IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 14 OF 2022

(Arising from an Award dated 17/12/2021 issued by Hon. G. Gerald, Arbitrator in Labour Complaint No. CMA/DSM/KIN/731/20/255/20 at Kinondoni)

BETWEEN

G4S SECURE SOLUTIONS (T) LIMITED ..... APPLICANT

AND

MUUMINU ADAM MTABAZI ..... RESPONDENT

JUDGMENT

Date of last Order: 29/06/2022
Date of Judgment: 15/07/2022

B. E. K. Mganga, J.

On 4th May 2020, respondent signed a one-year fixed term contract of employment with the applicant commencing on 1st May 2020 and expiring on 30th April 2021. In the said fixed term contract, respondent was employed as security officer (guard). The place of work was work indicated in the said fixed term contract to be at the US Embassy within Dar es Salaam. Employment relationship between the

two did not go well as a result, on 25th May 2021, respondent filed a referral of the dispute before the Commission for Mediation and Arbitration (CMA) complaining that his employment was unfairly terminated by the applicant. In the Referral Form (CMA F1), respondent indicated that he was claiming to be paid (i) remuneration for the work done prior termination, (ii) one month salary in lieu of notice, (iii) annual leave, (iv) severance and (v) be reinstated. Respondent indicated further in the said CMA F1 that his employment was terminated on 21st January 2021.

On 17th December 2021, Hon. G. Gerald, Arbitrator, having heard evidence of the parties, issued an award that termination of employment of the respondent was unfair for want of reasons. The arbitrator therefore awarded the respondent to be re-engaged in terms of section 40(1)(b) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019].

Being dissatisfied with the award, applicant filed this application supported by an affidavit of Imelda Lutebinga, her principal officer, beseeching this court to revise and set aside the said CMA award. In the affidavit in support of the application, Ms. Lutebinga, raised two main grounds namely: -

i). The arbitrator erred in law and facts for awarding respondent under Section 40(1)(b) of Cap. 366 which is remedy for unfair termination.

ii). The arbitrator erred in law and fact for failure to assess evidence and or analyze evidence both oral and documentary tendered by the applicant henceforth reached a wrong decision.

When the matter was called for hearing, Mr. Mosses Kiondo, learned counsel, appeared, and argued for and on behalf of the applicant while the respondent appeared in person.

Arguing the 1st ground of the application, Mr. Kiondo, learned counsel, submitted that respondent was employed for a fixed term contract that commenced on 01st May 2020 expiring on 30th April 2021. He went on that; respondent's employment was terminated on 25th January 2021. Mr. Kiondo submitted further tha, in the award, the arbitrator ordered respondent be re-engaged in terms of Section 40(1)(b) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] which is the relief for employees under unspecified contract which is not applicable to the respondent. Counsel for the applicant argued that the arbitrator was supposed to award the respondent the remaining period of the contract and not re-engagement.

On the 2nd ground of the application, Mr. Kiondo learned counsel for the applicant submitted that the arbitrator failed to analyze evidence

of the parties. He submitted further that, applicant followed all procedures for termination and that there were valid reasons for termination. On reasons for termination, Mr. Kiondo submitted that respondent was using/talking over the mobile phone while on duty at the USA Embassy. He however, conceded that the charge sheet (GS4) shows that respondent was charged for negligence. Counsel for the applicant went on that respondent was warned as per Exhibit GS7 and was transferred from the US Embassy to applicant's Headquarter but he insisted to work at the US Embassy and thereafter filed the dispute at CMA. He concluded his submissions that respondent did not testify at CMA.

Responding to the submissions made on behalf of the applicant, Mr. Mtabazi, the respondent, conceded that he had a one-year fixed term contract with the applicant and that the same was supposed to end on 30th April 2021. He submitted further that on 21st January 2021 he was denied access to the applicant's offices and that his ID and uniform were taken by the applicant as a result, he ceased to be applicant's employee.

On the allegation that employees were prohibited to use/ talk over mobile phones while on duty, he submitted that the allegation is untrue

because employees were given a smart phone that they were handing over to each one when leaving and entering on duty. Respondent submitted further that, he was working at the house of Andrew Robert, a US national, but the alleged email containing allegations that he was talking over the phone was sent to the applicant by Bryan, whom, respondent argued that has neither come across nor knows. He went on further that the investigation report shows that he was interrogated on 15th August 2020, but the incidence is alleged to have occurred on 31st August 2020. He maintained that there is no general order or code of conduct set by the applicant prohibiting the use of mobile phones while on duty. Respondent submitted further that, initially he was charged for breach of Company rule, but applicant did not give him the verdict thereof. He went on that, thereafter, he was charged for negligence.

Mr. Mtabazi submitted further that, there was no valid reason for termination and that procedures were not followed. He went on that, up to now, applicant has not served him with termination letter. He submitted further; at CMA, he gave evidence by statement, but Boman (PW1) gave oral evidence.

In rejoinder, Mr. Kiondo, learned counsel for the applicant submitted that no document was tendered by the respondent at CMA.

He conceded that duty Station of the respondent was at the house of the Officer of the US Embassy and not at the US Embassy.

I have examined the CMA record and considered submissions that were made in this application. In disposing the two grounds, I will start with the 2nd ground. It was submitted by counsel for the applicant that respondent was charged for negligence and further that there was valid reason for termination and further that producers for termination were followed. The respondent, on his side, submitted that there were no valid reasons for termination and that procedures were flawed.

I have examined evidence adduced by the parties in the CMA record and find that only Elifariji Kisaka (DW1) testified on behalf of the applicant and Ibrahim Bomani Pamba (PW1) testified on behalf of the respondent. As correctly submitted by counsel for the applicant, there is nothing on the CMA record showing that respondent testified. In his submissions, respondent submitted that he gave evidence by a written statement or affidavit. With due respect to the respondent, there is no order in the CMA record to that effect. More so, there is no record showing that respondent was cross examined in relation to the alleged written statement or affidavit.

On fairness of procedure, respondent, indicated in the CMA F1 that the procedure was unfair because allegations were unclear and changed when new charges were introduced and further that the entire hearing was a sham because no witness was called by the employer and no evidence was adduced against him. On fairness of reasons, respondent indicated that reasons for termination were a bogus and changed after the employer noticed that she could not substantiate the first charge. I have examined the CMA record and carefully considered these submissions and find that it is undisputed that, respondent was charged and that a disciplinary hearing was conducted as it was testified by Mr. Kisaka (DW1). According to DW1, respondent was charged for negligence. Applicant relied on email correspondences (exh. GS2), investigation report (exh. GS3), notice of disciplinary hearing (exh. GS4) and Disciplinary Hearing Form and minutes (exh. GS5 collectively). I have read email correspondences (exh. Gs2) that applicant relied upon to show that respondent was negligent and that was rejected by her client, namely, US Embassy and find that there are no reasons assigned for removal or transfer of the respondent from guarding the said place. The record shows that the whole saga against the respondent is based on hearsay and it was not substantiated. This conclusion is based on the

investigation report (exh. GS3) which clearly reads in its recommendation as follows:-

> *"RECOMMENDATION.*
>
> *Based on the details collected from Senior guard Allan Mbogo and guard Shah Suleiman,* ***the hearsay evidence shows that guard Muuminu Adam Mtabazi has a tendency of talking with a mobile phone every time while on duty including open the gate while talking with a phone. This is negligence with regards performance of duties*** *according to G4S disciplinary code section number 10.1..."*

From the quoted paragraph, the whole source of the saga against the respondent is the hearsay allegation that he used to talk over the phone while on duty. It is my view that talking with somebody over the mobile phone at any rate cannot be negligence in performing duties. It was not stated by the witness for the applicant how this becomes negligence in performing duties. In my view, there was not reason even for serving the respondent with the charge. The CMA record shows that on 9th October 2020 at 13:15hrs, respondent was served with notice of disciplinary hearing (exh. GS4) showing that he was facing the charge of negligence to perform duties. But the particulars of the charge were not disclosed. I therefore agree with the respondent's submissions that there was not fairness of procedure because he faced the charge that was unclear as to what was contravened and how. Not only that but

also, the Disciplinary Hearing Form (part of exh. GS.5) shows that Mr. Peter Ndyetabula was the chairperson while Romuald Haule was representing the applicant. I have noted that both Mr. Peter Ndyetabula and Romuald Haule were part to the email correspondences (exh. GS2) and had made earlier decision that respondent should be removed from US Embassy site without informing him the alleged misconducts. In other words, the two initiated the claim against the respondent relating to the alleged negligence and they sat in the disciplinary hearing especially Mr. Ndyetabula as chairperson. In short, the disciplinary hearing was just a formality because they had a premeditated decision against the respondent. This, in my view, faulted procedures of fairness. Though there was no evidence other than hearsay, the disciplinary hearing committee still reached a conclusion that respondent was negligence. In fact, the complaint by the respondent on both fairness of reason and procedure is reflected in evidence of DW1 while he was under cross examination when he admitted that charges can be amended at any time. It was argued by the respondent that applicant amended the charge after noting that she did not have evidence to prove the initial one. It is unclear in the evidence on record as what was the initial charge or allegations against the respondent. Despite that, yet

the applicant relied on hearsay to conclude that respondent was negligent. My conclusion that the allegation was hearsay is supported by the minutes of the disciplinary hearing that is part of exhibit GS.5. The minutes reads in part :-

> *"...**Kulingana na maelezo niliyopewa na askari shah na supervisor Allan Mbogo,** nina uhakika kuwa Muuminu alikutwa na mteja akiwa anaongea na simu...Muuminu ni mtumiaji mzuri wa simu wakati akiwa kazi, na mara kwa mara hukutwa akiwa anaongea na simu..."*

I am of the strong view that the whole issue against respondent was fabricated, and applicant failed to prove by evidence the allegations he put forward against the respondent. It is a trite principle of law that he who alleges must prove. This principle is clearly provided under section 110(1) and (2) of the Evidence Act [Cap 6 R.E. 2019] and restated in a range of cases including the case of ***Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura***, Civil Appeal No. 149 of 2017, CAT at Tabora (unreported), wherein the Court of Appeal held that: -

> *"...the trite principles in the law of evidence; the general concept of the burden and the standard of proof in civil litigations. The concept is **"he who alleges must prove," and it means that the burden of proof lies on the person who positively asserts existence of certain facts.** The concept is embodied in the provisions of section 110 (1) and (2) of the Evidence Act [Cap 6 R.E. 2019] ..."*

Applicant was required under the law, to prove by evidence, negligence of the respondent and not to rely on hearsay. This includes but not remitted to tendering the code restricting employees to use mobile phone while on duty. In my view, the said code does not exist. Even if we find that it exists, although no evidence, then, the issue is, is it fair. The question that one can ask is, is it that employees of the applicant are restricted to communicate *inter-alia* with their family members while at work? If that is the position, then, in my view, that code is repugnant to the right to private communication provided for under Article 16(1) of the Constitution of the United Republic of Tanzania of 1977. It is my view that total prohibition of the use of mobile phone by the applicant to her employees while at work is an infringement of constitutional rights of the employees. It is my further view, that this application is an admission by the applicant that her employees who have been guarding at the US Embassy or houses of the officers of the US, respondent inclusive, have been discriminated and mistreated. They have been discriminated in the sense that it is only the US embassy officials and or the applicant who have the right to use mobile phones and or communicate with their relatives etc. That is unacceptable and should stop forthwith.

In his evidence DW1, testified that after respondent was transferred from the US Embassy site to the applicant's Headquarters, he absconded and was paid salary for some months without attending at work and later applicant stopped paying him salary. DW1 testified further that respondent appeared at office to inquire why his salary was not paid. In scrutiny of evidence of DW1, it is clear that, DW1 was suggesting that respondent was terminated due to abscondment. In my view, that evidence cannot be true because there is no letter tendered that respondent was terminated due to abscondment. In my view, evidence of DW1 in that aspect is illogical and was intended to hide the real facts and truthiness of the story. I will therefore not buy in that story. I am of this firm view because in his evidence in chief, Elifariji Kisaka (DW1) testified that in the end of August 2020, applicant's client, namely, the US Embassy rejected the respondent due to his negligence. In his words, DW1 is recorded stating: -

> "Akiwa US Embassy alikataliwa na mteja end of August 2020 kutoka na ***uzembe alioufanya*** wakati wa kazi".

But while under re-examination, DW1 testified that once her client rejects an employee, that marks the end of the contract of that employee. In his words he was recorded stating that: -

"Mteja akimkataa mlinzi maana yake ni kwamba mlinzi huyo mkataba wake unakuwa terminated kutokana na sababu hiyo".

From the above quoted evidence of DW1 both in examination in chief and re-examination, I can safely conclude that applicant terminated employment of the respondent after being rejected by the US Embassy who is the applicant's client. In short there was termination of employment based on that reason. The argument that respondent absconded or that he was not terminated, in my view, is untrue story. As pointed hereinabove, there was no valid reason for the applicant's client to reject the respondent leading to termination of his employment. It is a disturbing issue and unfair to employees of the applicant, the respondent inclusive, to be terminated simply because applicant's client does not want that employee for any reason even for flimsy reasons. In my view, there must be valid and good reasons for that rejection, otherwise, employees will be terminated unfairly, and others will be forced to succumb to things that may be contrary to their duties or law fearing to be terminated. For instance, if applicant's client orders an employee to wash dishes or clean toilets or do anything illegal or prejudicial to security of the nation or any individual and the employee refuses, and it happens that the said applicant's client rejects

the employee, then, that employee's employment may be terminated simply the client has rejected him. This court, at any rate, cannot accept that. The court will insist, as I do hereby do, that there should be valid reason for termination to protect employee and the society at large. If we fail to do so, we will not be protecting employees, but we will be exposing them to unfriendly environment and nurturing circumstances that may lead to their unfair termination. More so, in so doing, we will be abrogating our judicial duties, violating the constitution, losing confidence and legitimacy from the society we are supposed to serve as we were reminded by the Court of Appeal in the case of ***Sylvester Hillu Dawi and Another v. The Director of Public Prosecutions***, Criminal Appeal No. 250 of 2006 (unreported). From where I am standing, we are here to serve the society within our constitutional mandates and not a group of individuals. That said and done, I dismiss the 2nd ground.

It was submitted by Mr. Kiondo, learned counsel for the applicant when arguing the 1st ground that the arbitrator erred to order re-engagement of the respondent under section 40(1)(b) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] since that relief can only be awarded to employees under unspecified period

contract. I have examined the CMA record and find that it is undisputed fact that the parties had a fixed term contract expiring on 30th April 2021. I agree with counsel for the applicant that the arbitrator erred to issue an award of reengagement instead of awarding the respondent to be compensated for the remaining period of the contract. I therefore allow the 1st ground and order that respondent be paid salary for the remaining period of the contract. According to salary slips (exh. GS.8), the respondent was paid up to February 2021. As pointed above, the fixed term contract of the parties was expiring on 30th April 2021. Therefore, respondents should be paid salary for the remaining period of two months. Again, according to salary slips (exh. GS.8) respondent's monthly salary was TZS 452, 000.25. Therefore, he will be paid TZS 904,000.5.

For all discussed hereinabove, I allow the application to the extent explained.

Dated at Dar es Salaam this 15th July 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 15th July 2022 in the presence of Muuminu Mtabazi, the respondent but in the absence of the applicant.

B. E. K. Mganga
JUDGE