THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 463 OF 2021

(Arising from an award issued on 15th October 2021 by Hon. Igogo. M, Arbitrator, in Labour dispute No. CMA/DSM/KIN/780/19/356 at Kinondoni)

BETWEEN

LANCENT LABORATORIES TANZANIA LIMITED.....APPLICANT

AND

JANUARY MUNYURI BYARO.....RESPONDENT

JUDGMENT

Date of last Order: 17/05/2022
Date of Judgment: 10/06/2022

B. E. K. Mganga, J.

Respondent was employed by the applicant for unspecified period in the position of Technologist officer. On 5th September 2019, applicant terminated employment of the respondent for breach of technical working instructions, endangering of a patient's life, breach of Medical Code of Ethics and dishonest. Aggrieved with termination, on 20th September 2019, respondent filed Labour dispute No. CMA/DSM/KIN/780/19/356 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni complaining that his employment was unfairly terminated. In the Form referring the dispute before CMA (CMA F1), respondent prayed to be reinstated without loss

of remuneration, 24 months' salary compensation/ damage for loss of remuneration and psychological torture. In the CMA F1, respondent showed further that, termination was substantively unfair but procedurally fair.

On 15th October 2021, having heard evidence and submissions from both sides, Hon. Igogo. M, Arbitrator, issued an award in favour of the respondent that termination of employment was both substantively and procedurally unfair. The arbitrator, therefore, awarded the respondent to be paid (i) TZS 47,883,800/= being salary for 38 months from the date of termination to the date of the award and (ii) TZS 15,121,200/= being 12 months' salary compensation all amounting to TZS 63,005,000/= because reinstatement was impracticable.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit sworn by Godliving Nkya, the Human Resources officer of the applicant in support of the notice of application, raised five grounds namely: -

1. *That the Honourable Arbitrator erred in law and fact by not giving the applicant a chance to decide either to reinstate the respondent or to compensate him as per his requirements through CMA-F1.*
2. *That the Arbitrator failed and/ or ignored to examine and analyze the evidence tendered with regard to the procedures followed for terminating the respondent and reached a wrong conclusion that*

termination of the respondent's employment was contrary to the procedures.

3. *That the arbitrator failed to examine and analyze testimonies of witnesses by the parties and exhibits tendered by the applicant consequently failed to appreciate that there were fair reasons for termination of Respondent's employment.*
4. *The Honourable Arbitrator erred in law and fact by not considering and analyzing the reasons why applicant decided to terminate the Respondent alone and not together with DW1 and DW2.*
5. *That the Arbitrator failed and / or ignored to correctly and adequately examine and analyze testimonies of all witnesses and exhibits tendered by the applicant and apply them correctly to the facts in issue and gave them required weight in answering labour dispute before her, consequently made a decision which is unfair and unjust.*

In resisting the application, respondent filed his counter affidavit.

By consent of the parties, the application was disposed by way of written submissions. In the written submissions, applicant enjoyed the service of Ms. Rashida Jamaldin Hussen, learned counsel while the respondent enjoyed the service of Pladius Mwombeki, learned counsel.

In the written submissions in support of the application, Ms. Hussein, learned counsel for the applicant dropped the 1st ground of revision and argued the remaining grounds.

On the 2nd ground relating to procedure for termination, Ms. Hussein, counsel for the applicant, submitted that applicant adhered to fair procedure of termination.

On the 3rd and 5th grounds relating to fair reason for termination and failure to analyze evidence of the applicant, counsel for the applicant submitted that arbitrator partly considered evidence of DW1 and DW2 but failed to analyze evidence and exhibits tendered by DW3 and DW4 relating to bad reputation respondent had with his co-workers and series of misconducts committed by the respondent showing how he was irresponsible employee. Counsel for the applicant went on that, arbitrator failed to analyze evidence and was biased. She argued further that the omission to analyze evidence is fatal and cited the case of ***Hussein Iddi & Another v. Republic*** [1986] TLR 166 to support her argument.

In the 4th ground relating to failure of the arbitrator to consider and analyze reasons as to why applicant terminated only the respondent and not DW1 and DW2, counsel submitted that it was testified by Dw4 that DW1, DW2 and the respondent were found guilty but basing on their history of working with the applicant, DW1 and DW2 were warned

because it was their first misconduct unlike to the respondent who had bad record and series of scenarios.

Responding to submissions made on behalf of the applicant, Mr. Mwombeki, learned counsel for the applicant submitted on the 2nd ground that procedure was not followed.

On the 3rd and 5th grounds relating to fair reason for termination and failure to analyze evidence of the applicant, counsel for the respondent submitted that applicant failed to substantiate fair reason for termination of employment of the respondent. Counsel submitted that applicant failed to produce crucial evidence during hearing namely, the forged medical report, the patient whose medical report was forged and the doctor who initiated the complaint. Counsel submitted further that applicant failed to produce copies of the CCTV camera and login and out printouts to prove presence of the respondent at workplace. Counsel for the respondent went on that, the arbitrator considered testimony of all witnesses before delivering the award. Mr. Mwombeki also submitted that, evidence of DW1, DW2, DW4 together with exhibit D10 shows that respondent was not implicated in the allegation and that DW1 and DW2 were responsible for the misconduct.

Responding to the 4th ground, counsel for the respondent submitted that, applicant is misleading the court because exhibit D10 shows that only DW1 and DW2 were found guilty of the misconduct but terminated employment of the respondent both unlawfully and unfairly.

In rejoinder written submission, counsel for the applicant submitted that, arbitrator was supposed to issue an order of either reinstatement or re-engagement of the respondent and not to award him compensation because that is not an option provided for under the law.

I have examined the CMA record and carefully considered submissions of the parties in this application. I should point out that, in her submissions in chief, applicant dropped the 1st ground relating to whether it was proper for the arbitrator to order compensation instead of either reengagement or reinstatement. But in rejoinder submissions, counsel for the applicant submitted on this ground criticizing the order of compensation made by the arbitrator. I will therefore not deal with it because the other party did not address it after applicant has indicated in her submissions that she has dropped it. The reason is not far. In dropping that ground, made the respondent to believe that it was not contested. Now opening the same issue in the rejoinder is denying the

other party right. I am of the view that courts cannot tolerate the hide and seek games that intend to deprive the other party right to be heard.

I have pointed out herein above that in CMA F1, respondent indicated that the dispute was based only on substantive reasons for termination and not also on fairness of procedure. But in the award, the arbitrator held that termination was unfair both for want of reason and improper procedure. It is a cardinal principal of law that parties are bound by their own pleadings. This principle has been consistently applied in our jurisdiction on various cases including the case of ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic),*** Civil Appeal No. 2 of 2020 ,CAT (unreported) and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited***, Civil Appeal No. 8 of 2015, CAT (unreported). In the ***IPC's case*** (supra), the Court of Appeal held that:-

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the*

parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

That being the position of the law, I find that the arbitrator erred to decided that termination was procedurally unfair while the respondent did not challenge fairness of procedure of termination. That said and done, I hereby allow the 2nd ground.

I have examined the CMA record and find that in the charge that led to termination of the respondent's employment contained three counts namely: -

" 1. Breach of Technical working instructions. The particulars were that; on 4th July 2019 at 9: 58 PM respondent gave unlogged sample to Ms. Salome Marwa and Mr. Kennedy Osoya sample under barcode number 770996455 and 770996456 on machine for testing glucose, creatinine, urine routine, uric acid, cholesterol, Triglyceride, calcium, Albumin, PO4, Hbsag HCV, and full blood count. Upon investigation it has been found that the barcode number 770996455 and 770996456 was not registered onto Meditech system. However, the results were not processed /transmitted to Meditech system as per normal procedure but only found on Machine and printed on fictitious template. The following technical procedures were in breach: -

a. Processing unregistered/ logged sample in Haematology and Microbiology Machine

b. Attending work premise during unofficial hours without informing the company's officials.

c. Processing the test under fictitious barcode number.

d. Create and edit the result on fictitious template.

2. *Endangering a Patient's life. The particulars were that; on 4th July 2019, employee endangered the life of a patient named A.M by forging off Meditech system results. The investigation shows submitted results had transcription error and wrong interpretation.*
3. *Breaching of Medical Code of Ethics. The particulars were that; employee is in breach of medical code of ethics by forging and releasing off Meditech system results of the patient named A.M."*

In their evidence both DW1 and DW2 testified that on 4th July 2019 respondent gave them samples for testing stating that the same is needed emergently. They testified further that respondent told them that he was finalizing the billing process according to normal procedure and that he will submit to them within a short time. Based on that promise and being aware that respondent was their co-worker, and further aware that tests relating to employee should be treated with urgency, they made the test and left the result in the machine waiting submission of the billing. The two witnesses testified further that employee especially who are in the same department, including respondent, had access to the machine and can read the results in the machines. They testified further that, they were required to show cause and further that they were issued with warning letters. While under cross examination by the respondent, both DW1 and DW2 maintained that respondent brought the sample promising that he was making

follow up of the billing so that the same can be entered into the system. In his evidence, Respondent (AW1) did not challenge the evidence of DW1 and DW2. In fact, during cross examination, respondent admitted that he was in good term with both DW1 and DW2. He testified further that both DW1 and DW2 were his interns because he trained them how to perform their duties. In the award the arbitrator disbelieved evidence of DW1 and DW2 on ground that they failed to bring other evidence to prove that respondent gave them samples for test. In disbelieving evidence of DW1 and DW2 the arbitrator stated: -

> *"...Tume inaona ni kweli shahidi DW1 na DW2 walifika kutoa Ushahidi kuwa mlalamikaji ndiye aliwapatia sample hizo hata hivyo hawakuwa na Ushahidi wowote wa kuthibitisha hilo.*

In the case of ***Goodluck Kyando v. Republic,*** [2006] T.L.R 363 the Court of Appeal that: -

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Again, in the case of ***Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008,*** (unreported) the Court of Appeal held: -

> *"...To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable*

evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc...".

I have carefully examined evidence of both DW1 and DW2 and find that there is nothing that warrant to disbelieve their evidence. The mere fact that no other witness or evidence was brought cannot be a base of disbelieving their evidence. It is my view further that the arbitrator misdirected herself in disbelieving the evidence of DW1 and DW2 by wrongly assuming that in order oral evidence to be accepted, should be supported by documentary evidence, which is why, she demanded other evidence as proof to what the two witnesses testified. Counsel for the respondent seems to hold a similar view, which is why, he insisted in his submission that copies of the CCTV camera and login and logout printouts were supposed to be tendered by the applicant to prove presence of the respondent at workplace. That assumption is wrong. I should say that I neither know law nor case authority to the effect that in order to prove a particular issue, oral evidence must be supported by documentary evidence. In my view, both oral evidence and oral evidence carries the same weight because the Evidence Act [Cap. 6 R.E. 2019] does not provide that either oral or documentary

evidence is superior to the other. I take that stance because that is not the requirement either of section 61 or 63 of the Evidence Act [Cap. 6 R.E. 2019]. This position was held by this court (Samata, J as he then was) in ***Julius Billie v. Republic*** [1981] TLR 333. The Court of Appeal in the case of ***Flano Alphonce Masalu @ Singu & others v. the Republic,*** criminal Appeal No. 366 of 2018 (unreported) clarifying on what was held by this court in ***Billie's case*** (supra) held that: -

> *"non-production of a thing which is the subject- matter of court proceedings goes only to the weight and not to the admissibility of the evidence concerning or relating to it. The court did not lay down or restate any principle of law requiring the tendering of the stolen goods or the offensive weapon as a precondition for establishing the guilt of an accused person. Whether or not the prosecution must tender such items depends, on the whole, upon the circumstances of the case."*

Had the arbitrator taken into consideration that correct position of the law, she could have not arrived at the conclusion that applicant did not prove reason for termination of the respondent.

I should point out that in her evidence, Godliving Nkya (Dw4) while under cross examination, testified that CCTV footage are stored for a period of between 7 and 14 days only. That evidence was not challenges by any other evidence of the respondent. The arbitrator did not therefore, take into account that evidence when holding that applicant

failed to produce CCTV footage as a proof that respondent was in office on the material date under consideration.

It was evidence by DW4 that misconduct committed by the respondent apart from endangering life of the patient and employment of his co- employment, was exposing the applicant to be sued in civil suits.

I have read the investigation report (exh. D10) and fid that it is loud that DW1 and DW2 conducted the test of which the two witnesses confirmed in their evidence. The report is also loud that there were fraud results because Mr. A.M, a cash patient from Dr. Kisanga paid TZS 160,000/= during evening hours on 4th July 2019 but was not issued receipt while the actual price is around TZS 184,000/= and that in absence of Dr. Kisanga the results were submitted to Dr. Abbas who noticed the wrong interpreter on the result and escalated the matter for follow up. The report shows further that a duplicate lancet format was used to release results and barcode for an old patient of 2018 namely, Ms. M. M with number 77096558 for tabulate result of Mr. A.M. As pointed hereinabove, the report shows that testing was done by both DW1 and DW2 who also confirmed in their evidence but explained that they were directed to do so by the respondent. In his evidence under

cross examination as pointed hereinabove, respondent (AW1) testified that both DW1 and DW2 were his interns because he trained them how to perform their duties. In my view, with that relationship, in no way DW1 and DW2 could have refused to test the samples that they were given by the respondent.

I should point that I have decided to hide the full name of Mr. A.M and Ms. M.M both being patients referred above and opted to use initials of their names to abide by medical professional and ethics namely none-disclosure of names of the patient to the third party without the consent of the patient. In my view, disclosure of names of the two patients in this judgment might have adverse consequences to the parties. I believe the position of none-disclosure of names will reduce more conflicts in the society leading to more litigations. This, in my view, will help the society to continue to enjoy their peaceful life and engage more in economic activities rather than in litigations.

That said and done, I revert to the issues in the application at hand. Having carefully examined evidence adduced by the parties at CMA and considered evidence of both sides, I hold that termination of the respondent was substantively fair. I have pointed hereinabove that at CMA, respondent was not challenging fairness of termination on

procedure. That being the case, I hereby hold that termination of the respondent was both substantively and procedurally fair.

For the foregoing, I hereby allow the application, revise, quash and set aside CMA award.

Dated at Dar es Salaam this 10th June 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 10th June 2022 in the presence of Jeston Justine, Advocate holding brief of Pladius Mwombeki, Advocate for the respondent but in absence of the applicant.

B. E. K. Mganga
JUDGE