IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 372 OF 2022

(Arising from an Award issued on 20/12/2021 by Hon. William, R, Arbitrator in Labour dispute No. CMA/DSM/KIN/58/21/2/21 at Kinondoni)

NDOVU RESOURCES LIMITED ..... APPLICANT

VERSUS

THIERRY MURCIA ..... RESPONDENT

JUDGMENT

Date of last Order: 01/12/2022
Date of Judgment: 06/02/2023

B. E. K. Mganga, J.

On 08th May 2008 applicant employed the respondent as Country representative for one-year fixed term contract renewable. The said contract of employment was renewed several times. In April 2021, applicant terminated employment of the respondent. Aggrieved with termination of his employment, on 30th April 2021, respondent filed Labour dispute No. CMA/DSM/KIN/58/21/2/21 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni. In the Referral Form (CMA F1), respondent indicated that he was claiming to be paid (i)

USD 1,798,399.68 being eight (8) years' salary compensation; (ii) USD 19,532.80 being accrued leave pay; (iii) USD 43,711.10 being severance pay; (iv) USD 14,036.52 being repatriation costs back to Australia; (v) USD 179,839.97 being 10% of the employer's part of Social Security contributions of eight (8) years salaries; (vi) USD 250,000 being damages; (vii) USD 22,324 being outstanding salary from March to April; and accrued substance allowance at daily rate of USD 624.45 from the date of termination to the date of repatriation. In the said CMA F1, respondent indicated further that, the dispute arose on **12th April 2021 and 26th April 2021** as he was served with six months' termination Notice for termination to yield on 26th April 2021 but he was summarily dismissed on 12th April 2021. On procedural fairness, respondent indicated that procedures were not followed in the first decision to terminate his employment through a notice and in the second termination, procedures were not adhered to, because he could not attend hearing due to lack of work permit. On fairness of reason, respondent indicated that in first termination, there was no reason adduced and if any, i.e., operational requirements, then, retrenchment procedures were not followed, and that, the second termination is nonexistence since the employer had already

terminated him. He indicated further that; reasons adduced for second termination are disputed because they are not true.

Having heard evidence and submissions of both sides, on 20th December 2021, Hon. William R, Arbitrator, issued an award in favour of the respondent that there was no valid reason for termination of employment and that procedures thereof were flawed. The afore conclusion of the arbitrator was based on six months' notice of termination issued by the applicant on 26th October 2020. In the same award, the arbitrator though discussed termination based on misconduct allegedly committed by the respondent, found that there was no employment capable of being terminated on 12th April 2021 based on the alleged misconducts after issuance of notice of termination on 26th October 2020. With those findings, arbitrator awarded respondent to be paid (i) USD 219,999.96 being 12 months' salary compensation for unfair termination; (ii)USD 19,532.80 being unpaid leave; (iii)USD 45,833.32 being severance pay; (iv) USD 22,324.00 being outstanding salaries for March to April 2021; (v) USD 14,036.52 being repatriation costs to Australia; (vi)USD 604.45 being subsistence allowance from 12th April 2021 to the date of repatriation; and (vii) USD 50,000 as general damages all amounting to USD 369,604.38.

Aggrieved with the said award, applicant filed this application seeking the court to revise the award. In the affidavit of Peter Balangwesa, the accountant of the applicant, in support of the application, raised seven grounds namely:-

1. *That the Honourable Arbitrator erred in law and facts by focusing on an unmatured procedure as valid termination as opposed to the actual termination that occurred on 12th April 2021.*
2. *That the Honourable Arbitrator erred in law and facts by not considering the fact that the Respondent's claims were inconsistent, being that he claims unfair termination for two different termination dates 12th and 26th April 2021 though termination occurred only on one date but the Arbitrator considered termination based on two different dates making the decision erroneous.*
3. *That the Honourable Arbitrator erred in law and facts by omitting from her award the fact that the respondent admitted during trial of his negligence by not keeping track of and effectively verifying the purchase orders and invoices he was authorizing, even though he was entrusted to do so.*
4. *That the Honourable Arbitrator erred in law and facts by not considering the fact that the respondent fabricated fats to add up to his claims of 'suffering'. It was established during trial that the respondent himself left his premises paid for by the Applicant without being told to do so but later claiming he was evicted and had nowhere to go.*
5. *That the Honourable Arbitrator erred in law and facts by awarding significant damages to the respondent that admitted having contributed to his own termination and exit from the company-paid for premises.*
6. *That the Honourable Arbitrator erred in law and facts by not considering the company properties that the respondent has taken from the Applicant and the USD 180,000 owed to the applicant from the respondent's misconduct and admitted negligence.*

7. That the decision by Honourable Arbitrator is ambiguous and bad in law.

In opposing the application, Anthony Mseke, Advocate, filed his counter affidavit, allegedly, that he was mandated by the respondent.

When the application was called on for hearing, Ms. Linda Mwambete, Advocate and Ms. Neema Richard, Advocate appeared and argued for and on behalf of the applicant, while Mr. Arbogast Anthony Mseke, Advocate, appeared and argued for and on behalf of the respondent.

Ms. Mwambete learned counsel for the applicant argued the application generally submitting that, in the award, the arbitrator focused on double termination namely, termination that was made on 26th April 2021 and on 12th April 2021 and held that termination occurred on 26th April 2021. Ms. Mwambete submitted further that; applicant gave notice to the respondent that was supposed to terminate employment on 26th April 2021 but thereafter, she discovered that auditors established that respondent committed frauds. She went on that, applicant conducted investigation and all procedures were complied with, as a result, applicant terminated employment of the respondent on 12th April 2021. Ms. Mwambete concluded that there was only one termination. Ms. Mwambete submitted further that; arbitrator wrongly considered that applicant issued

two separate terminations. She argued that, based on that assumption, arbitrator erred to hold that termination was unfair both substantively and procedurally without considering that applicant had valid reasons for termination namely, gross misconduct and gross negligence.

Ms. Mwambete submitted further that, during hearing, respondent did not deny those allegations. She went on that, in his response to the notice to show cause, respondent was evasive. Ms. Mwambete submitted further that, respondent authorized payment of USD 120,000 to TSN Ltd, the latter being a supplier who was not familiar to the applicant purportedly, that the said supplier supplied fuel but no fuel was supplied. She went on that, Peter Balangwesa(DW1) testified that TSN personnel did not recognize the invoice relating to that payment. She added that, respondent was aware that TSN was not the supplier of the applicant, yet, he authorized payment and directed Karos Nyangwesa, his subordinate, who unfortunately passed away before giving evidence, to effect payment. She went on that, after death of Karos Nyangwesa, respondent shifted blame to the said Karos Nyangwesa. She concluded that, in shifting blame to Karos, respondent was admitting that he failed to supervise his subordinates and that he was negligent.

In addition to that, Ms. Mwambete submitted that, respondent committed fraud by verifying purchase orders for materials valued at USD 60,000 from SPERON LTD, a Company that has never been a supplier of the applicant. She submitted further that, purchase orders relating to SPERON LTD were signed by the respondent at the time applicant was not operational hence there could have been no supply. She added that, respondent did not provide evidence of the whereabouts of materials purported to have been purchased from SPERON LTD. She went on that; respondent withdraw cash money from bank account of the applicant allegedly for paying the said supplier in violation of procedures of the applicant that does not allow cash withdrawal. Ms. Mwambete went on that, in his evidence under cross examination, respondent admitted having not kept tracks of invoices and purchasing orders contrary to the trust applicant placed on him expecting him to authenticate and keep track of monetary transactions. She submitted further that, respondent was fraudulent because he fabricated invoices and purchase orders and withdrew applicant's money for what is believed to be for personal gain. She concluded that, respondent was found guilty of gross negligence relating to TSN transaction and for gross misconduct relating to Speron Ltd transaction and referred the court to the outcome of the disciplinary

hearing(exhibit D4) hence valid reason for termination. Counsel for the applicant cited the provisions of Rule 9(4) of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007 to support her argument that misconduct is a fair ground for termination. She further cited Rule 12(4)(a) and (d) of GN. No. 42 of 2007(supra) to support her submissions that gross dishonest and gross negligence are grounds for termination and concluded that applicant had valid reason to terminate employment of the respondent.

On fairness of procedure, Ms. Mwambete submitted that DW1 testified that proper procedures were followed. She went on that, in his evidence while under cross examination, respondent admitted having participated in investigation though while testifying in chief, he stated that no investigation was conducted. Counsel for the applicant submitted that respondent gave contradictory evidence. Ms. Mwambete submitted further that, respondent was notified to attend the disciplinary hearing as per exhibit D3 and emails that was tendered as exhibit A3 by the respondent. She went on that, applicant invited respondent to attend the disciplinary hearing through video conference but he did not appear in two separate occasions, as a result, in terms of Rule 13(6) of GN. No. 42 of 2007 (supra), hearing proceeded exparte as per exhibit D3. She submitted

further that, through the aforementioned emails (exhibit A3) that were authored by Mr. Anthony Mseke, Advocate, respondent refused to attend the disciplinary hearing alleging that he had no valid work permit because it expired on 29th December 2020. Ms. Mwambete submitted that invitation to attend disciplinary hearing was sent to the respondent on 25th March 2021 but respondent was terminated on 12th April 2021 as per termination letter exhibit D5. As to who was responsible to make follow up of working permit, Ms. Mwambete, submitted that it was the respondent himself.

Ms. Mwambete submitted further that; respondent was afforded right to appeal but he did not. She added that, on 3rd May 2021, respondent was paid all terminal benefits including his last salary as per exhibit D6 and was required to handover applicant's proper that were in his possession but he did not respond. Counsel for the applicant submitted that, in his evidence, respondent admitted having received the said letter and that he did not respond because he was so advised by his Advocate, namely, Mr. Anthony Mseke.

On relief awarded to the respondent, Ms. Mwambete, advocate submitted that respondent is not entitled to severance pay because termination is based on misconduct. She cited the provisions of Section 42(3)(a) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019]

to support her submissions. She submitted further that, respondent was also awarded to be paid 12 months' salary as compensation and damages while there was no reason for that award. It was submissions by Ms. Mwambete counsel for the applicant that, applicant was paying rent for residence of the respondent up to June 2021 but respondent decided to leave that residence. She wound up her submissions praying that the application be allowed.

Responding to submissions made on behalf of the applicant, Mr. Mseke, learned counsel for the respondent, submitted that, on 12th May 2008 applicant employed respondent for unspecified period. He submitted further that, on 26th October 2020 applicant served respondent with 6 months' notice of termination expected to end on 26th April 2021 (exhibit D2) on ground that there was no business hence respondent's position was no longer required. He went on that, while serving the notice, respondent's work permit expired on 29th January 2021, as a result, applicant applied for extension of work permit (Exhibit A1). Meanwhile, on 18th March 2021, respondent was served with a special permit to remain in the country (exhibit A2) that did not allow him to work, as a result, he (respondent) continued to remain at home while being paid salary.

Mr. Mseke submitted that; arbitrator properly analyzed the situation because termination of employment of the respondent was at the time respondent was served with the notice of termination date 26th October 2020 (exhibit D2). He submitted that, the dispute was filed at CMA on 30th April 2021 and maintained that respondent was terminated on 26th April 2021 and not on 12th April 2021 based on the notice of termination. Counsel for the respondent submitted further that, the contract between the parties provided that termination will be on 6 months' notice. He went on that, there was no consultation because respondent was just served with a notice that he will be retrenched. Counsel for the respondent supported the findings of the arbitrator that the 2nd charging of the respondent for misconducts was an afterthought because the alleged misconducts occurred in 2017 and 2018. He submitted further that; the arbitrator considered the period of charging the respondent for misconducts that occurred after three years. During submissions, counsel for the respondent conceded that there is no provision providing time frame within which an employee should be charged. He was quick to cite Guideline 9(2) of schedule to GN. No. 42 of 2007(supra) and submit that it provides that an employee should be timely charged.

On fairness of procedure, Counsel for the respondent submitted that the disciplinary hearing was conducted in the absence of the respondent but no evidence was adduced against the respondent; no witness was called; and that exhibit D4 shows that there was no sufficient evidence to prove allegations relating to Speron invoice. Mr. Mseke submitted further that, neither invoice, investigation report nor audit report were tendered by the applicant at CMA. He submitted further that; invoices were rejected because they were filed at CMA after hearing had commenced. Counsel for the respondent submitted further that, Respondent was served with the charge without annextures of the invoice contrary to Rule 13(3) and (5) of GN. No. 42 of 2007(supra) and that there was no investigation report. In his submissions, counsel for the respondent conceded that he was not sure whether respondent replied to the show cause letter demanding to be supplied with documents that could have helped him to defend himself against the allegations or not.

It was submissions of Mr. Mseke that, before expiry of 6 months' notice, applicant charged respondent for alleged misconducts and required him to appear before the disciplinary hearing on 31st March 2021. He went on that; respondent did not attend because he had no work permit hence unable to conduct employer's business. When probed by the court as

whether respondent was invited to conduct applicant's business or attend the disciplinary hearing, Mr. Mseke readily conceded that he was not invited to conduct employer's business but to attend the disciplinary hearing and that the said disciplinary hearing was expected to be done via video conference.

On reliefs awarded to the respondent, Mr. Mseke submitted that they were fairly awarded to the respondent including repatriation to Australia.

Ms. Richard learned counsel for the applicant made a rejoinder submission submitting that there was only one termination. She submitted further that, the notice to show cause (exhibit D3) had all attachments and refuted the claim that respondent was not served with documents containing or proving the alleged misconducts. She went on that; the Notice of termination is not termination because respondent continued to receive salary and that, submission by counsel for the respondent that termination of the respondent was by notice, is misleading to avoid his refusal to attend the disciplinary hearing because reason for termination was misconduct.

During hearing, I asked the parties to address the court as to the value of a document or object admitted for identification purposes. I did so because, CMA proceedings shows that when respondent(PW1) was

testifying, he prayed to tender a document marked as **AM25** in the list of documents he filed to form part of his evidence relating to his monthly salary namely, USD 18,333.33. The record shows that counsel for the Applicant raised objection for admission of the said **AM25** as exhibit as a result, it was not received as exhibit, instead, it was admitted for identification purposes and the arbitrator marked it as **ID1**. Having received it as ID1, arbitrator promised to consider it at the time of composing the award. In reading the award, I noted that the base of arbitrator to make calculations of the amount respondent was entitled the salary and figures indicated in ID1. With those observations, I asked both counsel to address the court as pointed out hereinabove, the value of a document or object admitted for identification purpose and whether it was proper for the arbitrator to base her calculation of the amount awardable to the respondent to ID1.

Responding to the issue raised by the court, Ms. Richard, counsel for the applicant submitted that it is not proper for the court to receive a document for identification and promise to use it at a later stage as evidence and that the document so received, cannot form part of evidence unless a witness is called to tender it as exhibit. To support her submissions, Ms. Richard cited the case of ***Nitak Limited v. Onesmo***

Claud Njauka, Civil Appeal No. 239 of 2018,HC(unreported). Counsel for the applicant submitted further that the arbitrator was supposed to use the figure appearing on the contract of employment (exh. D7). She further cited the case of ***Ngorika Bus Transport Co. Ltd & Another vs. Ismail Abdulrahaman Divekar,*** Civil Appeal No. 15 of 2019, HC(unreported) and prayed that the amount awarded to the respondent based on ID1 be quashed.

On his part, Mr. Elipidius Philemon, counsel for the respondent submitted that it was wrong for the arbitrator to use ID1 that was admitted for identification to decide the merit of the case. He was however quick to submit that in his evidence, respondent (PW1) testified that his monthly salary was USD 18,333.33 and that the said amount was not disputed because respondent was never cross examined on that aspect. When probed the court as to the effect of respondent adopting the contract of employment (exh. D7) to be part of his evidence, he submitted that the in adopting the said exhibit, respondent admitted salary mentioned therein. He concluded that the proper amount of salary was the one mentioned in exhibit D7.

Before I decide on the merit or otherwise of the application, I should point as indicated hereinabove that in opposing the application, Mr.

Anthony Mseke, learned advocate filed his counter affidavit allegedly that he was given a power of attorney by Thierry Murcia, the respondent. Together with his counter affidavit, Mr. **Anthony Mseke** filed a purported power of Attorney issued by Thierry Murcia, the respondent to **Anthony Arbogast** on 15th June 2021 in the presence of Makubi Kunju Makubi, Advocate, Notary Public and Commissioner for Oaths. I have carefully examined the said power of Attorney and find that the donee was **Anthon Arbogast** and not **Anthony Mseke** who sworn and filed the counter affidavit to oppose this application. It is my view that the deponent of the counter affidavit was supposed to indicate the name as appearing in the power of attorney. Notwithstanding, I will decide the merit or otherwise of the application at hand because (i) this being a revision application, my decision will be based on evidence the parties adduced at CMA and (ii) in the application at hand, the court was moved by the applicant and not the respondent.

The issues that need to be answered in this application are (i) whether applicant had valid reason in terminating employment of the respondent; (ii) whether procedures were complied with and (iii) to what relief(s) are the parties entitled to.

In disposing the issue relating to validity of reasons for termination, I will start with the complaint relating to the date of termination of employment of the respondent that covers both the 1st and 2nd grounds of revision. Counsel for the applicant criticized the arbitrator that she relied on the so-called double termination that was made on 26th April 2021 and on 12th April 2021 and held that termination occurred on 26th April 2021. It was submitted by counsel for the applicant that termination of employment of the respondent occurred on 12th April 2021 and not on 26th April 2021. To the contrary, counsel for the respondent submitted termination of employment of the respondent was at the time respondent was served with the notice of termination date 26th October 2020 (exhibit D2) and not 12th April 2021. It was further submitted by counsel for the second charging of the respondent for misconducts was an afterthought because the alleged misconducts occurred in 2017 and 2018 and that the arbitrator considered the period of charging the respondent for misconducts that occurred after three years.

It is my view that, it is my view that respondent wrote two different dates of termination to spread wide the net knowingly that if he fails in one he will succeed in the other. In fact, he completed his mission because the arbitrator was caught in that cobweb trap as explained hereinbelow. I

should point that, CMA F1 being pleadings, was supposed not to be filled as respondent did by showing two different dates of termination. This explains why the parties were in dispute as to when termination occurred. In other words, CMA F1 was defective making the whole dispute incompetent liable to be struck out.

Now, assuming that CMA F1 was not defective and that the dispute was competently filed and heard, and if the court agrees with submission by counsel for the respondent that termination of employment of the respondent was on 26th October 2020, then, in terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, the dispute was time barred because it was filed at CMA on 30th April 2021 while out of the 30 days provided for under the said Rule. I have read evidence on record and find that the said notice did not mark the end of employment of the respondent because it is undisputed that after being served with the said notice, respondent continued to work and was receiving salary until when he was served with a notice to show cause and finally terminated based on gross misconducts and gross negligence. It is my considered view that at the time of serving the respondent with disciplinary charges, applicant had not made a final decision of terminating respondent's employment. It was an error on the part of the arbitrator to

hold that termination of employment of the respondent was by the notice dated 26th October 2020 and that there was no employment to be terminated on 12th April 2021. It is my view that, if there was no employment of the respondent to be terminated on 12th April 2021 because the same was already terminated by notice (exhibit D2) dated 26th October 2020, then, the said employment could also not be terminated on 26th April 2021. Therefore, in filing the dispute at CMA on 30th April 2021, respondent was out of time. In my view, reasoning of both the arbitrator and the learned counsel for the respondent that employment of the respondent was terminated by notice (exhibit D2) cannot be correct. It is my further view that the notice of termination of employment (exhibit D2) that was operative for six months' did not make a final decision. It was just an intention, of which, applicant was not prohibited to rescind.

In holding that respondent was unfairly terminated, the arbitrator remarked that:-

> "*…**upon issuance of the six months' notice of termination, there was no employment capable of being terminated and that the action taken by the respondent can be equated with throwing a nuclear bombshell into a mortuary room hence the subsequent disciplinary proceedings was redundant"*.

Before this court, it was submitted by counsel for the respondent that charging of the respondent for misconducts was an afterthought because the alleged misconducts occurred in 2017 and 2018 and that the arbitrator considered the period of charging the respondent for misconducts that occurred after three years.

In my view, in the afore quoted statement, the arbitrator did not consider the truth that, throwing a nuclear bombshell into a mortuary room, can still be disastrous, because it can cause bodies of the decease persons unidentifiable. More so, the said bombshell can kill mortuary attendants because not at all times, the mortuary room is occupied by dead bodies only. Sometimes, apart from the mortuary attendants, doctors and relatives of the missing persons or deceased persons do visit the said room for various reasons. Destruction of the mortuary room itself, may cause a great loss. Therefore, in my view, throwing a bomb in the mortuary room, may have negative effect contrary to what the arbitrator thinks. It is my view that, the mere fact that the misconduct occurred in 2017 and 2018 and respondent was charged in 2021, does not disapprove that a misconduct was not committed. The argument by counsel for the respondent that respondent was charged for misconduct in 2021 as an afterthought bears no evidence because there is no proof that applicant

was aware in 2017 or 2018 that respondent committed the alleged misconduct and took no action. It was correctly conceded by counsel for the respondent that there is no provision providing time frame within which an employee should be charged though he was quick to cite Guideline 9(2) of schedule to GN. No. 42 of 2007(supra) which provides that an employee should be timely charged. The requirement of timely charging an employee provided for under Guideline 9(2) of GN. 42 of 2007 (supra) in my view, is subjective as it depends as to when the employer became aware that an employee committed a misconduct. It was the wisdom of the drafter of the said law not to put time limit within which an employee should be charged, otherwise, employees would have also used that chance to commit misconducts including but not limited to theft, dishonest or breach of trust in a trickery way ensuring that they will not be discovered within the period provided for under the law to keep their employment safe. That said, I am also alive that, due to absence of time limit, some employers may use that chance just to terminate employees under the guise that an employee committed a misconduct long time ago. It is my view further that, the period within which an employee can be charged with a misconduct will depend on circumstance of each case and the court may assess evidence carefully and reach a fair conclusion. In the application at hand, it was

testified by Peter Barangwesa (DW1) under cross examination that the misconduct was discovered in February 2021 after applicant has received audit report. In my view, that cannot be said was an afterthought because applicant was unaware of the alleged misconduct prior to February 2021. In fact, evidence that applicant became aware of the alleged misconduct in February 2021 was not challenged by evidence of the respondent. I therefore hold that the arbitrator misdirected herself in holding that charging the respondent and conducting disciplinary hearing for the alleged misconduct was redundant.

As pointed out, in the CMA F1, respondent indicated that the dispute arose on 12th April 2021 and 26th April 2021. On reason for termination, he indicated that it was due to "**misconduct**" and "**unknown**". On fairness of reason, he indicated that:-

> *"IN FIRST TERMINATION THERE WAS NO REASONS ADDUCED AND IF ANY, I.E., OPERATIONAL REQUIREMENTS, THEN RETRENCHMENT PROCEDURES WERE NOT FOLLOWED. THE SECOND TERMINATION IS NOT EXISTENCE SINCE THE EMPLOYER HAD ALREADY TERMINATED ME. HOWEVER REASONS ADDUCED FOR THE SECOND TERMINATION ARE DISPUTED SINCE THEY ARE NOT TRUE."*

From the foregoing, it is clear in my mind that CMA F1 was defective. In my view, employment of the employee can only be terminated once and not twice. Respondent by indicating in the CMA F1 that termination of his

employment occurred on 12th April 2021 and on 26th April 2021, made the CMA F1 defective. More so by indicating that termination was due to misconduct and for unknown complicated the matter as he left the matter to CMA to choose the real date of termination between 12th April 2021 and 26th April 2021 and reason for termination namely misconduct and unknown. That in my view was not correct. It is unfortunate that the Arbitrator was caught by that trick which is why she made findings that termination of employment of the respondent was by notice that was issued on 26th October 2020 and that upon issuance of the six months' notice of termination, there was no employment capable of being terminated and that the action taken by the applicant was like throwing a nuclear bombshell into a mortuary room.

I have read the award and find that the arbitrator did not cite any law prohibiting the employer to terminate an employee for other grounds after serving an employee with a notice of termination according to the contract of employment, if within the period of notice to terminate employment, an employee commits a misconduct that warrants termination. That provision does not exist. The argument that once a notice of termination of employment is served to the employee any disciplinary proceedings taken by the employer for a misconduct committed by the employee during

pendency of notice, is redundant is an open cheque for the employee to commit misconducts even to the detriment of the employer. That argument implies that, as pointed out herein above that, during pendency of notice of termination, employees can commit misconducts to the detriment of the employer and the latter had to wait until expiry of the period of notice. In my view, that will be contrary to the spirit of section 52 of the Labour Institution Act [Cap. 300 R.E. 2019] and section 3 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019]. For the foregoing, I hold that termination of employment of the respondent was on 12th April 2021 the time he was served with termination letter because that was done prior expiry of the six months' notice of termination exhibit D2 that was expected to expire on 26th April 2021. In my view, there was only a single termination because during pendency of the notice of termination (exhibit D2) respondent continued to receive salary from the applicant. My afore conclusion is supported by what respondent indicated in CMA F1 as reasons for termination. In CMA F1, respondent indicated that reasons for termination is misconduct and unknown. I have examined the six months' notice of termination (exhibit D2) and find that applicant issued the said notice due to downturn and there is no reference as to misconducts. It is my view therefore that, since respondent indicated in the CMA F1 that is a

pleading, that termination was due to misconduct, then, both applicant and the arbitrator were bound by pleadings of the parties and were not allowed to depart therefrom. See ***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 [2020] TZCA 1875 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 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 Appeal No. 38 of 2012 (both unreported)".*

For the foregoing, I hold that findings by the arbitrator based on the notice of termination that termination of employment of the respondent was unfair on ground that applicant did not prove reasons for retrenchment and that procedures were not adhered to, was a misdirection.

On validity of reasons of termination, it was submitted by Ms. Mwambete, counsel for the applicant that respondent's employment was terminated after applicant has discovered through auditors who established that respondent committed frauds hence had valid reason for termination. It was submissions of counsel for the applicant that respondent committed gross misconduct and gross negligence hence applicant had valid reasons

for termination. It was submitted by counsel for the applicant that respondent authorized payment of USD 120,000 to TSN Ltd, a supplier who was not familiar to the applicant, alleging that the said alleged supplier supplied fuel but no fuel was supplied and further that verified purchase orders for materials valued at USD 60,000 from SPERON LTD, a Company that has never been a supplier of the applicant. Counsel for the applicant submitted that respondent was charged and found guilty of gross misconduct and gross negligence for the two incidents hence valid reason for termination. On the other hand, counsel for the respondent submitted exhibit D4 shows that there was no sufficient evidence to prove allegations relating to Speron invoice. Counsel for the respondent did submit on the allegation relating to TSN.

I have examined evidence adduced by the parties at CMA and find that Peter Barangwesa (DW1) testified that employment of the respondent was terminated for gross misconduct and gross negligence because, being signatory, respondent approved payment of TSN invoice valued at USD 120,000 and Speron invoices valued at USD 60,000. It was evidence of DW1 that, investigation found that those invoices were forged because both TSN and Speron disowned them. He added that payment was made in cash and further that when they called TSN for clarification, the latter

stated that they did not receive payment and further that they had no contract with applicant. DW1 testified further that, TSN stated that the format of the invoice did not match with theirs. DW1 added that, invoice for Speron was for building materials but during that time, there was no activity that needed bulding material. In his evidence, DW1 testified that Respondent was the authoriser of the invoices in question. Testifying under cross examination, DW1 stated that he is the one who went to TSN with the invoices to make verification and further that findings relating to TSN were that respondent was gross negligence.

On the other hand, Thierry Murcia (PW1) respondent testified in chief that there was no evidence to prove both allegation relating to TSN and SPERON invoices. While under cross examination, respondent (PW1) initially stated that he doesn't recall to have seen TSN invoice and can't recall who TSN and Speron are. But admitted to have verified several invoices. PW1 admitted under cross examination that he had communication with Carlos Nyaikunga in relation to TSN invoice though he evasively did not answer the question relating to backdating the said invoices or authorizing payment as he insisted that he verified several invoices.

It is my view that, respondent and the said Carlos Nyaikunga who were the verifiers of the invoices in question, especially respondent who was the final verfier and authorizer of payment, cannot deny to have hand in authorization of payment relating to TSN and SPERON. It id my views further that, since TSN did not receive payment and disowned the said invoices while respondent was the authorizer of payment, I find that applicant had valid reasons for termination of respondent's employment hence termination of employment of the respondent was substantively fair. In terms of Rule 12(4)(a) and (d) of GN. No. 42 of 2007(supra) these misconducts are sufficient to warrant termination of employment of the respondent.

On fairness of procedure, it was submitted by counsel for the applicant that procedures were followed. It was further submitted on behalf of the applicant that respondent was notified to attend the disciplinary hearing as per exhibit D3 and emails that was tendered as exhibit A3 by the respondent but respondent, through Mr. Anthony Mseke, Advocate, refused to attend the disciplinary hearing alleging that he had no valid work permit because it expired on 29th December 2020 and that the notice to show cause (exhibit D3) had all attachments. On the other hand, counsel for the respondent submitted that procedures were flawed because

the disciplinary hearing was conducted in the absence of the respondent, no evidence was adduced against the respondent, no witness was called, Respondent was served with the charge without annextures of the invoice contrary to Rule 13(3) and (5) of GN. No. 42 of 2007(supra) and that there was no investigation report.

I have examined the CMA F1 and find that on procedural fairness respondent indicated that:-

> "*PROCEDURES WERE NOT FOLLOWED IN THE FIRST DECISION TO TERMINATE THROUGH NOTICE AND THE SECOND TERMINATION WAS UNPROCEDURAL* ***SINCE I COULD NOT ATTEND HEARING DUE TO LACK OF WORK PERMIT***." (Emphasis is mine).

I have carefully considered rival arguments of the parties and wish to start with the complaint that procedures were not complied with in the first decision to terminate through notice of termination. I have held herein above that employment of the respondent was terminated on 12th April 2021 due to gross misconducts he committed and that termination of his employment was not based on the notice dated 26th October 2020 that was supposed to be effective on 26th April 2021. Therefore, all complaints relating to either fairness of reasons or procedures of termination based on the said notice of termination cannot be valid.

As quoted hereinabove, the complaint by the respondent on procedural fairness relating to termination that occurred on 12th April 2021 was that he did not manage to attend the disciplinary hearing because he had no valid work permit. I have examined evidence in the CMA record and find that it is undisputed that the disciplinary hearing was conducted in the absence of the respondent because respondent wished not to appear. Respondent was invited to attend the disciplinary hearing but he did not show up as evidenced by an email dated 30th March 2021 authored by Anthony Mseke, counsel for the respondent (exh. A3) informing the applicant that respondent cannot appear in the disciplinary hearing scheduled on 31st March 2021 at 3.00 pm allegedly, that respondent is not allowed to transact on any matter pertaining to the applicant, email dated 31st March 2021 authored by Brian Cassidy on behalf of the applicant (exh. A4) responding to Mr. Mseke's email (exh.A3), an email dated 7th April 2021 authored by Brian Cassidy on behalf of the applicant reminding respondent to attend the disciplinary hearing on 8th April 2021 after he has failed to appear on 31st March 2021 (exh. A5) and that the disciplinary hearing will proceed as planned. It is worth to note that exhibit A3, A4 and A5 were tendered by the respondent to advance his case. These exhibits corroborate evidence of the applicant that respondent was invited to attend

the disciplinary hearing specifically the invitation to the disciplinary hearing(exh. D3) and the outcome of the disciplinary hearing -summary dismissal (exh. D4) and exhibit A6 that was tendered by the respondent to prove that respondent was invited to attend the disciplinary hearing that was supposed to be conducted by video conference but he did not, as a result, hearing proceeded exparte. More so, in his evidence in chief respondent is recorded stating that:-

> " *…under good advice I did not attend such meeting but the disciplinary meeting was conducted as planned…".*

Evidence that respondent was advised not to attend the disciplinary hearing is clearly found in an email dated 30th March 2021 authored by Anthony Mseke(exhibit A3), respondent's counsel, informing the applicant that respondent cannot enter appearance because he was terminated by notice dated 26th October 2020 that was effective on 26th April 2021 and that respondent was not eligible to deliberate, answer or transact any matter relating to the applicant. In the said email (exh. A3) Anthony Mseke, counsel for the respondent wrote:-

> "…
>
> *I am writing on behalf of my client Thierry Murcia who has been issued with a termination notice by the company and is due to expire soon. As you may be aware, my client …was served with a six month's termination notice*

*thus according to your unjustifiable decision, his employment is officially coming to an end on 26th April 2021…**Be on notice that under the obtaining circumstances, my client is no longer eligible to deliberate, to answer or transact on any matter concerning the company as a matter of law.***

Be properly informed.

Regards

Anthony Mseke,
For and on behalf of Arbogast Mseke Advocates"

It is my considered opinion that the advice by Mr. Anthony Mseke and or position that after issuance of a notice of termination of employment dated 26th October 2020, respondent was no longer eligible to do anything including but not limited to answering allegation levelled against him by the applicant was erroneously given. I am of that view because at that time, applicant had not made a final decision to terminate respondent's employment. More so, respondent continued to receive his monthly salary. As pointed hereinabove, if respondent's employment was terminated by notice dated 26th October 2020, then, in terms of Rule10(1) of the Labour Institutions (Mediation and Arbitration)Rules, GN. No. 64 of 2007, the dispute was supposed to be filed within thirty days from the date the notice was served to the respondent. Applicant, correctly in my view, notified both the respondent and Mr. Mseke, through exhibit A4 that

respondent was supposed to attend the disciplinary hearing as an employee of the applicant but respondent acted on advice from Mr. Mseke learned counsel and did not attend. Due to refusal of the respondent to attend the disciplinary hearing, the same proceeded exparte as evidenced by an email addressed to the respondent by Brian Cassidy on behalf of the applicant (exhibit A5). During submissions, Mr. Mseke, learned counsel for the respondent strongly argued that respondent did not attend because he had no work permit hence unable to conduct employer's business. When probed by the court as whether respondent was invited to conduct applicant's business or attend the disciplinary hearing, Mr. Mseke readily conceded that respondent was not invited to conduct employer's business rather, to attend the disciplinary hearing and that the said disciplinary hearing was expected to be done via video conference. From where I am standing, I see no logic in the complaint that the disciplinary hearing proceeded exparte while respondent willfully refused to participate. It is my considered opinion that, the complaint in the CMA F1 that termination was procedurally unfair because respondent failed to attend the disciplinary hearing as he did not possess work permit lacks merit. Applicant failed to attend because he acted on wrong advice from his advocate. Applicant cannot be blamed for that failure. I am of that view because the

disciplinary hearing itself was being held through video conference. Therefore, that eliminated all complaints raised by Anthony Mseke in his email (exh. A3) justifying as to why respondent was not supposed to attend the disciplinary hearing. I see no logic how immigration officers could have arrested respondent by attending the disciplinary hearing through video conference even if assumed that respondent had no valid work permit. Contradictory as it is, evidence shows that on 18th March 2021, with the assistance of the applicant, respondent was issued with a special permit (exh. A2) that was tendered by the respondent himself as it was also submitted by counsel for the respondent.

It was submitted by counsel for the respondent that there was no investigation report and that respondent was not served with the alleged invoices. I should point out that, in his submissions, counsel for the respondent conceded that he was not sure whether respondent replied to the show cause letter and whether he demanded to be supplied with documents that could have helped him to defend himself against the allegations. It is my view that, the complaint is an afterthought because respondent was supposed, after being served with the charge, to inform the applicant that he needs to be supplied with the alleged invoices if at all the same were not supplied. My conclusion is fortified by the invitation to

disciplinary hearing dated 25th March 2021(exhibit D3) that was served to the respondent. In exhibit D3, the charges levelled against the respondent were explained in detail and shows that for the allegation relating to TSN, copies of TSN invoices; TSN purchase Order; email exchange between Graham Pearce and Carlos Nyunga; email correspondence between respondent and Carlos Nyunga; email correspondence between respondent and John Arthur; email correspondence between respondent and Charles Santos as part of investigation; emails relating to the audit and investigation of the TSN invoices; the diesel record for the NT-2 site from November 2016 – April 2017 and emphasis that the notes in red typeface in the final column 'Note' were added in the course of the investigation for clarification; and the Normal Transaction Account (fuel, water and Lubricants) were attached thereto. Exhibit D3 shows further that, a copy of the Speron POs; speron Invoices; email exchange between respondent and John Arthur; and the email exchange between the respondent and Charles Santos were attached. In his evidence in chief, respondent (PW1) testified that he received exhibit D3 and that he doesn't recall having received those annextures. Evidence by the respondent that he doesn't recall having received those annextures, in my view, doesn't prove that the same were not attached to exhibit D3. In other words, the said annextures were

annexed to exhibit D3 and well received by the respondent but respondent, during hearing lost memory whether he received them or not. That in my view, is not similar with saying that the said annextures were not served to him. Therefore, since respondent received exhibit D3 that showed that those annextures were annexed thereto as part of investigation, I hold that he received them hence the complaint that he did not receive them is an afterthought. The allegation relating to absence of investigation report also fails for two reasons. One; exhibit D3 shows that key areas in the investigation report relating to the issue in question was served to the respondent and two; in his evidence under cross examination, respondent (PW1) admitted having participated in investigation by helping Peter in the said investigation.

It was also submitted by counsel for the respondent that no witness was called in the disciplinary hearing hence termination was unfair procedurally. I should point out that in the CMA F1 that is a pleading, respondent did not plead that he was not served with the investigation report and or that witnesses were not called to testify on behalf of the applicant during the disciplinary hearing. The only issue relating to procedural unfairness was failure of the respondent to attend the disciplinary hearing due to lack of work permit. It is my view that,

respondent was bound by his own pleading in the CMA F1 and was not allowed to raise new issues that was not pleaded. The decision of the Court of Appeal in the case of ***Barclays Bank T. Ltd vs Jacob Muro,***(supra) is loud and clear on this issue. Since those issues were not pleaded by the respondent in the CMA F1, he cannot be allowed to raise them during hearing in his evidence or at this stage. I therefore find that termination was procedurally fair.

Before I pen down, I feel as a matter of completeness, obliged to comment albeit briefly, on the issue I raised relating to value and use of the document or object admitted for identification purposes(ID). In the application at hand, when respondent(PW1) was testifying, prayed to tender a document marked as AM25 in the list of documents he filed at CMA to form part of his evidence relating to his monthly salary namely, USD 18,333.33. Applicant raised objection ,as a result, AM25 was not received as exhibit, instead, it was received for identification purposes and the arbitrator marked it as ID1. Having received it as ID1, arbitrator promised to consider it at the time of composing the award. In fact, instead of using Australian Dollars 152,000 per month as salary provided for under the contract of employment (exh. D7) to calculate the amount respondent was entitled to, arbitrator used the figures in ID1 as the base

of calculations. During submissions, counsel for the respondent conceded that in his evidence respondent adopted exhibit D7 to form part of his evidence meaning that the said exhibit provided the monthly salary that respondent was entitled to. It was further conceded, correctly in my view, by counsel for the respondent that the arbitrator erred to calculate the amount respondent was entitled to, by relying on the figures in ID1 and that it was not proved that monthly salary of the respondent was USD 18,333.33. In short, both counsel submitted that it was wrong for the arbitrator to rely on ID1. I am of that settled view because documents or objects admitted for identification have no evidential value. See. ***Abdallah Abass Najim v. Amin Ahmed Ali*** [2006] TLR 55, ***Alex Mwalupulage @ Mamba vs Republic*** (Criminal Appeal 25 of 2020) [2022] TZCA 146, **Rashid Amiri Jaba & Another v. Republic,** Criminal Appeal No. 204 of 2008 (unreported), ***Francis Eugen Polycard vs M/s Panone and Co. Ltd*** (Civil Appeal 8 of 2019) [2020] TZHC 3407, ***Nitak Limited vs Onesmo Claud Njuka*** (Civil Appeal 239 of 2018) [2021] TZHC 4235, ***Ngorika Bus Transport Co. Ltd & Another vs Ismail Abdulrahaman Divekar*** (Civil Appeal 15 of 2019) [2021] TZHC 6969 to mention but a few. In ***Mamba's case*** (supra) the Court of Appeal quoted its holding in the ***Jaba's case***(supra) that:-

"The law is settled that any physical or documentary evidence marked for identification only and not produced as an exhibit does not form part of the evidence hence have no evidential value."

From the foregoing, I safely conclude that the arbitrator erred to consider and use ID1 as a base of calculation of the amount respondent was entitled to while the said ID1 was not evidence.

For all said hereinabove, I hold that termination of employment of the respondent was fair both substantively and procedurally. That said and done, I hereby allow the application, quash, and set aside the CMA award.

Dated in Dar es Salaam on this 6th February 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 6th February 2023 in chambers in the presence of Linda Mwambete, Advocate for the Applicant and Elipidius Philemon, Advocate for the Respondent.

B. E. K. Mganga
JUDGE