IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 344 OF 2021

BETWEEN

SRIYANJIT PERERA..... APPLICANT

VERSUS

RESEARCH TRIANGLE INSTITUTE TANZANIA ..... RESPONDENT

JUDGMENT

Date of last order: 30/11/2021
Date of Judgement: 30/03/2022

B.E.K. Mganga, J.

On 30th September 2020, Sriyanjit Perera, the applicant who is American and Canadian national, filed labour dispute No. CMA/DSM/KIN/746/20/14 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni complaining that he was unfairly terminated by the respondent. In the referral of a dispute to the Commission for Mediation and Arbitration Form No.1 hereinafter referred to as CMA F1, applicant claimed to be paid USD 408,030 as salary for 35.5 months of the unexpired fixed contract, USD 12,180 as one-month salary in lieu of notice, USD 12,180 as payment for 4 weeks unpaid

leave and USD 6,090 as severance pay for 14 days all amounting to USD 438,480. In the said CMA F1, applicant indicated that no reason was given by the respondent for termination of his employment, procedures of termination were not adhered to, and that respondent claimed that he (applicant) resigned while it is not true.

Having heard evidence and submissions of both sides, on 23rd July 2021, Hon. Mbena, M.S, arbitrator, delivered the award in favour of the respondent that there was no unfair termination, rather, applicant voluntarily resigned. Applicant was unhappy with the said award as a result on 8th September 2021, he filed a notice of application supported by an affidavit seeking this court to revise it. In the affidavit in support of the application, applicant raised four grounds of revision namely: -

1. *The arbitrator erred in law and fact in holding that the applicant resigned from his employment as opposed to being terminated.*
2. *The arbitrator erred in law and fact in holding that the applicant exerted too much pressure on the respondent to the effect that he must be released from employment such that the respondent had no option except releasing the applicant.*
3. *The arbitrator erred in fact and law in holding that the procedure was followed.*
4. *The arbitrator erred in failing to award the applicant the relief sought in CMA F1.*

On the other hand, the respondent opposed the application by filing the notice of opposition supported by a counter affidavit sworn by Jovinson Kagirwa, advocate.

When the application was called for hearing, parties prayed to argue it by way of written submission, a prayer which was granted.

In his written submission, Mr. Daniel Welwe, counsel for the applicant, submitted that applicant was an employee of the respondent from 15th June 2018 until 1st September 2021 when his employment was terminated. Addressing the 1st ground of revision, Mr. Daniel Welwe, counsel for the applicant, submitted that there is no evidence in the CMA record proving that applicant resigned from his employment. Counsel submitted further that, DW1, the only witness for the respondent, admitted while under cross examination, that, there was no notice of resignation filed by the applicant to Research Triangle Institute (RTI) and further that DW1 was not sure whether employment of the applicant was terminated or not. Counsel went on that, DW1 admitted while under cross examination that everything he testified before CMA is based on information, he received from respondent's Management Team hence hearsay evidence that is inadmissible. Counsel submitted further

that the arbitrator used extraneous documents not tendered as exhibit to reach a conclusion that applicant resigned from his employment.

I should point out that no submissions were made by counsel for the applicant in respect to 2nd, 3rd and 4th grounds of revision, instead, counsel submitted that arbitrator failed to analyse evidence of the applicant and that no cogent reasons were given in rejecting evidence of the applicant. Counsel for the applicant submitted further that email dated 13th July 2020 (exh.P3) was not analysed in view of the employment contract (exh.P1

Responding to the submissions made by counsel for the applicant, Mr. Jovinso Kagirwa, counsel for the respondent submitted that from 15th June 2018 until when he resigned from employment, applicant was employed by the Research Triangle Institute as Health systems and Sustainability Advisor and not the respondent. Counsel for the respondent submitted further that applicant resigned from employment and that email dated 13th July 2020 (exh.D3) was a notification to the respondent that effect. Counsel went on that applicant handed over the respondent's house and left. Mr. Kagirwa, counsel for the respondent submitted that, DW1 testified under cross examination that email correspondences (exh. D3 and D4) were shared to him as he was the

supervisory Manager of the respondent and seats in the Management Board of the respondent, as such, his evidence was not hearsay. Counsel for the respondent went on that, what DW1 stated when he was cross examined on exhibits P3 and P4 cannot amount to hearsay.

Responding on the contention that arbitrator failed to analyse evidence, counsel for the respondent submitted that evidence was properly analysed including email dated 13th July 2020 (exh.P3) that was found by the arbitrator to serve the purpose of notice of resignation.

In rejoinder, Mr. Welwe counsel for the applicant referred to employment contract (exh. P1) and submitted that respondent was the employer of the applicant. That applicant left the house he was residing in after termination and at the time respondent stopped to pay rent. Relying on email dated 31st August 2020 (exhibit P4), counsel for the applicant, concluded that applicant did not resign. Counsel for the applicant submitted that arbitrator wrongly dismissed the prayer to admit email dated 17th July 2020 as evidence of the applicant to prove that he did no resign and prayed the court to step into shoes of the arbitrator and admit it. Counsel implored the court to use the binding decision of the Court of Appeal in the case of ***Kato Paulo v. the Republic,*** Criminal Appeal No. 272 of 2008, at Mwanza (unreported)

Mr. Welwe, submitted further that, in the entire award, the arbitrator did not discuss evidence of PW1 and exhibits tendered in support of his case.

When I was perusing the CMA record with a view of composing the judgment, I found that one of the issues that was framed at CMA was whether CMA had jurisdiction or not. The arbitrator in the award found that CMA had jurisdiction because the matter relates to employment. In my close examination of submission of the parties I found that this issue was not addressed though it appears in evidence. I found also that counsel for the applicant raised a new ground in his written submission that was not included in the affidavit in support of the notice of application. Again, I found that in the rejoinder written submission, counsel for the applicant raised another new ground that was also not included in the affidavit in support of the application. I therefore summoned the parties to address whether CMA had jurisdiction and whether it was proper for counsel for the applicant to raise new grounds both in the written submissions and rejoinder submissions.

On the jurisdictional issue raised by the court, Mr. Welwe, counsel for the applicant submitted that, at CMA, the respondent challenged

jurisdiction of CMA because parties executed the contract that ousted jurisdiction of CMA. He submitted that in the award, the arbitrator held that CMA had jurisdiction. Counsel for the applicant submitted that there were two contracts namely (i) the one that was tendered by the applicant(employee) as exhibit P1 and (ii) that was tendered by the respondent(employer) as exhibit D1. Counsel for the applicant submitted that, based on exhibit P1 that was signed by the applicant(employee) but not signed by the respondent(employer), the arbitrator found that CMA had jurisdiction. He submitted further that, jurisdiction cannot be ousted by contracts as it was done by the parties in exhibit D2. When he was asked by the court as whether, the parties in exhibit D2 and P1 are the same, learned counsel for the applicant readily conceded that they are not. He maintained that CMA had jurisdiction.

In his submission, counsel for the applicant conceded that in order to have a work permit, applicant submitted the contract to the labour commissioner. On whether there was employment relationship between applicant and respondent, counsel submitted that it was there because applicant was paid salary by the respondent.

Submitting on whether it was proper for him to raise new issues during his both written submissions and rejoinder submissions that were

not in the affidavit in support of the application, counsel for the applicant admitted at first that the issues were not in the affidavit. He conceded that that was not in compliance with Rule 24(3)(c) of the labour Court Rules, GN. No. 106 of 2007. He however quickly submitted that, this is the court of equity hence not bound strictly with compliance of procedures. He relied on Rule 28 of the labour Court Rules, GN. No. 106 of 2007 and submitted that in revision, that the court has power to deal with anything apart from what is contained in the affidavit.

Mr. Kagirwa, learned counsel for the respondent opted to argue first the jurisdictional issue raised by the court. Responding to the jurisdictional issue, Mr. Kagirwa, submitted that parties chose the jurisdiction to determine their dispute and that the arbitrator was supposed to look on the evidence especially exhibit D2 and admission of the applicant that jurisdiction that jurisdiction to determine the dispute was on courts in Northern Carolina, in the United States of America (USA) and not CMA or our courts. Counsel submitted that the arbitrator did not determine the jurisdictional issue based on evidence but merely relied on section 86 and 88 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019]. Counsel went on that, where there is an

agreement on how the dispute will be resolved, that agreement must be respected.

Counsel for the respondent submitted that the issue at CMA was "who was the employer of the applicant". He argued that applicant was employed by RTI International as evidenced by exhibit P2 and that the working permit was obtained after signing the contract just for convenience to secure the said working permit. Counsel for the respondent submitted that exhibit P1 was not signed by a person in Tanzania and that names of persons thereon are of those residing in the USA. He concluded that CMA had no jurisdiction.

On the issues raised in written submissions and rejoinder submissions by the applicant, counsel for the respondent submitted that the same violated the Rules of the court and the principles of natural justice because respondent was deprived right to be heard. Counsel for the respondent prayed that those issues should not be considered by the court.

In rejoinder submissions, Mr. Welwe, counsel for the applicant conceded that principles of natural justice demands that respondent was entitled to be heard on those issues and went on that if the court finds it material, should call the parties and order them to make submissions

thereof. As to who was the employer of the applicant, counsel submitted that applicant was employed by one employer i.e., the respondent and did only one set of work. Counsel went on that at page 10 of the award it is shown that applicant was residing in Dar es Salaam.

Counsel for the applicant submitted further that, the practice of this country is that work permit is normally issued for two years only. He argued further that, there is no evidence to prove that what was submitted in the process of seeking work permit is exhibit D2 and not P1. He concluded that there is no evidence showing that applicant admitted that exh. D2 is binding.

Before I kick off to consider evidence and submissions of the parties, I have found it important to point out that (i) throughout in both submission in chief and rejoinder, applicant did not make submissions in respect to 2nd, 3rd and 4th grounds of revision and the respondent, correctly in my view, did also not make submissions thereof. Failure of the applicant to submit on these grounds, in my view, is clear indication that he found them barren of merit and impliedly abandoned them. This, in my view, is not a correct procedure. Counsels are advised whenever they find that they don't need to argue any ground filed before the court, should inform the court and the other party. That is what legal

professional demands because lawyers do not work by assumptions. Let us leave assumptions to at least one profession I know, which I refrain to mention but which fore sure assumptions are one of the daily activities, and (ii) that, in submission in chief, applicant raised one new ground that arbitrator failed to analyse evidence of the applicant, gave no cogent reasons for rejecting applicant evidence. Again, through the back door, but denying respondent right to reply, in a rejoinder submission, applicant raised another new ground of revision that arbitrator wrongly dismissed the prayer to admit email dated 17th July 2020 as evidence of the applicant which was intended to prove that he did no resign and prayed the court to step into shoes of the arbitrator and admit it. As if that was not enough, counsel for the applicant implored the court to use the binding decision of the court of Appeal in the case of ***Kato's case,*** (supra). Counsel for the applicant has raised these two new grounds in violation of Rule 24(3)(c) of the Labour Court Rules, GN. No. 106 of 2007 that requires grounds of revision to be contained in the affidavit in support of the application. These two new grounds are not in the affidavit of the applicant in support of the application and no leave of the court was sought and granted for him to file a supplementary affidavit. This, in my view, apart from violating the

aforementioned Rule, especially the new ground raised in the rejoinder submission, has denied the respondent right to be heard and is against the principle of fair hearing. I therefore advise counsel for the respondent to stop praying hide and seek game.

Having so said, let me now consider rival arguments and evidence of the parties with a view of resolving the issues raised.

It was submitted by counsel for the applicant that applicant was employed by the Research Triangle Institute Tanzania, the respondent. On the other hand, it was submitted by counsel for the respondent that applicant was not an employee of the Research Triangle Institute Tanzania, the respondent, though somewhere somehow, counsel submitted that applicant was employee of the respondent. I have carefully examined evidence in the CMA record and keenly considered these rival arguments and find that this issue can only be answered by evidence of the applicant (PW1) and DW1. I will therefore examine their evidence and in so doing, I will cover the complaint raised by counsel for the applicant belatedly and in violation of the law, that evidence of applicant was not considered.

Mr. Sriyanjit Perera (PW1), applicant, while giving his evidence in chief stated that his nationality is American and Canadian and that in

June 2018, he entered five years fixed term contract of employment with the respondent as Health Information System Advisor and that the said contract was expiring on 14th June 2023. He testified further that, in 2018, he was issued with work permit that was valid until on 16th August 2020. In his own words, applicant (PW1) while testifying in chief is recorded stating: -

> *"... **according to the permit, my employer is the respondent in this dispute. I was assigned as advisor by the US Government Centre of disease control here in Tanzania.** This centre of disease control is related with respondent because US government CDC issued terms of reference contract opportunity for companies to compete on providing service and the opportunity required for the company bidding must be registered in TZ and RTI (the respondent) won the contract. I don't know why CDC they were motivated to do the bidding they only mentioned they must be properly registered in order to work in Tanzania. **My contract came to an end in September for reasons (1) I was offered a new employment by a company in US called IAP around May 2020**...I was advised that I shouldn't resign my current employment...in the spirit of being transparent and to ensure that if time came, I should properly prepare so not to disturb service. I reached out RTI (respondent) to give them head up and informed them when the time to resign what process should I follow. On 3rd august 2020 I received communication from RTI that **CDC** had terminated the contract and at the time they did not know what that mean for me... RTI in spirit of the contract I do not believe if they were fair in exercising the TZ laws, RTI failed to respect the terms of the contract"*

Evidence of the applicant while under cross examination is as follows: -

> *"Q. Tell the difference btn RTI in TZ and RTI*

1. *I don't have an answer to that legal question. RTI who appeared in P2 is the same personas respondent but I have no clear answer.*

Q. Was there any other agreement between employer & you?

A. Yes I have employment contract with RTI three of them before this.

Q. What was the essence of the other 3 contracts

A. I have not produced them here since they were not musked in Tanzania. As far as I know these contracts were not legal in TZ and I signed them while in UK. It was before I landed in Tanzania for the purpose of this project.

Q. What is the difference with this employment agreement and the one you presented here P1?

A. The signing date.

Q. What is ***the applicable law in determining the dispute*** *in this employment agreement?*

A. the dispute will ***be resolved at a State court or Federal Court located in North Carolina. I did not bring them because are not applicable in TZ.***

Q. Do you have a termination letter?

A. No but they stopped paying my salary and through the emails they said my contract will end on 1st September 2020.

Q. under the policy of RTI was there a requirement of nf notice of termination?

A. I have tendered any document to show that CDC have terminated RTI's contract. I was employed in Tanzania and not USA. (Read P4 21st August 2020) "can you please send me the RTI policy document that stipulate ***that Americans posted oversea*** *are not eligible for severance" RTI was arguing that I was not eligible to both countries according to the policy so I was asking for the copy of the said policy for approval..."*

Evidence by the applicant while in chief, that that he was assigned as advisor by the US Government Centre of disease control here in

Tanzania and that his contract came to an end in September for reasons (1) that he was offered a new employment by a company in US called IAP around May 2020 and all what he stated, in my view, clearly shows that he was not referring to the respondent namely Research Triangle Institute Tanzania (TRI Tz). It is my view therefore that, CMA had no jurisdiction and that the argument by counsel for the respondent that arbitrator was supposed to determine jurisdiction based on evidence and not merely by relying on section 86 and 88 of Cap. 366 R. E. 2019 (supra) is valid.

I have also read the contract of employment, (exh. P1) that was tendered by the applicant and find that (i) it was not signed by the other party namely the employer hence cannot be regarded as valid contract and (ii) it is between Research Triangle Institute -Tanzania of P.o. Box 23182 Dar es Salaam as the employer and Sryiyanjit Michael Perera of 601 Brookridge Cr. Orleans, ON , K4A 1Z6 Canada as the employee. As pointed hereinabove, in his evidence, applicant was referring to RTI as his employer and not RTI-Tanzania.

In his evidence, applicant (PW1) relied on the work permit (exhibit PW2) to show that he was employed by the respondent. With due respect to counsel for the applicant, that exhibit does not prove that

applicant was employed by the respondent. I have examined the said work permit (exh.P2) and find that the applicant was employed by ***Research Triangle Institute*** and not ***Research Triangle Institute – Tanzania,*** the respondent. In other words, exhibit P1 and P2 both tendered by the applicant are at variance and does not prove that applicant was employed by the respondent.

My further finding that CMA had no jurisdiction is based on evidence of Sylvester Isuja (DW1) for the respondent. in his evidence, Sylvester Isuja (DW1) testified that he works at RTI International in TZ for Jiulize Uelewe project as chief of parties responsible for representing RTI in TZ in the said project and that he was a/board member of RTI in TZ. In his words, DW1 is recorded stating:-

*"... **I work at RTI international in for Jiulize Uelewe project**...I am on theproject Jifunze Uelewe with engagement with the government...RTI international is a big one ...then we have one locally registered here as RTI in Tanzania and I am the board member...I knew complainant from last year June & July but before I knew him, he was there working with RTI...**I have proof to show that he was employed by RTI international. His contract of employment is here and offer letter and I would like to** tender as exhibit Commission admitted as exhibit D1. **Basing on "D1" there was an agreement which was signed by the complainant with RTI TZ for purpose of getting work permit; I would like to make reference to exhibit "P1".** Also there was another agreement which was entered between the complainant and RTI international before he came to work in TZ...**Exhibit D2.** D2 was an agreement between complainant and RTI international. It was*

signed on 7th Dec 2018. After that complainant was sent to Tz to work under Centre for Disease Control (CDC) as Health System and Sustainability Consultant. ***Complainant was sent to Tz by RTI international... After working for 2 years, last year July he wrote an email to RTI international to inform that he will resign sometimes in September or August and RTI worked on the notice and did agree.*** *As a board member here in TZ we were informed through those emails to help us in decision making; I would like to refer to* ***"P3"*** *specifically the email of 13/7/2020. The information in this email is that there was a note of thanks and he mentioned the indication of the time which he wants to resign, and he want to support on smooth transition so that RTI will not stuck on the operation. RTI wrote an email to reply his email by accepting his resignation/official notice of separation. I refer to an* ***exh. P4*** *which is the email where RTI replied on 28/8/2020 came from Kristin to complainant with heading follow up your separation from RTI..."*

While under cross examination, DW1 is recorded stating:-

"Q. is complainant an employee of RTI in Tanzania?

1. No.

Q. Do you remember you were shown a contract between RTI TZ and complainant.

A. Yes.

Q. ***Read P1*** *on top line*

A. ***This employment contract is between RTI TZ & Perera . I don't agree if complainant executed the contract but he signed that contract. Contract commenced on 15th June 2018 to 14th June 2023. It was signed for getting permit for complainant.***

Q. ***When was the last time RTI TZ paid complainant salary.***

A. RTI TZ has never paid him salary rather he was paid by RTI international.

Q. ***Does RTI TZ have any agreement with RTI international regarding complainant's employment.***

A. No. RTI international signed on 7th Dec 2018. RTI TZ signed contract 15th June 2018. D2 does no state that complainant will work for RTI TZ. D2 does not prove that complainant will work at CDC.

Q. ***How was exhibit D2 terminated?***

A. ***complainant gave a resignation notice to RTI international. Am an employee of RTI international.***

Q. the email of 13th July 2020 were you copied?

A. I was not copied.

Q. how did you know it existed?

A. they were later shared the complainant was leaving. I cannot establish the numbers but reply from RTI international was certain.

Q. email of July 13th 2020 was between which parties.

A. ***Mr. Perera writing to kattie. The resignation email to Gerald. Still part of RTI international. RTI international was not registered in TZ and it operates in TZ through projects."***

While testifying during re-examination, DW1 stated:-

"...P1 was signed by the parties home office and the people signed the contract are all in the management of RTI international. In P3 the position of addressee Jared is working under operation and HR Department in North Carolina. In P4 this was sent on 31/8/2020 which was addressed to Kristin from transition of his terminal benefits and leaving the house. Therefore complainant replied an email of 28/8/2020 which acted upon his resignation notice."

It is on record that DW1 testified on 3rd June 2021 and knew applicant before termination of his employment. It is my view that the submission by counsel for the applicant that DW1 is incompetent and

that gave hearsay is not valid. His evidence was not shaken while under cross examination and I see no justification for not believing him.

From the afore quoted evidence of the applicant (PW1) and DW1, in my view, applicant had no employment contract with the respondent RTI TZ. There is no proof that he was paid salary by the respondent. It was testified by DW1 that applicant was paid salary by RTI international. This evidence was not shaken on cross examination. This is collaborated by the evidence of the applicant (PW1) when referring to exhibit P4 dated 21st August 2020 in which he was praying to be supplied with RTI policy document that stipulate that **"Americans posted oversea"** are not eligible for severance. Applicant was not employed in Tanzania but in USA and posted as an oversea employee, which is why, he was asking the document so that he can know his rights. Had it that he was employed by the respondent who is based in Tanzania, then, he would have not written the said email. DW1 nailed it to the ground that the persons applicant was communicating with, are employees of RTI international and not RTI TZ. It sounds a bit strange that applicant's fixed term contract was expiring on 14th June 2023, but his work permit was valid only until on 16th August 2020 and there is no evidence proving that after expiry of the said permit, applicant sought and was

granted another permit that enabled him to work from 16th August to 1st September 2020, the alleged date of termination of his employment. It was argued by counsel for the applicant that normally work permit in Tanzania are issued for two years only. With due respect to counsel for the applicant, that submission cannot be entertained for two reasons, (i) he is not the witness to testified to that effect as such, that is submissions from the bar, which is not evidence, however expert he ought be in that field, and (2) no proof or evidence on record that applicant sought another work permit after expiry of the first and that in September 2020 he was in possession of a valid work permit enabling him to work in Tanzania under the alleged fixed contract that was expiring in 2023.

Apart from the foregoing, a proof that applicant was not an employee of RTI TZ can be found in **exhibit D1** dated **14th June 2018** that was authored by Kelly Vester, Talent Acquisition Partner International Development Group RTI International addressed to Sriyanjit Perera, the applicant, notifying him that RTI international has offered him employment as a Health system and Sustainability Advisor in RTI. The said offer was accepted by the applicant on 15th June 2018 by signing it. On 14th June 2018, RTI international sent addendum to

supplement the offer that was sent to the applicant. This addendum which is part of **exhibit D1** was signed by the applicant on 18th June 2018. *The said addendum reads in part :-*

> *" June 14, 2018*
>
> *Sriyanjit Perera*
> *601 Brookridge Cr.*
> *Orleans, ON, K4A126*
> *Canada*
>
> *Dear sriyanjit,*
>
> *This addendum supplements your offer letter and employment agreement, and outlines the terms and conditions of your international work assignment as an employee for RTI.* ***You are employed by RTI International, a company based in North Carolina, U.S.A. with worldwide offices. We are assigning you to Dar es Salaam, Tanzania and you will be based out of the RTI Dar es Salaam, Tanzania office Location, effective on or about June 15, 2018. You will be a project based employee as a Health System and Sustainability Advisor*** *in RTI's Social, statistical and Environmental Sciences Group...*
>
> *This is an indefinite assignment for the needs of the* ***IOPPS: Division of Global Health Protection (DGHP) Support Services*** *project. It is currently anticipated that this assignment will last through* ***June 14, 2023*** *and it is expected that you will commit to fulfilling this assignment through that date. However, it is important to note that nothing herein alters the at-will nature of your employment. Accordingly, your employment may be terminated by either you or RTI for any reason either during the introductory period, or at any time during you're your employment...*
>
> ***RTI's "International assignment" are temporary by nature.*** *The definition of an RTI international assignment is the temporary company relocation of an individual outside their country of citizenship and or normal*

residence. The following allowances and reimbursements are provided due to expected temporary nature of the assignment outside the country of one's normal residence...

...

Shipping: RTI will provide shipment to and from post of assignment and home of record per RTI policy...

Living Quarters: RTI will pay living quarters ...the current approved allowance is $55,000 for housing..."

I have noted that the same amount appearing in exhibit D1 quoted hereinabove are appearing in exhibit P1 that was tendered by the applicant. I don't think that it was just a matter of coincidence.

For all explained hereinabove, I hold that CMA had no jurisdiction and I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Since the jurisdictional issue has disposed the whole application, I will not deal with all other grounds raised by the parties.

Dated at Dar es Salaam this 30th March 2022.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

B.E.K. Mganga
JUDGE