THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION APPLICATION NO. 421 & 422 OF 2020

BETWEEN

PETROFUEL (T) LIMITED ..... APPLICANT/RESPONDENT

AND

ENGELBERTUS LUSHAGARA ..... RESPONDENT/APPLICANT

CONSOLIDATED JUDGMENT

Date of last order: 10/03/2022
Date of judgment: 29/3/2022

B.E. K. Mganga, J.

This consolidated judgment relates to revision application No. 421 of 2020 filed by Petrofuel (T) Limited herein referred to as the employer and revision application No. 422 of 2020 filed by Engelbertus Lushagara hereinafter referred to as the employee. The two revision applications arose from the same CMA dispute that was filed by the employee and same award that was issued by the arbitrator.

Brief facts of these applications are that in 2016 Petrofuel (T) Limited, the employer employed Engelbertus Lushagara, the employee on one year fixed term contract renewable. The first position of the employee

was Business Development Executive but on 1st January 2017 the position of the employee changed to Business Manager Corporate. On 20th July 2018, the employee resigned on ground of constructive termination. After resignation, the employee filed labour dispute No. CMA/DSM/TEM/460/2018/157/2018 before the Commission for Mediation and Arbitration henceforth CMA at Temeke complaining that the employer made employment intolerable resulting to his resignation. In the CMA F1, the employee showed that he was claiming to be paid TZS 500,000/= as severance pay, TZS 12,000,000/= being compensation for not less than 12 months' salary for unfair termination and TZS 4,100,000/= being under payment (salary deductions) from January 2018 to May 2018 all amounting to TZS 16,600,000/=.

On 28th October 2019, Hon. Amos, H, arbitrator, having heard evidence of both sides delivered the award that there was constructive termination of the employment of the employee and ordered the employer to pay TZS 1,500,000/= being salary for July 2018, TZS 5,000,000/= being salary for 5 months' remaining on the said fixed term contract and TZS 4,100,000/= being salary deductions for the month of January 2018 to May 2018 all amounting to TZS 10,600,000/=.

The employer was aggrieved by the said award as a result she filed revision application No. 421 of 2020 seeking the court to revise the said award. In support of the notice of application, the employer filed the affidavit affirmed by Mustapha Said Nassoro her advocate. In the said affidavit, the deponent raised eight (8) grounds namely:-

1. *That the honorable arbitrator erred in law and facts in holding that there was constructive termination against the respondent without legal justification.*
2. *That the arbitrator erred in law and facts by not taking into consideration that it is only three salary slips that of December 2016, January 2017 and March 2017 that had no applicant's stamp on them were accepted as exhibit P2 by the CMA the rest of the salary slip were not accepted as evidence for not having stamp therefor were not regarded as evidence.*
3. *That the arbitrator erred in law and facts by failing to appreciate that there is no evidence on record that shows there is deduction in respondent salary which was made without his consent and/o approval.*
4. *That the arbitrator erred in law and facts by holding that the respondent herein was forced to write Exhibit P7 from Exhibit P6 in absence of legal proof.*
5. *That the arbitrator erred in law and facts by awarding the respondent the salary of July 2018 to the sum of TZS 1,500,000/= while the salary of July was already paid to the respondent herein and there was nowhere in evidence to show otherwise.*
6. *That the arbitrator erred in law and facts by awarding the respondent to be paid the remained Five-months' salary to the tune of the sum of TZS 5,000,000/= while the applicant did not breach the contract of employment and in fact it is the respondent who breached the contract of employment.*

7. *That the arbitrator erred in law and facts by awarding the respondent to be paid the sum of TZS 4,100,000/=as deduction in respondent's salary from January 2018 to May 2018 while the said allegations of deductions have never been proved by the respondent and have never been said how much were the deductions to explain (sic) an award of TZS 4,100,000/=.*
8. *That the arbitrator erred in law and facts by disregarding the evidence in exhibit D5 which clearly shows the respondent herein is owes(sic) the applicant the sum of TZS 10,849,702/=.*

The employee filed both the notice of opposition and a counter affidavit opposing the application by the employer. In his counter affidavit, the employee deponed that the employer made employment intolerable by deducting the employee's salary and paying him TZS 70,000/- instead of TZS 1,000,000/= without justification.

The employee also was not happy with the award as a result he filed revision application No. 422 of 2020. In the affidavit in support of his application for revision, the employee deponed that he entered into one-year fixed term with the employer with a monthly salary of TZS 1,500,000/= categorized as (i) TZS 1,000,000/= as basic salary, (ii) TZS 300,000/= as housing allowance and TZS 200,000/= as travel allowance. He deponed further that, in January 2018 the employer refused to give him written contract and started to deduct TZS 400,000/= housing allowance

and (iii) TZS 200,000/= travel allowance. He deponed further that, in February 2018, in addition to the aforementioned deductions, the employer started to deduct TZS 200,000 alleging to be a loan taken by the employee. He deponed further that in May 2018 he was paid TZS 70,000/= making working environment to be intolerable. The employee deponed that on 12th May 2018 he discovered that the employer entered into agreement with one of her clients namely Catic International Engineering(T) Ltd on how to clear outstanding debt and that the employer started to deduct salary of the employee without justification. That, on 19th June 2018 he wrote a 30 days' notice informing the respondent his intension to resign. That, on 25th June 2018 the legal officer of the respondent drafted a resignation letter and forced the applicant to copy it and was required to stop working on 20th July 2018 and that on the latter date the applicant was stopped from entering his office. In the said affidavit, applicant/ the employee raised three grounds namely: -

1. *The arbitrator erred in law by failure to award the applicant 12 months' salary compensation despite declaring that he was constructively terminated by the respondent.*
2. *The arbitrator erred in law by failure to award severance pay after declaring that the applicant was constructively terminated by the respondent.*

3. The arbitrator erred in law by failure by failure to award leave accrued but not taken after declaring that the applicant was constructively terminated by the respondent.

The employer filed the counter affidavit sworn by Doroth Mashamsham, her principal officer opposing the application for revision filed by the employee. In the counter affidavit, the deponent deponed that on 19th June 2018 the employer received employee's 30 days' notice of resignation that the employee has decided to resign on his own will and promised to finalize pending work before the final day of the notice including collecting and remitting TZS 10,849,701/= from the client under portfolio. The deponent stated further that the employer did not make employment intolerable leading to resignation of the employee on 25th June 2018.

When the application was called for hearing, Mr. Stanslaus Ishengoma, learned counsel appeared and argued for and on behalf of the employer while Ms. Sophia Kawamala, learned counsel appeared and argued for and on behalf of the employee.

On 2nd December 2021, Mr. Ishengoma, learned counsel for the employer, applicant in revision application No. 421 of 2020, prayed to add one ground relating to jurisdiction and the same was granted. In arguing the application on behalf of the employer, learned counsel prayed to adopt

the affidavit of Mustapha Said Nassaro in support of the application to form part of his submission. He submitted that in the said affidavit, the employer/ applicant in revision No. 421 of 2020 raised 8 grounds as appearing in paragraph 13 of the affidavit and that upon granting the jurisdictional ground they became 9 grounds. Before starting his submission, counsel for the employer prayed to abandon grounds (b), (d) and (e) and in his submission, consolidate ground (a) and (c) then (f), (g) and (h).

Arguing on the jurisdictional issue, counsel for the employer submitted that respondent filed the dispute at CMA based on constructive termination while out of time. He submitted further that, on 19th June 2018 the employee/respondent in application No. 421/2020 filed his resignation (exh. P2) and that filed CMA F1 on 23rd August 2018. From the date of resignation to the date of filing CMA F1 is almost 60 days. Counsel for the employer submitted further that, Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 requires disputes relating to termination be filed at CMA within 30 days of termination of employment. Counsel submitted further that, there was no application for condonation filed by the employee and granted by CMA. He went on that

the said CMA F1 was signed by the employee on 23rd July 2018. Even if we assume that the employee/respondent filed the dispute on 23rd July 2018, still, he was out of time for 30 days. Learned counsel submitted that the application was supposed to be dismissed. He submitted further that, once the matter is time barred, then, the court or CMA lacks jurisdiction. He cited the case of ***Barclays Bank (T) Ltd v. Jacob Muro, Civil Appeal No. 357 of 2019,*** CAT (unreported) and ***Tanzania Breweries Limited v. Edson Muganyizi Barongo & 7 others, Miscellanous Labour Application No. 79 of 2014,*** High Court (unreported) to support his argument that the remedy available for the matter filed out of time is dismissal. He went on that in **Muro's case**, the court of Appeal nullified both CMA proceedings and that of the High Court.

Learned counsel for the employer/applicant submitted that the CMA record shows that, CMA F1 was filed on 23rd August 2018 and CMA award on the first page shows that the dispute was filed on that date. Learned counsel for the employer/applicant submitted that sanctity of the court record should take precedence and cited the case of ***North Mara Gold Mine Limited v. Khalid Salum, Civil Appeal No. 463 of 2020,*** CAT (unreported) and ***Ferdinand Nazareno Sanga v. Abdallah Leki and***

Monica Mwayego, Land Appeal No. 9 of 2021, High Court (unreported) to support his argument.

On grounds (a) and (c), counsel for the employer/applicant, submitted that complaint of the employee/respondent at CMA was based on constructive termination. That, the employee based his complaint on issues that occurred way back before tendering of his resignation. Counsel submitted that the employee was complaining that the employer deducted his salary from January 2018 to June, 2018 specifically salary for April and May, 2018 without his consent. Counsel for the employer submitted further that the arbitrator in the award based the decision on matters that occurred before and after resignation, as a result, the arbitrator granted reliefs that the employee was not entitled to. Counsel for the employer submitted that the arbitrator ordered the employer to pay the employee all salary that was deducted and salary of five months of unexpired contract. Counsel submitted further that the employee's contract was expiring on 31st December 2018. He submitted that the arbitrator was not supposed to considers matters that occurred after resignation of the employee.

On ground (f), (g) and (h), learned counsel for the employer submitted that, the arbitrator having accepted resignation letter dated on

19th June 2018, erred to accept salary deductions claims from January, 2018 to June, 2018 which were time barred and there was no evidence to support these claims. Counsel for the employer submitted that Rule 10(2) of GN. No. 64 of 2007(supra) requires claims other that termination to be filed within 60 days. Learned counsel for the employer prayed the CMA award be quashed and set aside.

Ms. Kawamala, learned counsel for the employee in Revision No. 421 of 2020 and applicant in Revision No. 422 of 2020, prayed to adopt the counter affidavit of Engelbertus Lushagara, (the employee) to form part of her submissions.

Responding on the issue of jurisdictional, Kawamala, learned counsel for the employee submitted that the employee resigned on 19th June 2018 and that the dispute was filed at CMA on 23rd July 2018 showing that he signed the said form on the same date. Learned counsel for the employee submitted that the letter dated 19th June 2018 was a notice of resignation and not date of resignation and that the employer accepted resignation (exh.P8) on 25th June 2018. Counsel for the employee submitted that the dispute was filed within time and went on that, reference in the award that CMA F1 was filed on 23rd August 2018 was a human because CMA F1 was

filed on 23rd July 2018. Upon being asked by the court, she readily conceded that in the CMA record, there is CMA F.1 showing that it was filed on 23rd August 2018 and quickly submitted that she don't know where that form came from. Counsel for the employee submitted that in the employer's closing submission, the employer submitted that CMA F1 was filed on 23rd July 2018. Counsel for the employee went on that the employee served the CMA F1 to the employer through Tanzania Post Corporation and receipts were filed at CMA as proof of service hence there was no need of seeking condonation as the CMA had jurisdiction.

Responding on grounds (a) and (c), and (f), (g) and (h) learned counsel for the employee submitted that, there was constructive termination that led to resignation. Counsel for the employee submitted that the environment that was created by the employer forced the employee to resign because employee was paid only TZS. 70,000/= instead of TZS. 1,500,000/=. Learned counsel submitted that the arbitrator was correct to issue the award in favour of the employee.

In rejoinder, Mr. Ishengoma, learned counsel for the employer in Revision 421 of 2020, reiterated his submission in chief that it is not correct that resignation started after expiration of 30 days. He submitted that the

CMA F1 in the CMA record shows that it was filed on 23rd August 2018 and that, that is the proper record. That counting 30 days from date of resignation i.e., 19th June 2018, it is clear that the dispute was filed out of time..

Submitting in chief in relation to the 1st ground of revision raised by the employee in revision application No. 422 of 2020, Ms. Kawamala, learned counsel for the employee submitted that arbitrator erred not to award 12 months compensation to the employee instead, the employee was awarded unexpired five months of the contract. During submission, learned counsel for the employee conceded that the employee's contract was one-year fixed contract, but at the time of termination only 5 months had remained.

On the 2nd ground, learned counsel submitted that arbitrator erred not to award severance pay. Learned counsel for the employee submitted that the employee worked for two years with the employer but each year with its own contract. Learned counsel submitted that the employee was entitled for severance in terms of Rule 26 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007.

On the 3rd ground, learned counsel for the employee submitted that the arbitrator failed to award leave pay. Learned counsel submitted that the contract between the employer and the employee started on 1st January 2018 and was supposed to end on 31st December 2018 but the employee resigned on 19th June 2018. Learned counsel for the employee submitted that, in terms of section 31(3) of the Employment and Labour Relations Act [Cap 366 R.E. 2019], the employee was entitled to leave pay. But during submissions, learned counsel for the employee conceded that there is no evidence on CMA showing that the employee sought for leave and it is not stated as to whether, he was entitled for annual leave or not. Learned counsel conceded further that in the CMA F1 the employee did not indicate that he was also claiming to be paid leave.

Replying to submissions made on behalf of the employee in revision 422 of 2020, Mr. Ishengoma, learned counsel for the employer, submitted that under fixed term contracts, the employee is only entitled to be compensated salary for the unexpired period. Therefore, the arbitrator cannot be faulted. On the issue of severance and leave pay, learned counsel for the employer submitted that it is only payable after one year, but the employee worked only for six months therefore was not entitled

hence the arbitrator cannot be faulted. Learned counsel for the employer prayed that revision application No. 422 of 2020 be dismissed for want of merit.

In rejoinder, Ms. Kawamala, learned counsel for the employee in revision application No. 422 of 2020, submitted that the employee was entitled compensation of 12 months in terms of Section 40(1) (c) of Cap. 366 R. E. 2019 (supra). Learned counsel reiterated her submission in chief that employee was entitled to be paid severance and leave pay and prayed revision No. 422 of 2020 be allowed.

Having heard submissions of both counsel and examined evidence on record, I prefer to dispose of first the ground relating to jurisdiction of CMA as it was submitted by Mr. Ishengoma, learned counsel for the employer that the dispute was filed and heard out of time hence CMA lacked jurisdiction. On the other hand, it was submitted by Ms. Kawamala counsel for the employee that the dispute was filed at CMA within time. I have examined the evidence of the parties and find that on **19th June 2018**, the employee wrote a 30 days' notice of resignation (exh. P1 and D1). In the said resignation notice, employee wrote:-

> *"REF: 30 DAYS' NOTICE OF RESIGNATION*
>
> *I humbly request to direct your attention to the subject above.*

I'm writing to inform you that I will be resigning from Petrofuel (T) ltd and my position as Business Development Executive. My last day of work will be July 20,2018 (30 days from today).

I would like to thank you for having me as part of your team. I'm proud to have worked for petrofuel and I appreciate the time and patience you have shown in training me. I have learned a lot about sales and for sure these skills will serve me well in my career.

Please acknowledge this letter as my official notice of resignation (thirty days' notice). I will do my best to ensure that all debtors list for both retail and bulk clients are smooth and clear within this transition process(before the last day of my work at Perofuel).

I have been fortunate to have been a part of petrofuel, and I wish you continued success.

Sincerely.

Sgd

Engelbertus Kamala Lushagara."

The said resignation was accepted by the employer on **25th June 2018** as evidenced by acceptance of resignation letter (exh. P8). In exhibit P8, the employer stated that the employee was supposed also to settle Ten Million Eight Hundred Forty-Nine Thousand Seven Hundred Two Tanzanian Shilligs (TZS 10,849,702/=) which the employee collected from the employer's clients but did not remit to the employer. In the said acceptance of resignation letter, the employee was wished best in his carrier and required to do what is necessary to ensure smooth exit. On 17th

July 2018, the employer received a letter titled "RE: CONSTRUCTIVE TERMINATION" dated **16th July 2018** (exhibit P5) written and signed by Mutakyamirwa Philemon (advocate) on behalf of the employee complaining that the employer made employment intolerable leading to forced resignation of the employee.

I have examined the CMA record and find that the only referral of a Dispute to the Commission for Mediation and Arbitration Form 1 hereinafter referred to CMA F1 was received at CMA on **23rd August 2018**. The said CMA F1 shows that it was signed by the employee on **23rd July 2018**. The said CMA F1 shows that the dispute arose on 20th July 2018. Based on this CMA F1, Mr. Ishengoma, counsel for the employer submitted that the dispute was filed and heard out of time and that CMA lacked jurisdiction to determine it. Ms. Kawamala, counsel for the employee submitted that the dispute was filed within time and that a reference by the arbitrator in the award that the dispute was filed on 23rd August 2018 was a human error. Unfortunately, there is no any other CMA F1 showing that the dispute was not filed on that date. The employee did not attach to his affidavit a CMA F1 in support of revision application No. 422 of 2020 to show that the dispute was not filed at CMA on 23rd August 2018. In short, there is no

evidence to the contrary. In my view, any submission made by either side showing that the dispute was not filed on 23rd August 2018 without proof cannot be entertained. In the ***North Mara Gold's case*** (supra) the Court of Appeal quoted its earlier decision in the case of ***Halfan Sudi v. Abieza Chichili [1998] T. L. R. 527*** at page 529 where it stated that:-

> *" We entirely agree with our learned brother, MZAVA, JA and the authorities relied on which are loud and clear that, "A court record is a serious document. It should not be lightly impeached. There is always presumption that a court record accurately represents what happened".*

In the ***North Mara Gold's case*** (supra), the Court of Appeal refrained from impeaching the CMA record as it was presumed to be authentic of what transpired before it. On my side, from where I am standing, and being guided by the said Court of Appeal decision, I find that the CMA record represent what transpired thereat, namely that, the employee filed the dispute on 23rd August 2018. Since there is no dispute that the employee resigned on 20th July 2018 according to exhibit P1 and D1, the employee filed the dispute at CMA 34 days after resignation. The employee complained at CMA that employer made employment intolerable leading to his resignation hence constructive termination. In terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No.

64 of 2007, the period available for the dispute relating to fairness termination is 30 days. It goes without saying that the dispute was filed 4 days out of time and that there was no application for condonation. Since the dispute was time barred, the arbitrator had no jurisdiction to determine it. Since CMA had no jurisdiction based on limitation of time, the proceedings and the award arising therefrom were nullity.

For the foregoing, I will refrain from discussing whether there was constructive termination or not and all other grounds raised by both the employee and the employer.

I should point, albeit briefly, one procedural issue, namely marking of exhibits. It is clear from above that the resignation letter was marked as exhibit P1 and D1. It was marked as exhibit P1 when it was tendered by Angelbertus Lushagara, the employee then it was tendered by Kanuti stephano (DW1) on behalf of the employer. In my view, this was not proper; because, an exhibit cannot be tendered twice in the same proceedings. If the employer wanted to rely on that exhibit, the witness for the employer was supposed to be led to explain on that exhibit and not to tender it again. It was open for counsel for the employer to ask the arbitrator to avail the said exhibit to DW1 and lead him to give evidence

and not otherwise. More so, the arbitrator was supposed to endorse on all exhibit that he received and admitted them as evidence, but this was not done.

In the up short, I hereby nullify the entire CMA proceedings, quash, and set aside the award arising therefrom because the dispute was filed out of time and heard without condonation.

Dated at Dar es Salaam this 29th March 2022.

B.E.K. Mganga
JUDGE