IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 169 OF 2021

(Arising from an Award issued on 6/5/2020 by Hon. Belinda, S. Arbitrator, in Labour dispute NO. CMA/DSM/KIN/R.657/18/163 at Kinondoni)

BETWEEN

K.K. SECURITY LIMITED ..... APPLICANT

AND

MATTO JOHN SAMBULU..... RESPONDENT

JUDGMENT

Date of the last Order: 17/08/2022
Date of Judgment: 25/08/2022

B. E. K. Mganga, J.

On 20th March 2015, applicant employed the respondent as Security Officer for unspecified period. The parties enjoyed their relationship until on 3rd April 2018 when applicant alleged that respondent resigned. On 18th June 2018, respondent filed in Labour dispute NO. CMA/DSM/KIN/R.657/18/163 before the Commission for Mediation and

Arbitration (CMA) at Kinondoni complaining that on 30th May 2018, respondent terminated his employment unfairly. In the Referral Form referring the dispute at CMA (CMA F1), respondent indicated that he was claiming to be paid (i) TZS 1,800,000/= being 12 months' compensation for unfair termination, (ii) TZS 150,000/= being one month salary as leave pay, (iii) TZS 150,000/=being one month salary in lieu of notice, (iv) TZS 300,000/= being salary arrears for April and May 2018, (v) TZS3,600,000/= being subsistence allowance, (vi) TZS 2,000,000/= being Transport cost to place of recruitment, (vii) TZS 121,153/= being severance pay all amounting to TZS 6,121,153 and be issued a Certificate of Service.

Having heard evidence of the parties, on 6th May 2020, Hon. Belinda, S, Arbitrator, issued an award that respondent did not resign, rather, he was both substantively and procedurally unfairly terminated. Based on those findings, the Arbitrator awarded respondent to be paid TZS 150,000/= being one month salary in lieu of notice and TZS 1,800,000/= being 12 months' salaries compensation.

Applicant was aggrieved by the said award as a result, she filed this application seeking the court to revise the said award. In the affidavit

supporting the Notice of Application, applicant raised four grounds namely: -

1. *That, the arbitrator erred to proceed to hear the matter that was filed out of time.*
2. *That, the arbitrator erred in law in holding that respondent was unfairly terminate while he resigned.*
3. *That, the arbitrator erred in holding that the signature in the resignation letter was not signed by the respondent without proof of an expert.*
4. *That, the arbitrator erred in law by failure to analyze evidence before her hence caused injustice to the applicant.*

Respondent filed both the Notice of Opposition and the Counter affidavit resisting the application.

When the application was called on for hearing, Mr. Elipidius Philemon, Advocate appeared and argued for and on behalf of the applicant while Mr. Denis Mwamkwala, personal representative appeared and argued for and on behalf of the respondent.

Submitting on the merit of the application, Mr. Philemon, learned counsel for the applicant argued the 1st ground separately and argued the rest grounds namely, 2nd, 3rd, and 4th together.

In arguing the 1st ground, Mr. Philemon submitted that the arbitrator erred to proceed to hear the matter that was filed out of time. He clarified

that respondent resigned on 03rd April 2018 by a letter (Exhibit D1) and that 06th April 2018 applicant accepted his resignation (Exhibit D2) and served the respondent with that acceptance on the same date. Counsel submitted further that on 14th June 2018, respondent filed the dispute at CMA claiming that he was unfairly terminated. He argued that from 06th April 2018 the date he was served with acceptance of resignation to the date of filing the dispute at CMA on14th June 2018 is 70 days. He argued further that in terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, disputes relating to unfair termination must be filed within 30 days. It was further submissions by Mr. Philemon, learned counsel for the applicant that from the date respondent was served with acceptance letter of resignation to the date of filing the dispute at CMA, respondent was out of time for 40 days. He argued further that respondent did not file an application for condonation. He concluded that since the dispute was filed out of time, the remedy available is dismissal in terms of Section 3(1) of the Law of Limitation [Cap. 89 R.E. 2019].

Submitting on the 2nd, 3rd and 4th grounds namely, (i) that the arbitrator erred in law in holding that respondent was unfairly terminate

while he resigned, (ii) that the arbitrator erred in holding that the signature in the resignation letter was not signed by the respondent without proof of an expert and (iii) that arbitrator erred in law by failure to analyze evidence before her hence caused injustice to the applicant, counsel for the applicant submitted that respondent wrote two letters on 03rd April 2018. The 1st letter showing that he did not attend at work for some days due to some emergencies and apologized for that absence and the 2nd letter was resignation letter. he argued that the two letters were admitted as Exhibit D1 collectively. It was submissions of Mr. Philemon that applicant accepted resignation letter of the respondent as per exhibit D2. He went on that the issue of signature is one of the controversies in this application. He argued that the arbitrator compared previous signatures of the respondent and spellings in the name **Mato** but other documents of the respondents it is written **Matto** and concluded that the signature in the resignation letter does not belong to the respondent. He submitted further that the respondent received resignation letter and signed it while the name is written **Mato** (Exhibit D2). He went on that the said letter was served to the respondent by the Human Resource of the applicant. He argued further that the handwriting in exhibit D1 is similar to respondent's previous

handwriting. During submissions, counsel for the applicant conceded that documents containing respondent's previous handwriting were not tendered as evidence. He however maintained that in comparing exhibit D1 and CMA F8, the conclusion is that the two documents were written by the same person namely the respondent hence it was not proper for the arbitrator to hold that the signature on the resignation letter does not belong to the respondent. he concluded that since respondent resigned, there was no unfair termination hence there was no any procedure to be followed by the applicant. He therefore prayed that CMA award be quashed and set aside.

Responding to submissions made on behalf of the applicant Mr. Mwamkwala, the personal representative of the respondent submitted generally that, respondent was terminated on 30th May 2018 verbally. He submitted further that, at CMA, DW1 testified that he is the one who received exhibit D1 collectively from the respondent and sent them to the Human Resource (DW2). He argued that DW1 testified that he received those letters (exhibit D1) so that respondent can be heard. Mr. Mwamkwala argued further that, DW1 testified further that respondent absconded for five (5) days consecutively but exhibit D1 does not show

that respondent absconded for five (5) consecutively days. He argued further that in exhibit D1 it is recorded that respondent did not attend at work for some days, but no specific number of days were mentioned. He went to submit that, in his evidence, respondent (PW1) denied having written exhibit D1 collectively and tendered the contract between the parties (exhibit AP1) to compare the signatures appearing on the contract of employment and exhibit D1 collectively. It was further submitted by Mr. Mwamkwala that respondent (PW1) testified that the name in exhibit D1 does not belong to him and that he did not resign. Mr. Mwamkwala concluded his submissions that respondent's employment was unfairly terminated and prayed the application be dismissed.

In rejoinder, Mr. Philemon, counsel for the applicant reiterated his submissions in chief and added that it is true that DW1 testified that he is the one who received exhibit D1 collectively. He was quick to submit that, that does not prove that the said exhibit was authored by the applicant. counsel concluded by submitting that it is not true that respondent was terminated verbally.

I have carefully examined the CMA record and considered submissions made on behalf of the parties. I have noted that the

contentious issue between the parties both at CMA and before this court is whether respondent resigned, or his employment was verbally terminated by the applicant and the relief thereof. In resolving these issues, I have carefully examined evidence of the parties at CMA because the matter surely rests on credibility witnesses and reliability of their evidence.

It was evidence of Mwaja Pascal Jacob (DW1) that respondent had absent at work for five days and that on 3rd April 2018, respondent appeared before him and admitted having not attended at work for five days. DW1 testified further that respondent wrote an apology letter and pleaded to be allowed to resign to keep his record clean. It was further evidence of DW1 that respondent wrote both apology and resignation letters (exh. D1 collectively) in his presence. It was evidence of DW1 that he is the one who took exhibit D1 collectively to the Human Resources offices. In his evidence, DW1 is recorded stating: -

> *"…Mnamo tarehe 3/4/2018 Alifika Ofisi ya Operation na kuniona. Alikuwa hajafika kazini siku 5. Baada ya kuniona alikiri kutokufika kazini zaidi ya siku 5. Aliandika barua ya kutohudhuria kazini. Baada yah apo alisema kiongozi ukinipeleka huko watanifukuza kazi na faili langu kuchafuka. Hivyo alisema kiongozi bora uniseti niache kazi mwenyewe kwa barua ili nitakapokwenda faili langu liwe safi au ntakapohitaji kurudi niweze kupokelewa. Kwa hiyo aliandika barua ya kuacha kazi ndani ya masaa 24 pamoja na barua ya kutohudhuria*

kazini. Baada ya hapo nilichukua zile barua mbili na kuzipeleka kitengo cha meja Mwajiri ili kuweza kusikilizwa…"

Apart from that, it was evidence of Madali Moris Sisi (DW1) testified that he received the two letters (exh. D1 collectively) from DW1 and called the respondent for discussion on one to one to verify the contents therein. DW2 testified further that he advised but respondent maintained that he wanted to resign. In his evidence, DW2 added that the name in the resignation letter is similar to the one appearing in the contract of employment. Similarly, during cross examination, concentration of Mr. Mwamkwala was on the names and not in the substance of the evidence of DW2.

In his evidence, Matto John Sambulu (PW1), applicant disputed to have resigned. He testified that on 30th May 2018 he was called in office and informed that he has resigned and that was forced to go out the office.

It is my opinion that from the above quoted piece of evidence of DW1 that was not shaken during cross examination, that respondent tendered resignation on 3rd April 2018. I have noted that at the time Mr.

Denis Mwamwakala, the personal representative of the respondent was cross examining DW1, he (Mr. Denis Mwamwakala) concentrated on the spelling mistakes in the name of the respondent, which, DW1 admitted that there is spelling mistakes and not in the substance of evidence of DW1. Admission that there was spelling mistakes in the name of the respondent did not alter the evidence that respondent wrote the two letters (exh. D1 collectively) in the presence of DW1. It is my view therefore that DW1 was credible and saw the respondent writing the two letters (exh. D1 collectively) and proved that the said letters were written by the respondent on the date sated by DW1. That position of the law was taken by the Court of Appeal in the case of ***D.P.P. v. Shida Manyama @ Seleman Mabuba***, Criminal Appeal No. 285 of 2012 wherein it held

> *"…Generally, handwriting or signatures may be proved on admission by the writer or by the evidence of a witness or witnesses in whose presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof… More often than not, such direct evidence has not always been readily available. To fill in the lacuna, the Evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (s. 47) and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing (s. 49). The third mode of proof under s. 75 which, unfortunately, is rarely employed these days, is comparison by the court with a writing made in*

the presence of the court or admitted or proved to be the writing or signature of the person...

49(1) When a court has to form an opinion regarding the person by whom, any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact. (2) For the purposes o f subsection (1) a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himselfor under his authority and addressed to that person or when, in the ordinary course o f business, documents purporting to be written by that person have been habitually submitted to him".

The quoted holding of the Court of Appeal tells all.

It is my view therefore that evidence of both DW1 and DW2 proved that respondent resigned in April 2018. Having so found, I hold that the arbitrator erred in law to hold that exhibit D1 collectively were not authored by the respondent and that there was no resignation, rather that, applicant terminated employment of the respondent unfairly.

It was testified by the respondent that the name in exhibit D1 collectively is not his. Mr. Mwamkwala, respondent's personal representative in his submissions tried to impress the court that exhibit D1 collectively were not authored by the respondent. Mr. Mwamkwala based

his submission on the omission of T in the name of the respondent instead of being written as Matto it was written as Mato. It is my view that this is not fatal. The misspelling of the respondent's name can be resolved by applying the Doctrine of finger litigation or misnomer. The said doctrine was applied by the court of Appeal in the case ***Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd,*** Civil Application No. 113 of 2011, CAT (unreported) and ***Joseph Magombi v. Tanzania Natioanl Parks (TANAPA),*** Civil Appeal No. 114. Of 2016, CAT (unreported). In ***Christina Mrimi's case*** (supra)the Court of Appeal endorsed the holding in the case of ***Evans Construction Co. Ltd. versus Charrington & Co. Ltd. and Another (1983) I All E R 310*** where it was held: -

> *"...As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd., and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued...it would be just to correct the name of the respondent ...."*

Applying the said Doctrine of finger litigation or misnomer in ***Christina's case***, (supra) the Court of Appeal held: -

> *"We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers Ltd. to Coca Cola Kwanza Ltd".*

This court applied the said Doctrine of finger litigation or misnomer in the case of ***Liberatus Robert v. Tusiime Holdings (T) Ltd***, Revision Application No. 09 of 2022, HC (unreported) and ***Kunal Jagdish Vaghela v. Salehe Mushehe Kibwana and Another***, Miscellaneous Application No. 95 of 2021,HC(unreported). I therefore apply the same doctrine in the application at hand and hold that the name appearing in exhibit D1 collectively belongs to the respondent.

Having found that respondent resigned on 3rd April 2018, I should address the issue raised by the applicant that the dispute was filed at. CMA out of time. it is undisputed that the dispute was filed at CMA on 18th June 2018 though respondent indicated in the CMA F1 that the dispute arose on 30th May 2018. Since respondent resigned on 3rd April 2018, then, in terms of terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, respondent was supposed to file the dispute within 30 days. More so respondent's claim of salary arrears was supposed to be filed within 60 days. I therefore agree with the submissions by counsel for the applicant that the dispute was time barred. Since the dispute was time barred and not condonation was granted, then,

CMA had no jurisdiction. That being the position, all what was conducted at CMA is a nullity.

For the fore going, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Dated at Dar es Salaam this 25th August 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 25th August 2022 in chambers in the presence of Elipidius Philemon, Advocate for the applicant but in the absence of the respondent.

B. E. K. Mganga
JUDGE