IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 224 OF 2022

(Arising from an Award issued on 8/6/2022 by Hon. Faraja Johnson, L, Arbitrator, in Labour dispute No. CMA/DSM/KIN/326/21 at Kinondoni)

THE BOARD OF TRUSTEES OF SELASIANS OF
DON BOSCO NETWORK TANZANIA ..... APPLICANT

VERSUS

ROSEMARY NJOKI ..... RESPONDENT

JUDGMENT

Date of last Order: 20/10/2022
Date of Judgment: 31/10/2022

B. E. K. Mganga, J.

Brief facts of this application are that applicant employed the respondent under fixed term contract. The initial five years fixed term contract in which the parties enjoyed their employment relationship expired. Upon expiry of the said five years fixed term contract, on 6th January 2020 applicant employed the respondent as programs Manager for two years fixed term contract expiring on 31st December 2021. It was alleged by the applicant that in August 2021, respondent committed

misconduct of insubordination and did not attend at work for five days, as a result, she was served with a warning letter. On 12th August 2021 respondent wrote a resignation letter on ground that she was being threatened, intimidated, and sexually harassed. Applicant accepted resignation letter of the respondent and that marked the end of their employment relationship.

On 27th August 2021, respondent filed Labour dispute No. CMA/DSM/KIN/326/21 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to be paid USD 76,740 on ground that applicant(employer) made employment intolerable forcing her to resign. On 8th June 2022, Hon. Faraja Johnson L, arbitrator, having heard evidence and submissions of the parties, issued an award in favour of the respondent that the later was forced to resign. The arbitrator ordered applicant to pay the respondent (i) USD 76,740 being salary for the month of August 2021, unpaid leave amounting to 35 days, transport cost back to Nairobi and gratuity for the year 2021, (ii) TZS 100,000,000/= being general damages, and (iii) USD 4,500 being repatriation cost to Kenya all amounting to USD 81,240 and TZS 100,000,000/=.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit of Mundamattam Anthony in support of the Notice of Application, applicant raised 9 grounds namely:-

1. *The Honourable Arbitrator erred in law and facts by determining the nature of the dispute which was not mediated and which was not the ground for filing the dispute at CMA.*
2. *That the Honourable Arbitrator erred in law and facts by deciding that there was constructive termination while the nature of the dispute before the Commission was breach of contract.*
3. *That the Honourable Arbitrator erred in law and facts by deciding the dispute out of the pleadings.*
4. *That the Honourable Arbitrator erred in law and facts by deciding that there was sexual harassment to the respondent while the respondent failed to prove the alleged sexual harassment at work.*
5. *That the Honourable Arbitrator erred in law and facts by deciding that there was constructive termination of the respondent's fixed term contract while respondent voluntarily resigned from her employment.*
6. *That the Honourable Arbitrator erred in law and facts in determining the dispute highly relying on hearsay evidence as adduced by the respondent.*
7. *That the Honourable Arbitrator erred in law and facts by awarding TZS 100,000,000/= as general damages without any legal justification.*
8. *That the Honourable Arbitrator erred in law and facts by awarding some amount of money as compensation and terminal benefits contrary to the law.*
9. *That the Honourable Arbitrator erred in law and facts by failing to analyze the evidence thereby reaching to an erroneous decision.*

Godfrey Bernard Namoto, advocate filed the counter affidavit resisting the application on behalf of the respondent.

When the application was called on for hearing, Messrs Richard Madibi, and Bahati Nyajirali Makamba, Advocates appeared and argued for and on behalf of the applicant while Mr. Godfrey Namoto, Advocate appeared and argued for and on behalf of the respondent.

When I was perusing the CMA record, I found that Rosemary Njoki (PW1), Lucy Kaite Nyarwai (PW2) and Dr. Lucy Mgopa (PW3) testified under oath but Zephania Latta Mushumbusi(PW4) testified not under oath as the record reads:-

> *"UNSWORN"*
>
> *NTS:- Advocates of both sides signed hereunder to proceed with unsworn witness."*

Then, Godfrey B. Namoto, Advocate and Grayson Rweyemamu, Advocate wrote their names and signed. Thereafter examination in chief of PW4 continued. After re-examination of Zephania Latta Mushumbusi(PW4) the employee9herein respondent) closed her case. I noted further that, Casian C. Bilikwija (DW1) testified not under oath. Thereafter the arbitrator recorded evidence of Gideon Rwegerera (DW2), Diana Mwita (**PW3**) and Father Melchades Lukanyanga(**PW4**) for the employer (the herein

applicant) all under oath. I therefore asked the parties also in their submissions to address the court as to the effect of these irregularities.

In arguing the application, Mr. Makamba learned advocate, argued the 1st, 2nd, 3rd, and 5th together. Submitting on these grounds, Mr. Makamba argued that the award is based on constructive termination, but in CMA F1, respondent indicated that the dispute was on breach of contract and endorsed that it was constructive termination. Counsel submitted further that in CMA F6 during mediation, the mediator indicated that the dispute was on breach of contract hence constructive termination was not mediated. Counsel for the applicant submitted further that, in her evidence, respondent (PW1) testified that there was constructive termination due to sexual harassment. Mr. Makamba strongly submitted that arbitrator proceeded to determine the dispute based on constructive termination that was not mediated.

Mr. Makamba submitted further that, the dispute was not properly filed and heard at CMA, because respondent served the applicant with CMA F1 showing that the dispute is on breach of contract because she ticked breach of contract. He added that in the said CMA F1, respondent ticked breach of contract and in front of that breach of contract, she wrote

"constructive termination". He argued that at CMA, constructive termination was not mediated as a nature of dispute between the parties. He submitted further that parties are bound by their own pleadings and cited the case of ***Yara Tanzania Limited V. Ikuwo General Enterprises Ltd***, Civil Appeal No. 309 of 2019, CAT (unreported) to support his argument. Counsel argued that, by ticking breach of contract and thereafter endorse constructive termination, respondent created inconsistency that is not possible to be resolved and referred the court to ***Yara's case*** (supra). He went on that, in her evidence at CMA, respondent (PW1) testified that there was sexual harassment that led her to resign hence constructive termination. Counsel argued further that, respondent did not fill part B of CMA F1 relating to termination of employment hence the trial was a nullity. He concluded that the remedy available is to nullify CMA proceedings.

Arguing the 6th and 9th grounds, Mr. Makamba submitted that arbitrator acted on hearsay evidence of PW2 that there was sexual harassment. He went on that, arbitrator did not determine the issue whether; there was breach of contract by the respondent and whether; respondent willfully resigned. Counsel for the applicant cited the case of

Sheikh Ahmed Said V. Registered Trustees of Manyema Masjid [2005] TLRA 61 to support his submissions that arbitrator was supposed to resolve the issues that were framed by the parties.

Addressing the issues raised by the court, Mr. Makamba submitted that arbitrator have powers to administer oath before a witness testifies as provided for under Rule 19(2)(a) of GN. No. 67 of 2007. He also submitted that Rule 25(1) of GN. No. 67 of 2007 provides that, witness shall testify under oath and concluded that it is mandatory for witness to testify under oath or affirmation. He argued further that, the effect of a witness to testify not under oath or affirmation makes proceedings a nullity and cited the case of ***Attu J. Myna V. CFAO Motors Tanzania Ltd,*** Civil Appeal No. 269 of 2021 to support his submissions. Counsel submitted further that, it was not proper for the advocates of both side to sign as consent for Zephania Lutta Mshumbusi (PW4) to testify not under oath. He added that, consent of the parties cannot stop operation of the law and that, it is not stated on the record as to why, advocates signed to proceed with PW4 without taking oath. He concluded that the said consent is void ab initio because it was contrary to the law.

On naming of witness, that is to say; two PW3 and two PW4 with different names, he submitted that, in the award, the arbitrator referred to DW4 but in the proceedings there is no DW4. He went on that, at page 22 of the award, the arbitrator referred to Father Melchades Lukanyanga as DW4. Again, in the award, Arbitrator referred to DW3 while in the proceedings there was no DW3. Counsel for the applicant submitted that, if it was just a slip of the pen, at the time of composing the award, the arbitrator was supposed to correct the error by cancelling either PW3 and PW4 appearing in the evidence of the applicant and renaming them properly. He added that it was important for the arbitrator to summon the parties and notify them that error and make correction in their presence. Counsel submitted further that, the irregularity has affected the parties as it is unknown which evidence the arbitrator was referring to at the time of analyzing evidence of the parties.

On his part, Mr. Madibi, learned counsel for the applicant, submitting on the 8th ground, argued that respondent was awarded terminal benefit including salary for August 2021, unpaid leave, transport cost to Nairobi and gratuity while there was no evidence warranting respondent to be awarded. Counsel submitted that, respondent had a fixed term contract

expiring on 31st December 2021 and that in CMA F1, respondent alleged that dispute arose on 16th August 2021. Mr. Madidi submitted further that, respondent's salary was TZS 5,600,000/= per month.

Submitting on the 7th ground, Mr. Madibi argued that respondent was awarded general damages of TZS 100,000,000/= without legal justification. He went on that, in CMA F1, respondent did not pray for general damages and that there is nothing on the record showing what led the arbitrator to award this amount.

In cementing on what was submitted by Mr. Makamba on the 1st, 2nd, 3rd and 5th grounds, Mr. Madibi argued that, by showing that the dispute was on breach of contract and then endorse on CMA F1 by a pen that it was on "constructive termination", respondent created two course of action that cannot be decided together. He therefore submitted that, CMA F1 was defective hence incompetent. Counsel went on that, constructive termination is part of termination and that respondent was supposed to tick on termination of employment. He maintained that the matter proceeded without being mediated and prayed the court to nullify CMA proceedings. He cited the case of ***Ngorongoro Conservation Area Authority V. Amiyo Tila Amiyo & Another***, Revision No. 18 of 2019 HC,

(unreported) to support his submission. He concluded his submissions by praying that CMA F1 be struck out, proceedings be nullified, and the award be quashed and set aside.

Mr. Namoto, learned counsel for the respondent, in his submissions relating to the 1st, 2nd, 3rd and 5th grounds, conceded that constructive termination was not mediated and that the matter was not properly filed and heard at CMA. Initially, counsel submitted that, CMA F1, proceedings and award shows that the dispute was on breach of contract. During submissions counsel also conceded that in her evidence, respondent (PW1) testified that there was sexual harassment that led to her resignation and that there was constructive termination. He conceded further that, in her evidence, PW1 did not state the term of contract that was breached. Counsel conceded further that at CMA, respondent filled /ticked on breach of contract and endorsed "constructive termination" hence there was two claims in a single dispute and that CMA F1 was defective. He therefore prayed that CMA proceedings be nullified and order trial *de novo*.

Responding to submissions made on the 6th and 9th grounds, Mr. Namoto learned counsel for the respondent submitted that, evidence of PW2 is not hearsay because some of the incidences were committed in her

presence. On whether, there was breach of contract and whether; respondent was forcefully terminated, counsel submitted that all issues that were raised were determined. In his submissions, he conceded that in the award, it is not indicated that breach of contract as an issue was determined. Arguing the 8th ground, Mr. Namoto submitted that respondent specifically proved by evidence what she was claiming.

Arguing the 7th ground relating to general damages, Mr. Namoto submitted that general damages is a discretion of the Court and cited the case of ***Tanzania Saruji Corporation V. African Mobile Co. Ltd*** [2004] TLR 155 and ***Cooper Motors Corporation V. Moshi/Arusha Occupational Health Service*** [1990] TLR 96 and that the two case laws provide guidance on how it can be granted even if it was not claimed by the party. He therefore, maintained that general damages were properly awarded.

Responding to the issues raised by the court, Counsel for the respondent submitted that evidence of Zephania Mshumbusi(PW4) and Casian Bilikwija (DW1) was recorded in violation of the law. Counsel for the respondent distinguished ***Attu's case*** submitting that the said case cannot apply in the application at hand because evidence of PW1, PW2, PW3,

DW2, DW3 and DW4 was recorded under oath while in **Attu's case** all witnesses testified not under oath. Counsel argued that, since other witnesses testified under oath, that evidence should be considered.

In his submissions, counsel for the respondent conceded that PW3 and PW4 were recorded twice with different names. He therefore submitted that, that created confusion because witnesses were not properly recorded. He was however quick to submit that, the irregularity is not fatal to the extent of nullifying proceeding because that was a human error in recording two witnesses of the applicant. He added that, in the award, those names were mentioned as DW3 and DW4 and that the names tally with those mentioned as PW3 and PW4. He therefore invited the court to correct that error.

In rejoinder, Mr. Madibi submitted that it is true that general damages are a discretion of the court and added that discretions must be used judiciously.

Having examined the CMA record and considered submissions of the parties, in disposing this application, I will first consider grounds touching the nature of the dispute that was filed at CMA and heard by the arbitrator.

I have examined CMA F1 and find that respondent ticked the box relating to breach of contract and inserted words after the box "constructive termination". In her evidence, respondent(PW1)did not give evidence relating to breach of contract, rather, on circumstances that led to her resignation hence constructive termination. Mr. Makamba learned counsel for the applicant submitted correctly, in my view, that the dispute that was mediated is breach of contract and not constructive termination. I have examined the Certificate of Non settlement (CMA F6) and find that on 9th September 2021 M. Chengula, Mediator, marked that settlement failed. In the said CMA F6, it was indicated that the nature of dispute was breach of contract. But, in the award, the arbitrator found that there was constructive termination hence unfair termination of employment of the respondent. Rule 3(1)(b) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides that termination of employment includes circumstances which the employer makes continued employment intolerable for the employee. Again, section 36(a)(ii) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] defines termination to include termination by an employee because an employer made continued employment intolerable for the employee. In other words,

termination of employment under the said section and Rule, includes constructive termination. Section 36 of Cap. 366 R.E. 2019 (supra) falls under sub-part E of the said Act that relates to unfair termination of employment. Therefore, breach of contract cannot be said to be the same thing as constructive termination. Again, CMA F1 shows clearly that an employee who claims that he/she was unfairly terminated, in addition, must fill part B of the said CMA F1. I have examined CMA F1 that was signed by the respondent on 27th August 202 and find that she did not fill Part B that is mandatory for disputes relating to termination of employment. As submitted by counsels for the applicant, no dispute relating to constructive termination was mediated by the Mediator. The only dispute that was mediated was breach of contract and not constructive termination. It is my view that all along, parties were with impression that the dispute relates only to breach of contract. Since respondent filed the dispute relating to breach of contract and did not fill part B that is mandatory for disputes relating to termination, it was not open to her to change in her evidence and testify that the employer made employment intolerable that led her to resign hence constructive termination. It is a cardinal principle that parties are bound by their own

pleadings and are not allowed to depart therefrom as it was held in 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), ***Yara Tanzania Limited V. Ikuwo General Enterprises Ltd***, Civil Appeal No. 309 of 2019,CAT, ***NBC Limited & Another vs Bruno Vitus Swalo***, Civil Appeal No. 331 of 2019 [2021] TZCA 122, ***Barclays Bank (T) Ltd vs. Jacob Muro,*** Civil Appeal No. 357 of 2019 (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.

In ***Yara Tanzania Limited case*** (supra) the Court of Appeal quoted its earlier decision in ***Barclays Bank (T) Ltd vs. Jacob Muro,*** Civil Appeal No. 357 of 2019 (unreported), that:-

> *"We feel compelled, at this point, to restate the time-honored principle o flaw that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at the variance with the pleaded facts must be ignored- See* ***James Funke Ngwagilo v.Attorney General*** *[2004]T.L.R. 161.See also* ***Lawrence Surumbu Tara v.Hon.Attorney General and 2 Others,*** *Civil Appeal No.56 of 2012; and* ***Charles Richard Kombe t/a Building v.Evarani Mtungi and 3 Others****, Civil AppealNo. 38 of 2012 (both unreported)".*

In the application at hand, parties were bound by what was pleaded to, by the respondent in the CMA F1. As pointed hereinabove, respondent filed the dispute relating to breach of contract but departed from her pleadings and gave evidence relating to constructive termination. In awarding the respondent, arbitrator relied on evidence relating to constructive termination that was improperly pleaded because respondent did not fill part B of CMA F1 that is mandatory for disputes relating to termination. Since respondent departed from her pleadings relating to breach of contract, all evidence relating to constructive termination should

be ignored or disregarded. Once that evidence is disregarded, then, nothing remains on record justifying respondent to be awarded.

It was submitted by counsel for the applicant that CMA F1 was defective because respondent filled two different disputes that cannot be tried together. Counsels for the applicant prayed that CMA proceedings be nullified and the award arising therefrom be quashed and set aside. On his part, counsel for the respondent, correctly, in my view, conceded that CMA F1 was defective, hence the dispute was incompetent. It was submission by counsel for the respondent that CMA proceedings be nullified and that the court should order trial *de novo*. I agree with submissions by both sides that there was no dispute relating to constructive termination that was properly filed and determined by the arbitrator and that CMA proceedings should be nullified. I find the prayer for trial *de novo* raised by counsel for the respondent to be without substance because there was no dispute relating to constructive termination that was filed at CMA and the mistake was not by either the arbitrator or the applicant. In my view, trial *de novo* cannot be granted to the applicant to initiate a dispute which she did not. By failure to fill part B of CMA F1 means that there was no dispute relating

to constructive termination that was filed at CMA. Since no dispute relating to termination was filed by the respondent, ordering trial *de novo* will be circumvention of the law because respondent was supposed to file the dispute within 30 days. Therefore, in ordering trial *de novo* the court will be granting condonation which respondent has not applied for at CMA. I therefore reject that prayer.

It was correctly submitted by counsels for the parties that both PW4 and DW1 testified not under oath and that, that violated the law. It is true that Arbitrators have powers in terms of section 20(1)(c) of the Labour Institutions Act [Cap. 300 R.E. 2019] and Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, to administer oath or affirmation to a person called as a witness. It is a mandatory requirement under the provisions of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E 2019] and Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 that before a witness testifies, must take oath or affirmation. There is a litany of case laws to the position that failure of a witness to take oath or affirmation before testifying vitiates the whole proceedings.

See the case of **Gabriel Boniface Nkakatisi vs. The Board of Trustees of the National ui Social Security Fund (NSSF)** Civil Appeal No. 237 of 2021**, National Microfinance Bank PLC vs. Alice Mwamsojo, Civil Appeal No. 235 of 2021**, **Attu J. Myna v. CFAO Motors Tanzania Limited,** Civil Appeal No. 269 of 2021, **Unilever Tea Tanzania Limited v. Godfrey Oyema**, Civil Appeal No. 416 of 2020, **The Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020, **North Mara Gold mine Limited v. Khalid Abdallah Salum,** Civil Appeal No. 463 of 2020, **Unilever Tea Tanzania Limited v. David John,** Civil Appeal No. 413 of 2020, and **Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited and another,** Consolidated Civil Appeal No. 117/16 of 2018 and 199 of 2019.

It was submitted by counsels for the respondent while responding to the issue raised by the court in relation to naming witnesses namely PW3 and PW4 both for the applicant and respondent that it was a mere slip of pen because the arbitrator referred to witnesses of the applicant as PW3 and PW4 instead of DW3 and DW4 and prayed the court to make corrections. I will not dwell in this issue, rather, I will remind arbitrators to

be careful when taking evidence and recording names of the witness, because, at some time, that may be a ground for retrial if the names cannot be reconciled.

The grounds I have dealt with hereinabove, has disposed of the whole application. That being the position, I will not discuss the remaining grounds.

For all what I have explained hereinabove, I hereby nullify CMA proceedings, quash, and set the CMA award.

Dated in Dar es Salaam on this 31st October 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 31st October 2022 in chambers in the presence of Bahati Nyajirali Makamba, Advocate for the applicant but in the absence of the respondent.

B. E. K. Mganga
JUDGE