesses, erred in facts and in law in concluding that the Respondent (sic)constructively terminated the respondent despite abundant and uncontroverted evidence on the record.

(c) That award of the Commission has been improperly procured for the Commission having proceed (sic) with material irregularity causing injustice on the part of the Applicant for the Commission having

awarded the Respondent with reliefs which were not pleaded or /and not supported by evidence and in excessive;

(d) That award of the Commission has been improperly procured for the Arbitrator erred in law by ruling that the Commission had granted the Respondent leave to correct the complaint form;

(e) That award of the Commission has been improperly procured for the Arbitrator erred in law and exceeded its jurisdiction by deciding on matters that were not fully on balance of probability and /or brought by the Complainant/the parties before the commission and extraneous matters;

(f) That award of the Commission has been improperly procured for the Arbitrator erred in law and in fact in awarding illogically and excessive compensation to the Respondent without legal and factual basis;

(g) That award of the Commission has been improperly procured for the Arbitrator erred in law and in fact by ignoring the testimony, true facts and evidence led by the employer's (sic) that the Respondent absconded from work;

(h) The Commission exceeded its jurisdiction by deciding on matters which were time barred thus proceeded to determine the complaint without jurisdiction as there was no condonation application;

(i) The Commission's decision is illogical and full of contradictions and does not disclose analysis of all witnesses' evidence and reasons for the decision thereof on the vital issues leading to its decision.

(j) That the Commission's award is questionable for lack of legal basis and that there are errors material to the merits of the decision of the commission thus making the Commission's award improperly procured.

(k) That the Honorable Arbitrator erred in law for failure to issue an award within 30 days as required by law with prejudice to the Applicant.

(l) That the Hon. Arbitrator erred in Law and fat in exercising a lopsided evaluation of evidence and in ignoring potentially useful evidence adduced by the applicant without any reason.

The application was opposed by the respondent who filed both the notice of opposition and counter affidavit affirmed by Litete Haji Ndungo, her advocate.

The application was disposed by way of written submission whereas applicant enjoyed the service of Gerald Shita Nangi, Advocate while respondent enjoyed the service of Geofrey Joseph Lugomo, advocate.

In arguing the 1st ground of revision, counsel for the applicant submitted that the arbitrator erred to hold that applicant made the work intolerable hence constructive termination as respondent admitted that she was not given termination letter or that she resigned. He submitted further that resignation whether forced or not is an important element as provided for under Rule 7 of the Employment and Labour Relations (code of Good Practice) Rules, 2007 GN. No. 42 of 2007. He went on that both witnesses of the applicant proved that respondent absconded from work and she was nowhere to be seen until when she served the applicant with the complaint i.e., CMA F.1. Counsel further submitted that respondent did not utilize the Disciplinary Code of Conduct Exhibit D1.

Respondent to 1st ground, counsel for the respondent submitted that resignation of an employee should not necessarily be in writing as it

can be by oral or by conduct. He went on that respondent left employment and went to CMA to file the complaint and that this is sufficient conduct to regard that respondent resigned and that arbitrator did not err to hold that respondent was constructively terminated.

It is clear from submissions by both counsels that they are in agreement that for constructive termination to exist, resignation of an employee is necessary whether forced or not. Counsel for the respondent is of the view that the said resignation can be oral, written or by conduct. With due respect to counsel for the respondent, that position is not correct especially in the circumstances like the case at hand where the parties agreed on the mode of termination of employment. In clause 15 of the fixed term Contract of employment (exh. P1) it is expressly stated that a part desiring to terminate employment has to give the other a notice of termination. The said clause reads in part:-

> *"**15 termination:***
>
> ***The Company as well as Employee shall have the right to terminate the employment by giving 30 days' notice or to make payment of amount equivalent to the notice period in lieu thereof.***
> *However, the company reserves the right to terminate employment under this contract at any time without notice for "cause" which shall include and shall not be limited to:*
>
> *(i) Material breach of this contract by the Employee.*

(ii)Non-performance of such duties, or refusal to abide by or comply with the reasonable directive s of his superior officers

(iii) ...

(iv) ...

(v) ....

(vi) ....

(vii) ...."

Nothing was stated by the respondent in her evidence that she served a 30 days' notice to the applicant or paid one-month salary in lieu of notice. In my view, in the presence of the afore quoted terms of contract, it cannot be assumed that either part terminated contract of employment by conduct as submitted by counsel for the respondent.

The court of Appeal had an advantage to discuss the issue of constructive termination and the onus of proof thereof in the case of ***Kobil Tanzania Ltd vs Fabrice Ezaovi, Civil Appeal No. 134 of 2017*** (unreported). In the ***Kobil's*** case, (supra), the court of Appeal quoted, and endorsed an article by Sharon Sheehan titled **Constructive Dismissal - A Last Resort Remedy** that:

"Unlike all other dismissals, where an employee claims that they have been constructively dismissed the onus/burden of proof is placed upon them to prove that their resignation was justified. In effect, they are required to prove that they have exhausted all other avenues of resolution before they have ***resigned from their position****. This would generally require them to bring*

their grievance to the attention of their employer, ***follow all the employer's grievance procedures and industrial relations procedures,*** *as outlined in their contract or the employee handbook. Only where these procedures have not achieved an appropriate outcome or where the employer has refused to comply with or engage in these procedures, then should an employee consider* ***resigning from their position****. A failure to invoke these procedures may leave the Court or Tribunal open to rejecting a claim of constructive dismissal."*

In the application at hand, respondent did not resign, and nothing was testified by the respondent that she followed applicant's grievance procedures, or the grievance procedure provided for, in the Guidelines under the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. NO.42 of 2007. Not only that, I have carefully read her evidence and find that she gave no reason for not following the grievance procedure. In clause 14 of the fixed term contract of employment, it is stated that:-

"...the Employee undertakes to comply with the provisions of the grievance procedure in respect of any grievance or complaint that may arise out of his /her employment".

As stated above, no evidence was adduced by the respondent that she followed the said grievance procedure before referring the dispute to CMA. The court of Appeal in the case of ***David Nzaligo vs. National***

Microfinance Bank PLC, civil Appeal No. 61 of 2016 (Unreported) dismissed the claim by the appellant who resigned claiming constructive termination as he was under probation for a long period, based *inter- alia* on sanctity of employment contract. In ***Nzaligo's case***, supra, the Court of Appeal held:-

> *"...It is important to note that the sanctity of the employment contract cannot be gainsaid. In the present appeal the appellant and the respondent agreed to be bound by the contract under the terms and conditions therein and also accepted the rights and duties, responsibilities and obligations on either party."*

Applying sanctity of employment contract between the applicant and the respondent in the application at hand, I hold without demure, that respondent was bound to comply with the provisions of the grievance procedure of the applicant. Nothing was testified by the respondent to the effect that the said procedure is not in existence and, if it is in existence, reasons for not complying with it.

In the ***Kobil case***, supra, the court of Appeal subscribed to the South African decision in the case of **Solid Doors (Pty) Ltd v. Commissioner Theron and Others, *(2004) 25 ID 2337 (LAC)*** at para 28 that:-

"... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment Intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent constructive dismissal is not established"

It is my considered view that termination of contract of employment in constructive termination is by resignation as provided for under rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. The respondent did not resign, and no evidence was adduced at CMA that she resigned. Counsel for the respondent submitted that resignation was by conduct. With due respect to him, it cannot be inferred as such. The argument that resignation was by conduct is not born out of evidence of the respondent at CMA. Therefore, that argument is submission from the bar and not evidence. Counsel was supposed to lead the respondent to state so in her evidence if he wished. Rule 7 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 is clear and provides:-

"7(1) where an employer makes an employment ***intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or termination.***

(2) subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify resignation or constructive termination-

(a) sexual harassment or the failure to protect an employee from sexual harassment and;

(b) if an employee has been unfairly deal (sic) with, ***provided that an employee has utilized the available mechanisms to deal with grievances unless there are god reasons for not doing so.***

(3) where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer."

In fact, in order for an employee to succeed in an application for unfair termination based on intolerability of employment, it has to be proved that it is the employer who caused the employment intolerable in terms of section 36(a)(ii) of the Employment and Labour Relations Act [Cap.366 R.E 2019]. This section provides:-

"36 For purpose of this sub-part-

(a) "termination of employment" includes-

(i)...

(ii) ***a termination by an employee because the employer made continued employment intolerable for the employee."***

It is clear from that section, that an employee must have terminated employment and the reason for that termination being that the employer

has made it unbearable or impossible. As pointed above, nothing showed that respondent resigned or terminated employment.

In my view, counsel for respondent, having found that there was no resignation by the respondent, and that there was none-compliance of the afore quoted rule, as an afterthought, came with the idea of resignation by conduct. This idea is also bound to fail as there is ample evidence by Laurian Martin (DW1) and DW2. Oliver Huruma Mawole that respondent absconded from work. It is this abscondment that counsel for the respondent termed as resignation by conduct. Abscondment from work, by and large, cannot be regarded as resignation by conduct. I therefore hold that there was no resignation.

The Court of Appeal in the ***Kobil case*** supra, cited with approval the cases of ***Girango Security Group v. Rajabu Masudi Nzige, Labour Revision No. 164/2013*** (unreported) and ***Katavi Resort v. Munirah J. Rashid [2013] LCCD 161*** on matters to be considered by the court in determining whether there was constructive termination or not. The court of appeal gave the following criteria:-

1. Did the employee intend to bring the employment relationship to an end?

2. *Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?*
3. *Did the employer create an intolerable situation?*
4. *Was the intolerable situation likely to continue for a period that justifies termination of the relationship by the employee?*
5. *Was the termination of the employment contract the only reasonable option open to the employee?*

Applying the aforementioned criterial to the application at hand, in her evidence, applicant (PW1) testified:-

"... Workstation was at Masaki. I was assisting the CEO to arrange his documents, to arrange meetings and sometimes attend meetings to take minutes. The challenge of my duties was that CEO was harsh. Sometimes he was causing me not to do my job. He was giving me hard time to do my job. ...sometimes he could threaten and order me to go home...we were doing our job in presence of a dog (German Shephard). We were also responsible to give food for the dog at home... I was called at Pugu road by the HR manager of Tanzania and legal service. The head of HR from India informed me that they have decided to give me the job of sales executive because I could not do the job of personal assistant because I was incompatible. ... they told me if I did not accept the job offered, I was supposed to resign... ***I refused to work as sales executive because*** *it was different from what the CEO told me. After that they wrote a letter offering me alternative work and changed my workplace to Buguruni. They indicated in it some key performance indicators which I was not given when I was employed...He also said I was incompatible of doing sales job..."*

In cross examination, respondent (PW1) is recorded saying:-

"*In the employment contract, employer had discretion to assign me any task*"

In his evidence, Laurian Martin DW1 testified that respondent refused a job she was reassigned to, and that she had bad relations with her fellow employees. Later on, respondent was attending at work but without working. Not only that but also, in September she absconded for more than five days. When she came back, she brought an ED from a different hospital other than Hindu Mandal hospital where all employees are being treated. That, due to conducts of the respondents, several warnings were given after being called to the disciplinary hearing several times. During cross examination, DW1 maintained that respondent was not in good terms with fellow employees. In addition to that, Oliver Huruma Mawole (DW2) testified that respondent was employed as Assistant Manager at Masaki office but due to bad relationship with her boss, she was transferred to another workstation. Her new role in the new workstation was within the contract. DW2 went on that in August respondent left on her own. The evidence of both of DW1 and DW2 were not shaken during cross examination.

With that evidence, and in applying the above quoted criteria, it is my view that the employer did not create intolerable situation, but respondent created that environment. Her refusal to work at a new

workplace on allegations that it was different from what the CEO informed her, specifically refusal to work as sales executive, in my view, is uncalled for, because according to the contract of employment (exh. P1) amongst her responsibilities were sales. All other duties and responsibilities assigned to the respondent are tied to the position of Corporate Assistance Manager as per clause 2 of the fixed term contract of employment (exh.P1). Clause 2 of the said contract provides:-

> *"**2. Position***
>
> *The Employee shall be employed in the position of 'Corporate Assistance Manager' in the Company and will report to the General Manager of the Company. The Employee undertakes to perform and complete the duties and responsibilities broadly specified services to the Company as stated in* ***Annexture -I.***

As pointed hereinabove, the said ***annexture -I*** to the fixed term contract of employment shows the duties and responsibilities of personal Assistance, Marketing Communication, and Sales responsibilities. An argument that applicant was transferred to another workplace without her consent seems to be strange to me because it was not expected that respondent would have discharged all these responsibilities while at Masaki office for the whole period of her contract. By the way, it was not stated in the fixed term contract of employment (exh.P1) that respondent cannot be transferred to any other offices of the applicant. In other

words, respondent was not employed as a fixed fixture in the office of the applicant that can only be moved after it has become not useful or at the time of disposal after decrease of its value. Criticism on transfer without consent of the respondent, in my view, is a self-defeating in circumstances where the respondent alleged mistreatment by the CEO at Masaki otherwise there is an undisclosed secret between the two. More so, respondent admitted that applicant (employer) had a discretion to assign her a different duty. According to clause 15(ii) of the contract (exh.P1) quoted above, it is clear that that non-performance of such duties, or refusal to abide by or comply with reasonable directives of her superior warrant for termination. In my considered opinion, DW1 and DW2 were supposed to be complemented rather than to be criticized as they made all efforts to ensure that respondent continues with her employment.

It is clear from the evidence of the respondent quoted above that she was not comfortable to work at Masaki office for the reasons quoted above. It is equally clear that, as mitigation factor, applicant decided to transfer the respondent to Pugu Road office then to Buguruni Office. Nothing was said by the respondent that the acts complained of at Masaki

office were also existing at both Pugu road and Buguruni offices. As there were no such incidences at Pugu road and Buguruni offices, it cannot be said that the employer (applicant) caused employment intolerable to the respondent. In my view, applicant made all efforts possible to enable the respondent to continue with her employment. In short, in transferring respondent from Masaki office to Pugu road then to Buguruni office, applicant was putting to an end the complained acts that was unpleasant to the respondent and that were likely to cause the work not to be beyond the limits of tolerance. In my view, applying the test set out hereinabove, the work was not intolerable.

Respondent testified that after transfer from Masaki office to Pugu Road then to Buguruni offices, she was required to fill Key Result Area (KRA) and Key Performance index (KRI) which, according to her, were not given to her at the time of entering into the said fixed term contract of employment. In short, applicant was advancing argument that the requirement of signing KRA and KRI was a continuation of the alleged acts that caused the employment to be intolerable. This argument also is bound to collapse because clause 6 of the said fixed term contract of employment (exh.P1) provides:-

" 6. Key Result Area & Key Performance Index:

Once you join us, we shall mutually agree on your KRA & KPI's"

That said and done, has disposed off that argument.

It was argued on behalf of the respondent that she was faced with series of warning letters without justification, transferred to another workplace without her consent and denied annual leave. It was argued that these mistreatments were done by the CEO and reported to the Human Resources Manager, but nothing was done to rectify the situation. It was submitted that all these made employment intolerable.

It is my considered view that, these claims are, but with no substance. As pointed above, the alleged mistreatments are said to have been committed by the CEO at Masaki office. The respondent (PW1) in her evidence testified that she reported to the HR and Legal Service who decided to transfer her from Masaki office. A submission that nothing was done to remedy the situation, in presence of the evidence of the respondent to the contrary, in my view, is not justifiable.

On issuance of various warning letters to the respondent, reasons are clear and some answers may be found in her evidence (Pw1) quoted above that she refused to accept the work or duties she was assigned.

This was in violation of clause 15(ii) of the fixed term contract of employment (exh. P1) which she was bound with, under the principle of sanctity of contract of employment as it was held in ***Nzaligo's case*** supra.

All the afore said in my view, has covered both 1st and 2nd ground of revision. I therefore allow these two grounds of revision.

In the 3rd ground, applicant submitted that the arbitrator erred in awarding respondent TZS 3,304,921/= as unpaid leave while the same was not pleaded in CMA F.1. In the 4th ground counsel for the applicant submitted that arbitrator erred by ruling that the commission granted leave to the respondent to correct or amend the complaint form. He submitted that initially respondent filed CMA F.1 dated 9th August 2017 showing that the dispute arose on 19th July 2017 and termination to have occurred on 29th September 2017. The said CMA F.1 dated 9th August 2017 was tendered as ***ID 1*** by the applicant. Applicant has annexed the said ***ID 1*** to the affidavit in support of the application. Counsel for the applicant submitted further that CMA F.1 dated 29th September 2017 indicating that the dispute arose on 29th September 2017 was illegally introduced in the record.

Responding to these grounds of revision, counsel for the respondent submitted that respondent indicated in CMA F.1 that she was claiming to be paid annual leave. On CMA F.1 allegedly to have been illegally introduced in the record as applicant complained, counsel for the respondent submitted that, when respondent submitted the earlier form to the registry officer found it to be defective and that it was before registration and that after correction, the amended CMA F.1 was filed and registered. He went on that arbitrator could not cite the order amending CMA F.1 as there was no such order.

I have considered submissions of both counsels and evidence on record and find that the allegation in both 3rd and 4th ground are devoid of merit. The criticism that respondent did not claim payment of annual leave is not correct. I have examined CMA F.1 and find that annual leave was amongst the claim by the respondent. what was not claimed but awarded is notice pay. I can understand that applicant may be meant notice pay but not annual leave pays. Allegation that a new CMA F.1 was illegally introduced in the CMA record, is but without substance. Applicant tendered for identification CMA F.1 allegedly introduced in the record illegally. As if that is not enough, applicant annexed it on the affidavit in support of this revision application so that this court can use it as

evidence in this revision application. Without any hesitation, I hold that the said ID 1 is not evidence and it has nothing to help applicant at this stage of revision as the court is not receiving new evidence. If applicant intended to use it, she was supposed to tender it as exhibit. It was only after being admitted as exhibit, this court could have examined it and make comment or assess its probative value. These two grounds fails.

Counsel for the applicant argued the 5th and 6th ground together. It was submitted that arbitrator had no jurisdiction to deal with the claim for termination of the contract and award compensation thereof as the respondent departed from her pleading. The case of ***the Registered Trustee of Islamic Propagation Centre (IPC) v. the Registered Trustee of Thaagib Islamic Centre (TIC), Civil appeal No. 2 of 2020, CAT (***unreported) wherein the Court held that parties are bound by their own pleading were cited by applicant to bolster his argument. According to counsel for the applicant, respondent was supposed to file a complaint for breach of contract and not termination as the fixed term contract comes to an end automatically. The case ***Serenity on the Lake Ltd v. Dorcus Martin Nyanda, Civil Appeal No. 33 of 2018, CAT*** (unreported) was cited to that effect. Counsel cited section 36(a)(ii) of the Employment and Labour Relations Act [Cap.366 R.E. 2019] and Rule 4(4)

of the of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007. Applicant challenged further jurisdiction of CMA on ground that respondent filed CMA F.1 that was issued under GN. 65 of 2007 that has been revoked by Rule 34(1) of the Employment and Labour Relations (General) Regulations, 2017, GN. No. 47 of 2017.

Responding on submission relating to filing CMA F.1 that was issued under GN. 65 of 2007, counsel for the respondent argued that respondent filed CMA Form that was issued under GN. 47 of 2017. On jurisdiction, counsel submitted that arbitrator had jurisdiction.

Having considered the rival arguments of counsels, my answer to their controverse is straight forward and simple. It is true that parties are bound by their own pleadings as it was held in ***the Registered Trustee of Islamic Propagation Centre (IPC)*** *case, supra.* I don't see any departure from own pleading in this application. On complaint that respondent was supposed to file a complaint for breach of contract and not termination as the fixed term contract comes to an end automatically and the citing of the ***Serenity on the Lake Ltd case,*** supra, my quick response is that the this is a none-issue between the parties at CMA. In my view, the ***Serenity on the lake case*** (supra) was cited out of context. I have also to point out quickly here, that Rule 4(4) of the

Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007 cited by the applicant to challenge jurisdiction is a general Rule on how a fixed contract can be terminated. It does not say that an employee has to file only a dispute based on breach of contract and not termination.

The jurisdictional issue was further challenged based on CMA F.1 issued under GN. No. 65 of 2007. It is my considered opinion that, this is a misdirection. I have carefully examined the CMA F.1 under attack by the applicant and find that it was issued under GN. No. 47 of 2017. It is true that CMA F.1 that was issued under GN. No. 65 of 2017 was revoked by GN. No. 47 of 2017 but it was replaced in identical terms. In my view, CMA F.1 issued under either of the GN No. 65 of 2007 or 47 of 2017 does not cloth CMA with a jurisdiction but guides the parties on how to file their disputes or claims. In short, CMA F.1 issued under either GN.65 of 2007 or 47 of 2017 are there to assist the parties to file correctly their claims but does not cloth jurisdiction to CMA. These grounds are therefore dismissed for lack of merit.

Counsel for the applicant argued the 7th, 9th, 10th and 12th grounds of revision together. Submitting on these grounds, counsel for the applicant argued that the award was issued in violation of Rule 27(3)(d) and (e) of

the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007 that makes it mandatory for the award to contain summary of the parties' evidence and arguments and reasons for the decision amongst others. The complaint by the applicant is that the arbitrator did not consider evidence on abscondment of the respondent, applicant's readiness to let the respondent back to work and exhibits namely Disciplinary Code of Conduct for Diamond Motors Limited (exh.D1), letter dated 21st July 2017 from the applicant to the respondent to show cause, letter dated 23rd February 2017 titled "*disciplinary charges against me*" from the respondent to the applicant, a letter dated 22nd February titled Disciplinary charges from the respondent to the applicant, a letter dated 13th April 2017 from the respondent to the applicant titled request for outcome for disciplinary hearing, (collectively admitted as exh. D2) and Disciplinary Hearing Form of 1st March 2017 (exh.D3).

Responding on these grounds, counsel for the respondent submitted that arbitrator complied with Rule 27(3)(d) and (e) of GN. No. 67 of 2007, supra, as the award contains summary of evidence of parties.

I have carefully examined the award to satisfy myself as to whether in the award, the arbitrator summarized evidence of both parties, their arguments and it contains reasons for the decision as required by Rule

27(3)(d) and (e) of GN. No. 67 of 2007, supra or not. In my considered view, arbitrator fairly summarized evidence of the parties as it is evidenced from page 2 to 10 of the award. In summarizing that evidence, in my view, arbitrator is not required necessarily to reproduce the evidence verbatim. In reading the award, applicant might have found that some of the evidence which to him was very crucial was not summarized. But that alone, cannot justify a conclusion that evidence of the parties was not summarized.

Arbitrator is being criticized that he did not consider evidence of the applicant relating to abscondment of the respondent. I have examined the award and find that the same was considered at page 21 (post) and page 22 (ante) albeit briefly. On abscondment of the respondent, arbitrator had this to say:-

> " *I am equally not in disregard of the* ***allegation that the complainant had once absconded from work*** *by reason of sickness and that she was called to make her statement in defence (Exh.p11). However, through her testimony and exh. p12 which was not shaken even on cross examination, she gave notice of such absence and later an excused from duty (ED) recommendation. Even if it would have been the case, it was not the subject matter of the dispute. If the respondent wanted to deal with such alleged misconduct, normal disciplinary procedures under Rule 13 of GN. No. 42/2007 ought to have been complied."*

From the quoted paragraph, it is clear that the allegation of abscondment of the respondent from work was considered and rejected by the arbitrator. The complaint in my view would have been that it was wrongly rejected but not it was not considered. In my view, the arbitrator was supposed to carefully scrutinize the evidence of the parties rather than lightly rejecting the issue of abscondment that it was not a subject matter of the dispute. In my view, it was one of the issues to be taken into consideration in showing whether, it was the employer(applicant) who made the work unbearable or it was the conduct of the respondent.

I have examined evidence of the parties on the alleged abscondment and sickness of the respondent to see whether I can arrive on the same reasoning by the arbitrator. In her evidence, respondent (Pw1) stated:-

> *"...Based on all the transactions I was given another letter to show cause of my absence for one day which I was sick. I notified the General manager on my absence through the phone. I was surprised to receive a show cause letter...I replied to show cause letter ...I attached the ED...after all that on 22/09/2017 I wrote to apply for leave and reminded of the previous claim for leave...there was no response to my application for leave...* ***After that I had to search for an advocate and so we filed a case. After submitting a Form I became sick*** *and informed the General Manager. The General Manager wrote to me a text message that I was no longer an employee until the dispute is resolved.* ***After that I went after the 3 days of my sickness to see the General manager. The guards did not allow me but instead they told me that they had instructions from the General***

manager that I should not be reporting to work because I was not an employee..."

It is clear from the evidence of the respondent (PW1) in chief quoted above, that respondent was absent from work more than once contrary to the views of the arbitrator. It is also clear that in only one occasion, respondent was issued with ED. It is also beyond apprehension that respond has to fell sick for three days after contacting an advocate, filling and filing CMA F.1 and go back to office after the said three days. I am not saying that a person after contacting a lawyer and filing a dispute at CMA cannot become sick, but that the circumstances and conducts of the respondent in this application makes any reasonable person to suspect that there was something fishy.

The complaint that arbitrator did not properly consider and give weight the evidence of DW1 and Dw2 has substance. Having correctly cited the ***Katavi Resort case***, supra, and pointed out the test to be applied in determination of whether there was constructive termination or not, arbitrator failed to consider the evidence of DW1 and DW2 and exhibits tendered on behalf of the applicant and apply them to the said test. The arbitrator was of the view that since allegations were against the CEO who did not testify, evidence of DW1 and DW2 was of less value in the circumstances of the application at hand. With that view in mind,

arbitrator held that whatever forced the respondent to quit was the CEO and not DW1 and DW2 and that respondent raised concern against the said CEO to the Human Resources Manager and Legal Manager, who ,instead of dealing with such concern, declared respondent incompatible and transferred respondent to the Vingunguti office. In my view, DW1 and Dw2 are supposed to be complimented and not criticized by transferring the respondent to Vingunguti office as pointed earlier. These witnesses intervened to put to an end intolerability that occurred at Masaki and make sure that termination cannot happen. In short, they were in four corners of the tests set out in the **Katavi resort case** (supra) cited by the arbitrator and the ***Kobil case***, supra. In fact, the letter of transfer (exh. P3) from Masaki to Vingunguti office is to that effect. The said letter reads:-

> " *...Due to incompatibility reasons with your reporting manager as evidenced by yourself in your email dated 13th February 2017, addressed to the HR Manager and the Legal Manager,* ***the management has decided to support you by providing an opportunity to work for the same roles except personal Assistant at Diamond Motors Limited office locate at plot No. 22B, Nyerere Road, Vingunguti Estate or any other place that may be designated by the company.***"

Both DW1 and DW2 appears to have been discredited by the arbitrator, wrongly in my view, as they informed the respondent through exh.p3

quoted above that she was incompatible with her Manager. The arbitrator interpreted the word incompatible in a legal environment as per rule 22(2) of GN. No. 42 of 2007 and not in its literal meaning. Had the arbitrator considered the meaning of the word "incompatibility" by looking generally the whole quoted above paragraph, he would have applied its literal meaning and would have given weight the evidence both of DW1 and DW2. Literal meaning of incompatibility is conflict, mismatch, irreconcilable, in harmoniousness. The word "incompatibility" is defined by Bryan A. Garner, J.D., LLD in ***Black's law Dictionary, Tenth Edition,*** to mean conflict in personality and disposition usually leading to break up of a marriage. Had the arbitrator interpreted the word incompatibility in its literal meaning, he would have discredited both DW1 and DW2.

In 8th ground of revision, counsel for the applicant submitted that the commission exceeded its jurisdiction by deciding a matter which was time barred hence it lacked jurisdiction as there was no condonation. Counsel submitted that respondent admitted in cross examination that the dispute arose o 19th July 2017, but the CMA F.1 was filed on 29th September 2017. He submitted that this was in violation of Rule 10(1) and (2) of GN. No. 64 of 2007 that require dispute on termination be referred to CMA within 30 days and other claims within 60 days.

Counsel for the respondent submitted that based on the CMA F.1, the dispute was filed within time hence CMA had jurisdiction. Counsel cited the case of ***Barclays Bank(T) Ltd v Jacob Muro, Civil Appeal No.357 of 2017, CAT*** (unreported) wherein the Court of Appeal held that in determining whether a referral to CMA is made within time or not, the date of termination indicated on the form would be the date of reckoning.

This issue cannot detain my mind. I have examined the evidence of the respondent (PW1) while on cross examination and find correctly as submitted by counsel for the applicant that he stated that the dispute arose on 19th July 2017. Apart from that assertion while under cross examination, there is no other evidence showing that the dispute arose on that date. That evidence, in my view, cannot, in isolation of other evidence, be conclusive that the dispute arose on 19th July 2017. This is because in her evidence in chief, respondent (PW1) testified that the situation started in February 2017 until 2nd October 2017 when she received a message from the General Manager that she was no longer employee of the respondent. More so, on 11th August 2017, applicant wrote a warning letter to the respondent(exh.P9) informing her that management has decided to be lenient and is giving a severe warning

letter. In the said letter, respondent was required to abide to the policy and submit the KRA /KRI assessment for Q1 and Q2 with immediate effect without. This speaks all that in August 2017, respondent was still an employee of the applicant. It is therefore wrong to submit that the dispute arose on 19th July 2017. In the CMA F.1 applicant indicated that the dispute arose on 29th September 2017. Counsel for the respondent cited the ***Barclays Bank(T) Ltd case,*** supra, wherein the Court of Appeal held that in determining whether a referral to CMA is made within time or not, the date of termination indicated on the form would be the date of reckoning. I should add that, all other evidence relevant to establish as to when the cause of action arose should also be looked at and be considered. This is because, there is also possibility of complaints who, after noting that they are out of time, may indicate a wrong date to serve their purpose. The court of Appeal was alert to that possibility, which is why, it insisted in the ***Barclays Bank(T) Ltd case,*** supra, that it is an **obligation on part of the complainant to state accurately** the date of termination on the Referral Form so that CMA may determine whether the referral was made within the prescribed period or not. As the application was made within time, the ground that the Commission lacked jurisdiction fails.

In 11th ground of revision, arbitrator is faulted for issuing an award beyond 30 days provided for under section 88(11) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. Counsel for applicant submitted that parties made their final submissions on 17th September 2019, but the award was issued on 25th November 2019 without any account. Counsel submitted that the proceedings were rendered illegal and prayed the award be set aside based on this ground.

Counsel for the respondent conceded that the award was delivered out of the prescribed period of time. He was quick to submit that the delay in delivery of the award cannot be held to be material illegality capable of setting aside the award. Counsel cited the case of ***FINCA Tanzania Ltd .v. Wildman Masika & 11 others, Civil Appeal No. 173 of 2016, CAT*** (unreported) to bolster his argument.

I am entirely in agreement with submission of counsel for the respondent on this point. In the ***FINCA Tanzania Ltd case,*** supra, the Court of Appeal held that:-

> *" The law in terms of s.88(9) of the Employment and Labour Relations Act requires that decisions be given within 30 days after the hearing. It is true that the CMA's decision in this case was delivered after 4 months. However,* ***the delay in our view is not a material irregularity in procurement of an award, sufficient to have the same invalidated****. We say so because if for example the award is nullified merely because the decision was not*

given within thirty days the effect is to have the process commence afresh causing further delay which is to the disadvantage of both parties. ***To us that is not the spirit behind section 88(9). The spirit is to have a time frame in completing matters brought before the CMA but failure to meet the deadline stipulated in section 88(9) will not invalidate the proceedings and the award****. At any rate, the delay of four months in this case has not prejudiced any party, hence no injustice occasioned". (emphasis is mine)*

Guided by the above Court of appeal decision, the 11th ground also fails.

I the up short and for all said and done, I hereby allow the application and set aside the award.

It is so ordered.

B.E.K. Mganga
JUDGE
21/10/2021

Labour Court Tz.