

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REFERENCE NO. 2024011400000648**

**LABOUR REVISION NO. 648 OF 2024**

**TANPACK TISSUES LIMITED ..... APPLICANT**

**VERSUS**

**ALFRED MBUSSA ..... RESPONDENT**

**JUDGEMENT**

**Date of last Order:** *04/03/2024*

**Date of Judgement:** *15/03/2024*

**MLYAMBINA, J.**

The brief material facts of the application are that the Respondent was employed by the Applicant since 01/02/2009 in the position of Machine operator. He was then promoted to the position of Supervisor. Following the misconduct, which will be apparent in due course, the Respondent was terminated from employment on 16/06/2022. Being aggrieved by the termination, the Respondent referred the matter to the Commission for Mediation and Arbitration (herein CMA) claiming for unfair termination both substantively and procedurally. Such application was accompanied by condonation which was granted. Similarly, the CMA found the claim of unfair termination to have merit. As such, the Respondent was awarded a sum of TZS 16,680,960/= being 29 months and 14 days of

the remaining period of the contract. The decision which led to the present application on the following issues:

- i. Whether the Hon. Trial Mediator had jurisdiction to entertain the Condonation application.
- ii. If issue no 1 is in affirmative, whether the trial Mediator was right to grant the condonation relying on untrue medical report from Mwananyala Hospital.
- iii. Whether the trial Mediator exercised her powers judiciously in granting for an extension of time after considering all factors enabling for granting an extension of time.
- iv. Whether the Honourable trial Arbitrator was right to declare that the Respondent was terminated unfairly.

When the matter was called for hearing, Mr. Mlyambebele A. L. Ng'weli, learned Counsel appeared for the Applicant and Mr. Muhindi Said, Personal Representative was for the Respondent.

Arguing in support of the first ground, Mr. Ng'weli argued that the trial Mediator being a person who is entitled to be neutral in the mediation process, was not supposed to step into the shoes of resolving a condonation application from which it technically involves battling between the two parties. In support of his argument, he cited the provision of

*Section 86(4), (7) and (8) of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein ELRA) and the cases of **Suzana Mwanyama v. Cardinal Rugambwa Hospital**, Revision No. 191 of 2022, High Court Labour Division at Dar es Salaam (unreported) and **Tanzania Cigarette Public Ltd Company v. Nancy Mathew Kombe**, Revision Application No. 421 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported). Mr. Ngw'eli though being aware of the two contradicting schools, he did not subscribe to the position in in the case of **William Ryoba Wambura v. Grumeti Reserved Limited**, Application for Revision No. 18 of 2020, High Court Labour Division at Musoma (unreported).*

On the second ground it was submitted by Mr. Ngw'eli that annexure MA 1 (the medical report from Mwananyamala referral Hospital referring the Respondent to be their patient), was denounced by Annexure TTL1. Further, Annexure TTL1 is a genuine letter from Mwana nyamala Referral Hospital dated 13/09/2022. Mr. Ngw'eli argued that; since the medical report of the Respondent was discarded, then it was obvious that the Respondent made criminal forgeries with an intent of gaining from his wrong doings. He submitted that the trial mediator ought not to have trusted on the same rather than condemning the Respondent into criminal

investigations. To strengthen his submission, Mr. Ngw'eli referred the Court to the case of **Mohamed Athuman Bodo v. Leila Kaleb Makundi**, Misc. Civil Application No. 14 of 2022, High Court of Tanzania, Temeke (unreported) where it was held that:

I wish to comment on the allegedly forged documents. Filling forged documents in Court is unacceptable. Lying under oath is detestable by any standard. I direct the Deputy Registrar to report the alleged forgery to the police for criminal process actions.

On the third issue, it was submitted by Mr. Ngw'eli that; even if the report from Mwananyamala Referral Hospital which was granted to the Respondent was found to be genuine, yet the same report determines to have attended the Respondent on 23 June 2022. Upon medical examination, the Respondent was put into anti-depressant tablet for 30 days only. The said 30 days ended on the 22 Day of July 2022. He argued that it is very unexpectedly that the condonation application was filed on the 29<sup>th</sup> August 2022, which marks almost 38 days after the period prescribed by the said medical report. To that end, the Respondent failed to account for the period of 38 days contrary to the law as enshrined in a number of cases such as the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) which was quoted

with approval in the case of **Rui Wang v. Eminence Consulting (T) Ltd**, Revision No. 306 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported), p. 9. In the later case, it was emphasized that delay of even a single day must be accounted for.

It was also submitted by Mr. Ngw'eli that since the sick Respondent was never hospitalized then there was no need of relying on the said medical report in computing the days as he was able to file the suit on time. To booster his position, he recited **the case of Rui Wang** (supra).

Turning to the last issue, the Applicant's Counsel submitted that; it was not proper for the trial Arbitrator to rule in favour of the Respondent since all evidence presented justifies that the Respondent was reckless. He stated that his sleeping negligence during working hours caused less supervision to his subordinates. Such negligence resulted into an eruption of fire which left the Applicant with massive loss as attributed thereto.

He added that; it was not proper for the trial Arbitrator to ignore Exhibit DI which was the CCTV footages demonstrating the Respondent to be asleep during the eruption of fire until when one Fadhili Juma went to awake him up. In conclusion, Mr. Ngwe'li urged the Court to revise and set aside the CMA's decision.

In response to the first, second and third ground, Mr. Said submitted that the Arbitrator was right to grant an application for condonation as per *Rule 11(3) of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007* (herein GN. No. 64/2007). He stated that the issue of forged medical report needs proof while the same was not proved by the Applicant. He stated that there is no police report to substantiate the Applicant's claim of forgery. He added that the Applicant tendered exhibits TTL1 and TTL2 to disapprove medical report tendered by the Applicant but he did not follow procedure to obtain the exhibits attached. He was also of the view that the Applicant infringed human rights in obtaining the exhibits in questions without the patient's (Respondent) consent. It was also argued that the cases cited on first ground including the case of **Rui Wang** (*supra*), are distinguishable to the circumstances at hand.

On the last ground, it was submitted by Mr. Said that the CCTV footage failed to prove the allegations levelled against the Respondent. He stated that the Applicant did not bring the alleged Fadhili Juma who claimed to awaken the Respondent on the incident date. He maintained that the Applicant had no sufficient reason to terminate the Respondent. He therefore urged the Court to uphold the CMA's award.

I have dully considered the rival submissions of the parties, CMA and Court records as well as relevant issues. I find the Court is called upon to determine the following issues: *One, whether the Mediator had jurisdiction to an application for condonation. Two, whether the application for condonation was properly granted and whether the Applicant properly terminated the Respondent.*

To start with the first issue; *whether the Hon. Trial Mediator had jurisdiction to entertain the Condonation application*, as rightly highlighted by Mr. Ng'weli, there are two schools of thought established by this Court on Mediators' powers to determine an application for condonation. The first school is the position that the Mediator has no power to determine an application for condonation. His powers are limited to mediation of the dispute. Therefore, the mediator is not seized with the jurisdiction to determine any issues relating to condonation. This position is supported by numerous decisions including the case of **Suzana Mwanyama** (supra). In the referred decision various reasons were stated why Mediators should not determine an application for condonation.

The second school is of the position that; pursuant to *Rule 15 of GN. No. 64/2007* which empowers Mediators to determine jurisdictional issues relating to the dispute, Mediators have jurisdiction to determine an

application for condonation. Therefore, condonation matters being one of the jurisdictional issues to the dispute, Mediators have powers to determine condonation application. That is the position in the case of **Rui Wang** (*supra*). Similarly, in the referred decision also several reasons were stated to justify why Mediators have jurisdiction to determine an application for condonation.

It should be noted that following the High Court contradicted decisions, the Labour Commissioner in Reference No. 1 of 2023 exercised her powers conferred under *Section 58(2) of the Labour Institution Act [Cap 366 Revised Edition 2019] (herein LI A) and Rule 53 of the Labour Court Rules [G.N No. 106 of 2007]* by making reference to this Court to certify points of law arising from the conflicting decisions of **William Ryoba Wambura v. Grumeti Reserved Limited**, Application for Revision No. 18 of 2020, High Court Labour Division at Musoma (unreported) and the case of **Suzana Mwanyama v. Cardinal Rugambwa Hospital**, Revision No. 191 of 2022, High Court Labour Division at Dar es Salaam (unreported), for the purpose of referring the same to the Court of Appeal of Tanzania for determination. The application was granted and the contradicting decisions were referred to the Court of Appeal.



On the basis of the afore analysis, since I also subscribe to the position in the second school, in this decision, I maintain the position reached in the case of **Rui Wang** (supra). Since the Court of Appeal is yet to give position, I find no justifiable reason to depart from my previous decision.

The second issue is; *whether the application for condonation was properly granted*. Mr. Ng'weli was of the view that the trial mediator was not right to grant the condonation relying on untrue medical report from Mwananyamala Hospital. Before the CMA and in this Court, the Applicant strongly alleged that the medical report relied by the Arbitrator was untrue. In his counter affidavit at the CMA, he attached a letter from Mwananyamala hospital (exhibit TTL2) stating that the said letter did not come from the named hospital. The said letter challenged the report in question by stating that the said report was written by the Medical Officer namely Dr. Bushiri Selemani who does not exist on the list of doctors from Mwananyamala hospital. It was also stated that the said report is not genuine from Mwananyamala hospital.

I have gone through the two contested letters. It is my view that the said letter (exhibit TTL2) on its own, is not sufficient to prove that the alleged medical report relied by the Arbitrator was forged. The Applicant

ought to have brought corroborative evidence such as the alleged list of Doctors from Mwananyamala hospital to prove that the said Dr. Bashiri does not exist in the list of doctors from the relevant hospital.

Additionally, the record is silent to further action taken against the Respondent for bringing a forged document. The action taken against him was necessary to prove the alleged forgery if at all existed. Short of that, the Applicant's allegation lacks merit. Thus, the Arbitrator properly relied to the exhibit in question.

It was Mr. Ng'weli's argument that; even if the medical report is relied it is not sufficient evidence to grant the extension of time sought. The medical report is dated 27/06/2022 which indicated that the Respondent was under medication for 30 days. The record shows that the matter was referred at the CMA on 29/08/2022 but the Respondent was terminated on 16/06/2022. Therefore, the Applicant delayed for 73 days to refer his matter at the CMA. Only 30 days were accounted by the Respondent that he was under medication which ended on 22/07/2022. The Respondent did not account for his delay from 23/07/2022 to 29/08/2022 when the Applicant referred the matter to the CMA.

As rightly argued by Mr. Ng'weli, delay of even a single day has to be accounted for. This is also the Court's position in the case of **Bushiri Hassan** (*supra*) where it was held that:

Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.

Therefore, in the case at hand, since the Respondent did not account for all the days of the delay, I find the extension granted was not proper contrary to *Rule 11(3) of GN. No. 64/2007*.

Since the two issues can dispose of the matter, there is no relevance of determining the remaining issues. Notwithstanding such position, the Court will briefly proceed to determine the same. The termination letter (exhibit D5) indicates that the Respondent was terminated from employment for the following offenses:

- i. Guilty of being non – compliance with acceptable standards of (performance and conduct principles of ethical conduct clause (XV)
- ii. Being negligent of his duties during shift duty thus putting his life, fellow colleagues and company properties at risk during the fire incident (Code of Conduct clause (b) & (h).

- iii. Giving false information to the Disciplinary hearing and for being disrespectful to the hearing committee procedures.

At the CMA, the Arbitrator found that the above misconducts were not proved. At page 13 of the impugned decision, he stated as follows:

Katika ushahidi uliotolewa na Mlalamikiwa, imeelezwa sababu ya uzembe kwa kulala kazini. Nimeangalia kwa umakini mkubwa sana Kielelezo D1 ambacho ni CCTV Footage, sijaona popote anapoonekana Mlalamikaji akiwa amelala kama inavyodaiwa. Vilevile katika ushahidi wa DW2 shahidi alieleza kuwa kuna Mfanyakazi anayeitwa Fadhil Juma ambaye alidai kuwa ndiye aliyeenda kumwamsha mlalamikaji, hata hivyo mtu huyu hakuletwa mbele ya Tume kuja kuthibitisha hilo.

The above quotation can be loosely translated as follows:

In the evidence given by the Respondent, it is stated the cause of negligence is sleeping on duty. I have looked very carefully at Exhibit D1 which is CCTV Footage. I have not seen anywhere the complainant is seen sleeping as alleged. Also, in DW2 evidence a witness explained that there was an employee named Fadhil Juma who claimed to be the one who went to wake the complainant, however this person was not brought before the Commission to prove it.

I have also looked at the exhibit in question. A person is seen sleeping and the other one is awaking him. When the exhibit in question was tendered before the CMA, the Respondent did not dispute the same. He did not even challenge that the person seen sleeping in the relevant exhibit is not him. Therefore, since the exhibit in question was not contested, it is sufficient evidence to prove that the Respondent was negligent and slept at the working place, thus, causing harm to the employer's properties.

In his position as a supervisor, the Respondent was entrusted with the responsibility of monitoring all activities thereto. Unfortunately, he slept and failed to perform his responsibilities which could have prevented the fire outbreak. Therefore, the Respondent was rightly terminated on the ground of negligence.

In the premises, for the reasons explained above, I find the present application has merit. The Mediators' decision on grant of condonation is hereby quashed and set aside. Hence, the arbitration proceedings and the subsequent award are hereby nullified.

It so ordered.



**Y.J. MLYAMBINA**

**JUDGE**

**15/03/2024**

Judgement pronounced and dated 15<sup>th</sup> March, 2024 in the presence of Counsel Pensia Mbilinyi holding brief of Mlyambebele Ngw'eli for the Applicant and Mhindi Saidi Personal Representative for the Respondent. Right of Appeal explained.



**Y.J. MLYAMBINA**

**JUDGE**

**15/03/2024**