IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 68 OF 2023

(Arising from an Award issued on 28/02/2023 by Hon. Chuwa P.M, Arbitrator in Labour dispute No. CMA/DSM/TMK/311/2021/43/2022 at Dar es Salaam)

CYPRIAN CONSTANTINO..... APPLICANT

VERSUS

LAKE CEMENT LIMITED..... RESPONDENT

JUDGMENT

Date of last order: 16/05/2023
Date of Judgment: 25/05/2023

B. E. K. Mganga, J.

Brief facts leading to this application are that, on 18th September 2020, Lake Cement Limited, the abovementioned respondent, employed Cyprian Constantino, the abovementioned applicant, as a Heavy Vehicle Driver for two years fixed term contract with monthly salary of TZS 295,000/= expected to expire on 17th September 2022. It is undisputed that, respondent is a cement manufacturing industry and that applicant's duties were to transport cement to various places. It is said that before entering into the said contract, respondent made medical checkup of the

applicant. It is undisputed that in May 2021, applicant's health condition was not normal as a result, he attended at Kigamboni Health Centre within Kigamboni Municipal where he was diagnosed to have contracted Tuberculosis. The doctor who diagnosed applicant observed that, lungs of the applicant were seriously damaged by Mycobacterium Tuberculosis, acid fast bacteria. On 17th November 2021, respondent terminated employment of the applicant due to health condition. In terminating employment of the applicant, respondent considered the medical report that to permanently relieve applicant's lungs from the said condition, applicant must quit from heavy duties, dusty and cement working environment. After termination, respondent paid applicant TZS 556,000/= only being one-month salary in lieu of notice and one-month salary as leave pay minus pay as you earn tax.

Applicant felt unhappy, as a result, he filed Labour dispute No. CMA/DSM/TMK/311/2021/43/2022 before the Commission for Mediation and Arbitration (CMA). In the Referral Form (CMA F1), applicant indicated that he was claiming to be paid (i) one-month salary in lieu of notice, (ii) Leave pay, (iii) severance pay, (iv) unfair salary deductions and (v) salaries for the remaining period of the contract. He further indicated that there

was no valid reason for termination and that respondent did not follow fair procedures of termination.

On 28th February 2023, Hon. Chuwa, P. M, Arbitrator, having heard evidence and submissions of the parties, issued an award dismissing the dispute filed by the applicant. In the award, the arbitrator stated that in his evidence, applicant consented termination of his employment hence there was valid reason for termination. The arbitrator added that fair procedures of termination were adhered to.

Applicant was aggrieved with the said award, as a result, he filed this revision application. In his affidavit in support of the Notice of Application, applicant raised four (4) grounds namely: -

1. *That, the Hon. Arbitrator erred in law and facts by concluding that termination was fair while respondent failed to discharge her legal obligations provided for under rule 21(5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007.*
2. *That, the Hon. Arbitrator erred in law and facts by misdirecting himself on the application of section 32(1) of the Employment and Labour Institution Act, [Cap. 366, R.E. 2019] because the said section is not applicable in termination of Employment.*
3. *That, the Hon. Arbitrator erred in law and facts in holding that applicant was paid notice of termination while there was no payment voucher.*
4. *That, the Hon. Arbitrator erred in law and facts by holding that applicant did not adduce evidence to prove the accruing benefits for the remaining period of the contract.*

In opposing the application, respondent filed the counter affidavit of Yasini Juma, her Principal officer.

When the application was called on for hearing, Mr. Jimmy Mnkeni, from CHAWAMATA, a Trade Union, appeared and argued for and on behalf of the applicant while Mr. Yasini Juma, the Human Resource Manager of the respondent, appeared and argued for and on behalf of the respondent.

Submitting generally in support of the grounds for revision, Mr. Mnkeni argued that, on 18th September 2020 respondent employed applicant for two years fixed term contract expected to expire on 17th September 2022. He further submitted that, applicant fell sick and attended at hospital where he was issued with a medical report that he was unable to perform his duties. Mr. Mnkeni went on that, on 16th November 2021, respondent served applicant with a letter terminating his employment with effect from 17th November 2021. Mr. Mnkeni argued that, in terminating employment of the applicant, respondent violated Rule 21(5) of the Employment and Labour Relations (Code of Good Practice), Rules, GN. No. 42 of 2007 because there was no meeting that was held between applicant and respondent to terminate employment on medical ground. He argued further that, respondent was also supposed to comply with Rule

7(3) of GN. No. 42 of 2007(supra). Mr. Mnkeni insisted that, applicant was not called in the meeting and results of the said meeting was also not tendered at CMA. Mr. Mnkeni submitted further that, there were reasons for termination but procedures were not complied with hence termination was unfair and prayed that the application be allowed.

In resisting the application, Mr. Yasini Juma, the Human Resource Manager of the respondent, submitted generally that, the parties had a two-yearly fixed contract and that, on various dates, applicant prayed for sick leaves and was granted. Mr. Juma submitted that applicant was granted sick leave on 10/06/2021, 17/06/2021, 30/06/2021, 06/07/2021, 28/07/2021, 01/10/2021 and 15/10/2021.

Mr. Juma submitted that, on 10th November 2021, applicant served respondent with a medical report with recommendations that he should be terminated because he is not permitted to work in dusty industry. He added that, on 11th November 2021 applicant was called in a meeting for consultation whereby he (applicant) stated that, he cannot continue with employment. Mr. Juma added that, after the said meeting, procedures were initiated by filing documents to the Workers Compensation Fund (WCF). During submissions, Mr. Juma conceded that, minutes of the said

alleged meeting were not tendered at CMA. He was quick to submit that procedures for termination were complied with and prayed the application be dismissed.

In rejoinder, Mr. Mnkeni reiterated his submissions in chief and had nothing material to add.

I have examined evidence in the CMA record and considered submissions made on behalf of the parties in this application and wish, in disposing this application, to start with the 1st ground. I have examined evidence of Greciana Benard Tarimo(DW1), the only witness who testified on behalf of the respondent and find that, in her evidence, she testified that, applicant' s employment was terminated based on ill health condition. It was evidence of DW1 that applicant's ill health condition started on 13th May 2021 and that, at different dates, applicant sought sick leave and was granted. DW1 testified further that, applicant was paid full salary from May 2021 to July 2021 and that, from August 2021 to October 2021, applicant was paid half salary. DW1 testified further that, according to the doctor, sickness of applicant is not work related. But during cross examination, DW1 admitted that before entering employment contract, applicant was not suffering from Tuberculosis and that, he contacted that disease while

in work. During re-examination, DW1 testified that, it is only the doctor who can state how applicant contacted the said disease.

In his evidence, Cyprian Costantino Mbagahela(PW1) stated *inter-alia* that, at the time of commencement of his employment with the respondent, he was checked his health condition. He mentioned also the dates he attended at hospital where he was diagnosed with Tuberculosis after contracting the said disease and that his employment was finally terminated.

It is clear from evidence of the parties that; applicant was diagnosed with Tuberculosis only after having worked with the applicant for sometimes. It is also in applicant's evidence that, initially he entered one-year contract with the respondent on 18th September 2019 and that, after expiry of the said contract, they entered a two years fixed term contract. It is my view that, evidence of DW1 on sickness of applicant, was not caused by work or is not work related cannot be accepted for two reasons. One, that evidence is hearsay because DW1 started that, that evidence is according to the doctor. Unfortunately, the doctor was not called. More so, DW1 stated in her evidence under re-examination that, it is only the doctor who can establish how applicant contacted that disease. Two, evidence by

applicant that at the time of entering into the said two years fixed contract respondent checked his health condition was not challenged. I therefore agree with both DW1 and PW1 when they stated that, the said disease was work related. My afore conclusion is further anchored on the medical report (exhibit D5) dated 4th November 2021 from Kigamboni Health Centre that was tendered by DW1 on behalf of the respondent which was the base of termination of applicant's employment. The said medical report (exhibit D5) reads in part:-

> *"REF: SYPRIAN CONSTANTINO MBAGAHELA*
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> *On examination revealed that, the lungs of the client named above were seriously damaged by Mycobacterium Tuberculosis, acid fast bacteria. To permanently relieve his lungs from the condition, he is* ***strongly recommended to quit from heavy duties, dusty and cement working environment****. Therefore we strongly request you to let him quit from the job for the betterment of his health.*
>
> *Thanking you in advance for continued cooperation,*
>
> *Best regards,*
>
> *Dr Aggrey Mwakabuli*
>
> *TB OFFICER".*

It is my view that, the said disease is related to work applicant was performing, which is why, the doctor recommended that applicant should quit from dusty and cement working environment. Therefore, in order to have a valid reason for termination of employment of the applicant,

respondent was supposed to comply with the provisions of Rule 19 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. Rule 19(1)(d) and 19(2) of GN. No. 42 of 2007 (supra) provides clearly that, when incapacity is due to work-related illness, an employer shall go to the greater length to accommodate the employee. In terms of Rule 19(6)(b) and (c) and 19(10)(a) and (b) of GN. No. 42 of 2007(supra), respondent was supposed to give applicant light duty or alternative work. In fact, in exhibit D5, it was not recommended that applicant must be terminated, rather, he should be removed from heavy duties, dusty and cement working environment. There is no evidence on record to show that respondent tried to find alternative work or had no light duties that were not related to dusty and cement working environment. It is my considered opinion that, there was no valid reason for termination because respondent did not comply with the provisions of Rule 19 of GN. No. 42 of 2007 that relates to fairness of reason for termination based on ill health. I should also point out that, it is unacceptable for the employer to terminate an employee after the latter has fell sick due to work-related illness and employ another employee just to make sure that business goes on. Employers has a duty not to expose

their employees to health risk caused by employment. But, if that happens, employers should, be made accountable. In other words, employers for their own gains, should not be allowed to try their luck by exposing employees to health risk and thereafter terminate them easily after deterioration of health conditions and employ new ones.

In the application at hand, respondent exposed applicant to risk due to dusty and cement, which is why, it was recommended in exhibit D5 that applicant should be relieved from those conditions to serve his life after his lungs were severally damaged. In other words, applicant was exposed to air pollution. In fact, respondent was supposed to comply with the Working Environment (Air Pollution, Noise and Vibration) International Labour Convention, 1977 No. 148 to ensure that health of applicant cannot be affected. The Convention casts a duty to employers to ensure that health of employees are not affected by air, Noise and or vibration pollutions by supplying protective gears. Unfortunately, in the application at hand, there was no evidence to prove that respondent supplied those protective gears for her to escape from liability.

It was submitted by Mr. Juma on behalf of the respondent that, a meeting was held in compliance with the law prior termination of the

applicant and that applicant consented to termination. With due respect, there is no such evidence in the CMA record, as such, those are submissions from the bar that is not evidence. Again, it was held by the arbitrator that applicant consented to termination hence termination was valid. It was also submitted by Mr. Mnkeni, from CHAWAMATA, a trade Union, on behalf of the applicant, that termination was valid. With due respect to both Mr. Mnkeni and the arbitrator, there is no evidence to support their findings.

It was the arbitrator's findings that procedures for termination were complied with. With due respect, that findings cannot be correct. Fairness of procedure for termination of employment based on ill health is provided for under Rule 21(1), (2), (3), (4), (6), (7) and (8) of GN. No. 42 of 2007 (supra). The said fairness of procedure includes consultation of the employee, employer to consider alternative given by the employee, representation of the employee by a trade union or fellow employee, employer holding a meeting with the employee in presence of a fellow employee or member of a trade union and the outcome of the meeting be communicated to the employee in writing. All these were not complied with. I therefore hold that termination was also unfair procedurally.

It was submitted by Mr. Mnkeni on behalf of the applicant that, respondent did not comply with the provision of Rule 7(3) of GN. No. 42 of 2007(supra). With due respect, that Rule has nothing to do with the application at hand because, it relates to constructive termination, which is not the case in the application at hand.

It was complained by the applicant in the 2nd ground that arbitrator misdirected himself on the application of section 32 of Cap. 366 R.E. 2019(supra). I entirely agree because, the said section has nothing to do with termination of employment of the applicant. I am of that view because, it was not disputed that applicant sought and was granted sick leave and the modality of payment of salary was explained in evidence of the respondent. As pointed hereinabove, the central issue was fairness of reason and procedures for termination and not otherwise.

It was complained by the applicant that the arbitrator erred to hold that applicant was paid notice of termination. Without wasting time, I hold that this ground has no merit because in his evidence, applicant(PW1) testified that he was paid one-month salary in lieu of notice. I therefore dismiss this ground.

In the last ground, it was complained that arbitrator erred to hold that applicant is not entitled to be paid the remaining period of the contract. From what I have discussed hereinabove, I find that the holding by the arbitrator that termination of employment was fair was erroneously arrived at. Therefore, the conclusion that applicant was not entitled to be paid the remaining period was wrong reached. For the fore going I allow the application.

Since I have held that termination of employment was unfair both substantively and procedurally, then, applicant was entitled to be paid salary for the remaining period of the contract as compensation. The Court of Appeal had an advantage to discuss a similar issue to the application at hand in the case of ***Hussein Said Kayagila vs Bulyanhulu Gold Mine Limited*** (Civil Appeal 508 of 2021) [2023] TZCA 103 where the appellant who had a fixed term contract, was terminated due to illness and held:-

> *"…We entertain no doubt that, the fact that his contract of service having been terminated because of a condition of illness which was an occupational hazard directly linked to the respondent's mining works, he deserved a much kinder compensation than what he was awarded…"*

Guided by the the Court of Appeal decision in ***Kayagila's case*** (supra) I order applicant be paid the remaining period of the contract. In

the application at hand, applicant was terminated on 17th November 2021 while his contract was expiring on 17th September 2022. In short, applicant's employment was terminated 11 months' prior to its expiry. Therefore, applicant is entitled to be paid TZS 3,245,000/= being compensation for the said 11 months' remaining to the contract of employment.

Dated at Dar es Salaam on this 25th May 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 25th May 2023 in chambers in the presence of Jimmy Mnkeni, from CHAWAMATA, a Trade Union, for the Applicant and Yasini Bakari Juma, the Human Resources Officer for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE