THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 441 OF 2020

BETWEEN

TINDWA MEDICAL & HEALTH SERVICES..... APPLICANT

AND

INNOCENT KILIAN .....RESPONDENTS

JUDGMENT

Date of last Order: 29/03/2022
Date of Judgment: 31/03/2022

B.E.K. Mganga,J

On 20th January 2018, the applicant signed a one year fixed term contract with the respondent with effect from 22nd January 2018 expiring on 21st January 2019. It was agreed in the said one year fixed term contract that respondent will be under probation for six (6) months. It happened that their relationship did not go well as a result, on 14th August 2018 respondent filed the dispute before the Commission for Mediation and Arbitration (CMA) complaining that applicant breached the contract. In the CMA F1 respondent showed his employment was orally terminated by the applicant on 11th May 2018 and claimed to be paid (1) TZS 1,5000,000/= as one month salary in lieu of notice, (2) TZS 1,500,000/= as salary arrears for the month of May 2018, (3) TZS

1,500,000/= as one month salary in lieu of leave, (4) TZS 9,000,000/= being 8 months' salary for breach of contract, (5) TZS 5,820,000/= being payment for day allowances for the remaining 194 days as per the contract of employment, (6) repatriation costs namely (a) TZS 50,000/= Bus fare from dar to Moshi, (b) TZS 50,000/= as transport allowance, (c) TZS 2,412,000/= as transport of personal belongings from Dar to Moshi and (7) TZS 20,000,000/= as general damages all amounting to TZS 41,792,000/=. Applicant claimed that respondent absented himself from work from 4th May 2018 to 23rd May 2018.

On 10th September 2020, Hon. William, R, arbitrator, having heard evidence of both sides delivered his award that respondent did not absent himself from work, but that applicant breached the contract between the two. The arbitrator awarded the respondent to be paid (1) TZS 12,000,000/= being 8 months' salary of the remaining period of the fixed term-contract, (2) TZS 1,500,000/= being one month salary in lieu of notice and (3) TZS 1,500,000/= being salary for May 2018 all amounting to TZS 15,000,000/=.

Applicant was unhappy with the said award hence this application seeking the award to be revised. In the affidavit of Victoria Wilbard, the principal officer of the applicant, in the support of the notices of application, raised 12 ground namely:-

1. *That the arbitrator erred in law and facts by entertaining the respondent's complaint for unfair termination while the respondent was still serving his probation period while fully aware that CMA has no jurisdiction.*
2. *That CMA had no jurisdiction to award reliefs granted the respondent who was the probationer and had only worked for less than six months.*
3. *The arbitrator erred both in law and fact in holding that applicant breached the fixed term contract.*
4. *That the arbitrator erred both in law and fact by issuing the award beyond 30 days contrary to section 88(9) of the Employment and Labour Relations Act [cap.366 R.E 2019]*
5. *That the arbitrator failed to evaluate and give weight evidence adduced by the applicant that respondent absconded from work for more than five days without permission that may constitute serious misconduct leading to termination.*
6. *That arbitrator failed to consider that the respondent breached the contract and filed the complaint prematurely.*
7. *That arbitrator erred in law and fact by relying on oral evidence of the respondent that he was attending to work place while there was plenty evidence including that of the respondent that he was not in regular attendance.*
8. *That arbitrator erred in fat and law when he failed to take judicial notice that the respondent prematurely terminated his employment and prematurely filed the complaint at CMA.*
9. *That the arbitrator erred in law and fact in holding that employment of the respondent was orally terminated and disregarded the terms of the contract which expressly provided that termination of the employment shall be in writing.*
10. *That the CMA erred in law and fact when it agreed that there was an oral termination of employment on 11.05.2019 despite the available evidence to the contrary by way of a letter from the managing director.*

11. *That the CMA erred in law and fact in holding that when a staff's identity card is taken away from such staff then such staff is deemed to have been terminated.*
12. *That the CMA erred in law and fact by holding that the respondent was not an absentee employee on account of not being asked to account for the absence while there is evidence by way of exhibit D3 requiring the respondent to explain within 72 hours why he was absent from his work station.*

Respondent filed both the notice of opposition and a counter affidavit praying the application be dismissed for want of merit.

By consent of the parties the matter was disposed by way of written submissions.

In his written submissions, Mr. John Seka, learned counsel for the applicant, submitted that CMA lacked jurisdiction because respondent was a probationer and that his employment was terminated while he has worked for not more than six months. Counsel cited that cases of ***Patrick Tuni Kihenzile v. Stanbic bank(T) Limited [2013] LCCD 10*** and ***Stanbic Bank(T) Ltd v. Irene Walala [2013] LCCD 35*** to support his argument.

Submitting on the 2nd ground, counsel for the applicant argued that the arbitrator failed to evaluate evidence adduced by the applicant that respondent absconded from work for more than five days without permission from his employer. Counsel submitted further that arbitrator

erred in holding that respondent was not an absentee employee on ground that respondent was not asked by the applicant to account for the absence. It was also submitted that in so holding, the arbitrator ignored exhibit D3 and evidence of the respondent himself that he was not in regular attendance from 4th May 2018 to 18th May 2018 and that he did not report at work from 19th May 2018 until when he was terminated on 30th May 2018. Counsel went on that consider that respondent breached the contract and filed the complaint prematurely. Counsel for the applicant cited the case of ***Messrs. Komesha Security Service Ltd v. Said Ching'umba [2015] LCCD 140*** to support his argument that absenteeism from work is a serious misconduct leading to termination of employment of the employee.

On the 3rd ground, counsel for the applicant submitted that arbitrator erred both in law and fact in holding that respondent was orally terminated on 11th May 2018 while it was proved by evidence by the applicant that on 19th May 2018 respondent was informed through a letter written by the managing director of the applicant that there was no termination. Counsel submitted further that arbitrator erred to hold that there was oral termination while the contract between the parties provided that termination will be in writing. Mr. Seka, counsel for the applicant cited a litany of cases to the effect that employer and

employees are bound by the terms of the contracts they have agreed upon. One of the case cited to that effect is ***Hotel Sultan Palace Zanzibar v. Daniel Laizer and Another, Civil Appeal No. 104 of 2004*** (unreported).

In alternative, Mr. Seka, counsel for the applicant submitted that respondent resigned on 15th May 2018 when he informed the applicant in writing that he was no longer interested to work with them. In further alternative, counsel for the applicant submitted that contract of the respondent was terminated on 30th May 2018 due to long and unexplained absence from work particularly absence from 19th May 2018 to 30th May 2018.

Responding to the 1st ground of revision, Mr. Sabas Shayo, learned counsel for the respondent submitted that, the dispute between the parties at CMA was not on termination rather, breach of contract. Counsel for the respondent submitted that ***Patrick's* case**(supra) and ***Walala's case*** (supra) are distinguishable and not applicable to the application at hand.

Counsel for the respondent cited the case of ***Agness Buhere V. UTT Finance, Revision No. 259 of 2015*** and Rule 10 of GN. 42 of 2007

that a probationer employee is protected and that can only be terminated upon following termination procedure.

On the 2nd ground that arbitrator erred for not holding that respondent absconded, counsel for the respondent submitted that on divers' dates between 4th May 2018 and 11th May 2018 respondent travelled from Songosongo to Dsm to the headquarters of the applicant to submit a monthly report for the month of April 2018 but did not meet the head of the department. That, on 11th May 2018 respondent was informed that applicant does no longer intending to continue with him. Counsel submitted further that at CMA, applicant did not tender any proof of abscondment. Counsel cited this court's decision in the case of ***National Microfinance Bank v. Neema Akeyo, Labour Revision No. 35 of 2017*** (unreported) to bolster his submission that to prove abscondment, applicant was supposed to tender attendance book. and that he did not manage to meet. Counsel submitted further that applicant breached the contract by terminating employment of the respondent orally. Counsel for the respondent submitted that all cases cited by the applicant are distinguishable because they relate to binding of the contracts and not abscondment. Counsel prayed the application be dismissed.

In rejoinder written submission, counsel for the applicant reiterated that contract of the respondent was not orally terminated on 11th May 2018 and that respondent was terminated on 30th May 2018.

At the time of composing the judgment, I carefully read the CMA record and find that when Jackson Jeremiah (DW1) was testifying in chief, applicant sought to tender email printouts, but respondent raised objection that applicant did not follow procedure laid down under section 8 of the Electronic Transaction Act No. 13 of 2015. Counsel for the respondent submitted that applicant was supposed to lay foundation on how the said emails were generated, how they were stored, that there was no possibility for the said data to be altered by any other person and that applicant was supposed to file an affidavit as a proof thereof. Counsel for the applicant conceded to the preliminary objection. The arbitrator issued an order rejecting reception of the said emails. When counsel for the respondent was cross examining DW1, he prayed to contradict him using the said emails as the result the arbitrator granted the prayer. Counsel for the respondent asked DW1 to read email dated 30th May 2018 headed "call for disciplinary hearing committee hearing authored by DW1 forwarded to the respondent. counsel for the applicant asked DW1 whether can tender the said email as exhibit to support his evidence or not. DW1 replied in the negative on

ground that it has time errors caused by the internet. The arbitrator proceeded to admit it as exhibit A3 without asking whether counsel for the applicant objects or not. In the award, the arbitrator considered the said A3 and formed one of the bases of her decision.

Since this was not covered in the written submissions by both counsels, I summoned them and invited them to address whether that procedure was proper and the effect thereof.

Responding to the issue raised by the court, Mr. Seka, counsel for the applicant submitted that it was not properly admitted considering that the same exhibit was refused its admission. He therefore prayed that the said exhibit be expunged from evidence and that if the court finds that the procedure vitiated proceedings, the court should nullify proceedings and order trial de novo.

Mr shayo, counsel for the respondent submitted that the said emails (exh. A3) were properly admitted. He conceded that initially they objected admission of the said emails because there was no affidavit. Counsel for the respondent submitted further that it is not necessary that always an affidavit should be filed in order for electronic evidence to be admitted. In other words, counsel submitted that electronic evidence can be admitted even in absence of an affidavit. He cited the case of

EAC Logistic Solution Ltd v. Marine Transportation Ltd, civil Appeal No. 1 of 2021, High Court(unreported) that not only the affidavit can prove compliance of section 18 of the Electronic Transaction Act. He went on that compliance with the said section can be proved by oral evidence. He argued further that the aim of tendering the said email was to contradict DW1. Counsel for the respondent submitted that if the court finds that exh. A3 was not properly admitted, then should expunge it but objected the prayer for retrial.

Counsel for the respondent conceded that at CMA both parties were represented by counsels.

I should point albeit briefly that counsel for the applicant neither argued the other grounds contained in the affidavit in support of the application nor prayed to abandon them. In my view, counsel for the applicant was, for courtesy to the court and the other party and for better discharge of professional duty in assisting the court in administration of justice, supposed to expressly say whether he abandoned them or not. That would have enabled the court to be focused.

In disposing this application, I will start with the issue raised by the court relating to the procedure used in admitting the aforementioned emails (exh.A3) in to evidence and thereafter used by the arbitrator as one of base of the decision in the award. In order to show exactly what transpired at CMA when the said emails (Exh. A3) was sought to be admitted in evidence, I have decided to reproduce the evidence as follows: -

" Comp. Adv. naomba kum-contradict shahidi kwa mujibu kifungu cha 164(1)(c) na 154 cha TEA cap. 6 R.E 2002. Kwa kielelezo cha Email print out ambacho kilikataliwa.

Resp Adv- Sina pingamizi.

Tume:- Prayer granted.

Q- Soma email ya tarehe 30/5/2018 yenye heading: " call for disciplinary committee hearing; kutoka kwa Jackson Jeremiah kwenda kwa Innocent Kilian, iliandikwa saa ngap?

A. Saa 9:26 alasiri

...

Comp. Adv- je ungependa kutumia email hiyo iwe sehemu ya Ushahidi?

Shahidi:- Hapana, kisitumike kwasababu kina error ya internet kutokana na muda ulioonekana sio sahihi.

Tume:- ***tume inakipokea kielelezo hicho cha email kwa kuwa sababu alizotoa shahidi kwamba kisipokelewe hazijairidhisha Tume, na kukataa huko kunaleta tafsiri kwamba shahidi ana nia ya kuidanganya Tume****. Hivyo ili Tume iweze kutenda haki kimepokelewa kama kielelezo A3(Ushahidi wa mlalamikaji). Na maamuzi haya yamefikiriwa kwa*

mujibu wa Kanuni ya 19(1) ya the Labour Institutions (Mediation and Arbitration Guidelines) GN 67/2007".

From the CMA record as quoted hereinabove, it is clear that, on 11th February at CMA, applicant was represented by Neema Kivuyo learned counsel while respondent was represented by Sabas Shayo and Esther Msangi, learned counsels. The CMA record does not show that the said Neema Kivuyo, counsel for the applicant was asked by the arbitrator comment whether she had objection or not on admissibility of the said emails (exh. A3). That failure deprived the applicant right to be heard considering that the same email was initially objected by counsel for the respondent who questioned its authenticity, reliability, and originality. It is not said as to whether authenticity, reliability, and originality of the said emails (exhibit A3) were established at the time they were tendered as exhibit A3 on behalf of the respondent. The least I can say is that the arbitrator played double standard and was biased. In fact, the above quoted order says it all.

In the application before, counsel for the respondent submitted that the said exhibit A3 was properly admitted and that authenticity, reliability and originality can be proved by oral evidence and not necessarily by an affidavit. Strangely, the same counsel at CMA was arguing that in absence of an affidavit, authenticity, reliability, and

originality of electronic data cannot be established. In my view, counsel for the respondent has made the U-turn because the emails (exhibit A3) were found in his favour. I am of the opinion that learned counsels should always strive to assist the court regardless of whether the submissions are in his favour or not provided that the submissions helps the court to deliver justice to the parties.

Since applicant's right to be heard was infringed, and since the arbitrator exhibited bias, the only option available is to nullify the whole CMA proceedings, quash, and set aside the award arising therefrom and order trial *de novo*.

For the foregoing, I hereby nullify CMA proceedings CMA proceedings, quash, and set aside the award arising therefrom and order trial *de novo* before another arbitrator without delay.

Dated at Dar es Salaam this 31st March 2022.

B.E.K. Mganga
JUDGE