

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 33 OF 2022

(Arising from an Award issued on 30/12/2021 issued by Hon. Igogo M, Arbitrator in Labour dispute No. CMA/DSM/ KIN/R.791/20/387/20 at Kinondoni)

WAMAINGU S. NYANGERO APPLICANT

VERSUS

G4S SOLUTION (T) LIMITED RESPONDENT

JUDGMENT

Date of last Order: 17/08/2022

Date of Judgment: 22/08/2022

B. E. K. Mganga, J.

Applicant was employed by respondent under one-year fixed term contract. The said contract started on 14th November 2019 and was expected to expire on 19th November 2020. It is alleged by the applicant that the said contract was constructively terminated by the respondent on 02nd November 2020. Aggrieved with the alleged termination, on 4th November 2020, applicant filed Labour dispute No. CMA/DSM/KIN/R.791/20/387/20 before the Commission for Mediation and

Arbitration(CMA) at Kinondoni claiming to be paid TZS 70,000/= being outstanding salary for October 2019, TZS 150,000/= being leave accrued for 2019/2020, TZS 95,000/= being salary for the remaining 19 days for November 2019, TZS 40,000,000/= being general damages all amounting to TZS 403,315,000/= and be issued a certificate of service.

On 30th December 2021, Hon. Igogo, M, Arbitrator, issued an award dismissing the dispute that there was no constructive termination, rather, applicant voluntarily resigned. Applicant was dissatisfied by the award dismissing his claims, as a result, he filed this application seeking the court to revise the said award. In the affidavit applicant raised three grounds namely: -

- 1) That the arbitrator erred in law and fact in dismissing the dispute while the respondent caused harassment and illness to the applicant after arresting him illegally and detained at Police for unjustified allegations of theft.*
- 2) That the arbitrator erred in law and fact for not recording properly the evidence adduced by the applicant and*
- 3) The arbitrator erred in law and fact in granting the suspension letter and the investigation made by the respondent while there was no reason or allegation which caused the suspension and the investigation to be carried against the respondent.*

In resisting the application, respondent filed the counter affidavit sworn by Imelda Lutebinga, her principal officer.

When the application was called on for hearing, Mr. Henry Kitambwa, Advocate, appeared and argued for and on behalf of the applicant, while Mr. Mosses Kiondo, Advocate appeared and argued for and on behalf of the respondent.

Submitting in favour of the application, Mr. Kitambwa argued that there was constructive termination due to circumstances prevailing. He argued further it was alleged by the respondent that applicant stole safe box as a result respondent reported at Police. He went on that applicant was arrested and detained at Police and that Police Officers conducted investigation and found that there was no stealing. He argued that applicant was harassed by the respondent at work and that due to that, he resigned.

Mr. Kitambwa leaned counsel for the applicant submitted that DW1 testified that theft of safe box was reported by their customer and not the respondent. He argued that evidence of DW1 was an afterthought and that DW1 is not credible and reliable. Counsel for the applicant submitted that

the report from Police (Exhibit A1) shows that applicant did not participate in the alleged theft and that there was no theft of the said safe box. Counsel cited the case of ***Abdallah Mbukuzi V. TPB Bank PLC***, Revision No. 662 of 2019, HC (unreported) to the effect that applicant was forced to terminate his employment hence there was constructive termination. He argued further that, forced termination is provided under Rule 7 of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He therefore prayed that the application be granted, and applicant be awarded the reliefs he prayed in the CMA F1.

Resisting the application, Mr. Kiondo, Advocate for the respondent submitted that, applicant was employed for one-year fixed term contract of employment expiring on 19th November 2020. He submitted further that in July 2020, it was reported that theft occurred at the place of work of the applicant. That due to that incidence, applicant was suspended with pay (exhibit D2) pending investigation. He submitted that the Police Force cleared the applicant, as a result, suspension was lifted (exhibit D3) and resumed work. Counsel went on that applicant worked for 3 days then he tendered resignation (exhibit D4). He added that after resignation,

applicant was paid his entitlements. Counsel for the respondent submitted further that, there was no forced termination but that, applicant voluntarily resigned. He cited the case of ***Mrisho Omary & Another V. Raheem Nathoo***, Civil Appeal No. 354 of 2019, CAT (unreported) arguing that the factors to be considered to establish that there was constructive termination does not exist in the application at hand. He therefore prayed the application be dismissed.

In rejoinder, Mr. Kitambwa, learned counsel for the applicant submitted that the person who is alleged to be the customer of the respondent was not called as a witness and that even the report from the said customer was not tendered. He maintained that there was harassment which resulted into resignation. When asked by the court as to whether the dispute was properly filed at CMA based on constructive termination, Mr. Kitambwa, submitted that he is leaving it to the court to decide.

I have examined the CMA record and considered submissions by the parties and find that it is undisputed that on 14th November 2019 parties entered a one-year fixed term contract expiring on 19th November 2020. It is alleged that the said contract was constructively terminated by the

respondent on 02nd November 2020 that is to say, 17 days prior to its expiration. It is also undisputed that in the CMA F1, applicant claimed to be paid TZS 70,000/= being outstanding salary for October 2019, TZS 150,000/= being leave accrued for 2019/2020, TZS 95,000/= being salary for the remaining 19 days for November 2019, TZS 40,000,000/= being general damages all amounting to TZS 403,315,000/= and be issued a certificate of service. In the CMA F1, applicant indicated that the dispute was based on discrimination and breach of contract but in his evidence, he testified that it was constructive termination.

I have examined the CMA F1 and find that applicant did not fill Part B of CMA F1 that relates to fairness of termination only. In my view, the CMA F1 was defective making the whole dispute incompetent. I am of that view because, constructive termination or forceful resignation falls under Part E of the Employment and Labour relations Act [Cap. 366. R.E. 2019] that relates to fairness of termination of employment. Section 36 (a)(ii) of Cap. 366 R.E. 2019 (supra) is clear on this point. The said section provides: -

"36 for purpose of this Sub-Part-

(a) "termination of employment" includes

(i)....

(ii) a termination by an employee because the employer made continued employment intolerable for the employee."

In terms of section 37(2)(a) and (c) of Cap. 366 R.E. 2019 (supra), for termination of employment to be fair, an employer must prove there was valid reason for termination and that she followed fair procedures of termination.

In the application at hand, applicant indicated that dispute was based on discrimination and breach of contract. It is my view further that, applicant went out of what he pleaded in the CMA F1 when he adduced evidence relating to constructive termination while he did not plead that the dispute is on fairness of termination. It has been constantly held by the Court of Appeal that parties are bound by their own pleadings. See the case of **George Shambwe v. AG and Another** [1996] TLR 334, [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 [Astepro Investment Co. Ltd v. Jawinga Company Limited](#), Civil Appeal No. 8 of 2015, CAT

(unreported) to mention but a few. 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."

Guided by the above Court of Appeal decisions, I hold that applicant was bound by his pleadings in CMA F1 and further that it was wrong on his part to change in his evidence and adduce evidence relating to fairness of termination namely constructive termination. Since applicant's evidence was on constructive termination and not on discrimination and breach of contract, as there was no evidence adduced to prove that he was discriminated or that there was breach of contract, I hold the dispute was

not proved. That said and done, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam this 22nd August 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 22nd August 2022 in the presence of Wamaingu Nyangero, the applicant and Moses Kiondo, Advocate for the respondent.



B. E. K. Mganga
JUDGE