IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 369 OF 2022

(Arising from an Award issued on 26/8/2022 by Hon. William, R, Arbitrator in Labour dispute No. CMA/DSM/KIN/381/2021/142/2021 at Kinondoni)

LANCET LABORATORIES (T) LIMITED ..... APPLICANT

VERSUS

NELSON NG'IDA ..... RESPONDENT

JUDGMENT

Date. Of last Order: 28/11/2022
Date of judgment: 16/12/2022

B. E. K. Mganga, J.

Brief facts leading to this application are that, on 22nd January 2014, applicant employed the respondent as an Admin Intern. He was promoted to various position including Admin Manager In charge of Procurement Logistics and IT. On 27th August 2021 applicant terminated employment of the respondent allegedly that the latter committed several misconducts *inter-alia* conflict of interest, dishonest, breach of company policy and procedures and poor store management. Aggrieved with termination of his employment, on 28th August 2021 respondent filed Labour dispute No.

CMA /DSM/KIN/281/2021/142/2021 before the Commission for Mediation and Arbitration (CMA) complaining that applicant terminated his employment unfairly. Based on that claim of unfair termination, respondent prayed to be reinstated without loss of remuneration.

Having heard evidence and submissions from both sides, on 26th August 2022 by Hon. William, R, Arbitrator, issued an award that termination of employment of the respondent was unfair. Based on those findings, the arbitrator ordered applicant to pay the respondent TZS. 25,020,000/= being twelve months salaries compensation for his termination.

Applicant felt resentful with the award and decided to challenge the CMA award hence this application. Applicant filed the affidavit of Godliving Nkya, her Principal Officer to support the application. In the said affidavit, applicant raised four grounds as hereunder:-

i. *The arbitrator erred in law and fact by concluding that the termination was substantively unfair while in fact there is massive evidence on record that the respondent committed the serious work-related offences.*
ii. *The Hon Arbitrator erred in law that the procedures for termination were not adhered to while in fact there was no evidence that the respondent was prevented from appealing against the Disciplinary Committee.*
iii. *That there is no evidence that the respondent's last salary was Tanzanian Shillings 2,058,000/=*

iv. That the trial arbitrator erred in law and fact in awarding compensation to the respondent while providing and relying on unrelated reasons from the matter in issue.

When the application was called on for hearing, Prisca Nchimbi, learned Advocate, appeared, and argued for on behalf of the applicant, while George Masoud, learned Advocate, argued for on behalf of the respondent.

Before learned counsels have submitted on the grounds raised by the applicant, I asked them also to address the court in their submissions on competence of the dispute at CMA and whether CMA had jurisdiction or not.

Ms. Nchimbi learned counsel for the applicant opted to submit first on the issues raised by the court. It was submissions of Ms. Nchimbi that Rule 10(1) of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007 requires disputes relating to fairness of termination to be filed within 30 days from the date of termination. Counsel for the applicant submitted that Respondent was terminated on 27th August 2021 but he filed the dispute at CMA on 28th September 2021 while out of time for one day. She insisted that, CMA had no jurisdiction because no condonation was granted.

Counsel for the applicant submitted further that, in CMA F1, respondent indicated that the dispute was based on termination of employment and he indicated in Part B of the said CMA F1 that the dispute arose on 27th August 2021. She added that, in Part A of CMA F1, respondent indicated that the dispute arose on 30th August 2021. She submitted further that the dispute arose on 27th August 2021 because that was the date the applicant made a final decision for termination of employment of the respondent.

Submitting on the 1st ground raised by the applicant, Ms. Nchimbi, learned counsel argued that the arbitrator erred in law and fact by concluding that termination was substantively unfair while evidence proved that respondent committed misconduct of dishonest and conflict of interest, breach of company policy and procedure for unauthorized display of company property. She submitted that; the Disciplinary Hearing Form(exhibit D5) that was signed by the respondent proved the allegation because respondent admitted having committed the said misconducts but the Arbitrator did not consider that exhibit. She went on that, in his evidence, respondent (PW1) denied each and everything stating *inter-alia*

that he was not served with the charge sheet and concluded that evidence of the respondent is unreliable.

On the 2nd ground, Ms. Nchimbi submitted that the arbitrator erred in law in holding that procedure for termination was not followed. She submitted that, respondent was served with the charge sheet, suspension letter etc. she went on that, Arbitrator erred to hold that applicant did not serve respondent with the copy of investigation while the law does not require the copy of investigation to be served to the employee. In her submissions, counsel for the applicant conceded that no witness was called by the applicant to prove the allegation before the Disciplinary Hearing Committee.

Submitting to the 3rd ground Ms. Nchimbi submitted that in compensating the respondent, arbitrator relied on salary that was not proved because there is no evidence proving that respondent's monthly salary was TZS 2,058,000/=.

Arguing the 4th ground, counsel for the applicant submitted that, in CMA F1, respondent prayed to be reinstated but Arbitrator merely assumed that parties cannot work together and ordered applicant to pay TZS 25,020,000/= as 12 months' salary compensation. Counsel for the

applicant submitted further that, parties were not asked to address whether circumstances of the dispute allow reinstatement or not and cited the case of ***Ngorongoro Conservation Area Authority V. Amiyo Tlaa Amiyo & Another***, Revision No. 28 of 2019, HC (unreported) to support her submissions. Counsel for the applicant concluded her submissions by praying that the application be allowed, the award be quashed and set aside because arbitrator wrongly believed contradictory evidence of the respondent (PW1).

Responding to the issues raised by the court, Mr. Masoud learned counsel for the respondent, concurred with counsel for the applicant that Rule 10(1) of GN. No. 64 of 2007(supra) requires the dispute on fairness of termination to be filed within 30 days of termination. He added that, the said Rule should be read together with Rule 4(1) of GN. No. 64 of 2007 (supra) that requires the first day to be excluded and include the last day. He added that, respondent was served with termination letter on 30th August 2021, showing that termination was on 27th August 2021 and therefore the dispute was filed within time. Counsel for the respondent submitted further that, CMA F1 was filed at CMA on 28th September 2021 and that respondent indicated in the said CMA F1 that the dispute arose on

30th August 2021. Counsel for the respondent concluded that CMA had jurisdiction.

Responding to submissions made by counsel for the applicant on the 1st ground, Mr. Masoud learned counsel for the respondent submitted that, applicant did not prove allegations against the respondent. He submitted further that; the only evidence available is the Disciplinary Hearing Form (exhibit D5). Counsel for the respondent cited the provisions of Section 110 of Evidence Act[Cap.6 R.E. 2019] and Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 to support his submissions that applicant had the burden of proof and added that applicant did not discharge that burden.

Responding to the 2nd ground, counsel for the respondent submitted that, procedure of termination was no adhered to because respondent was not served with the charge sheet, instead, he was served with a notice to show cause (exhibit D3). Counsel for the respondent submitted further that, the charge sheet was supposed to show the provision violated and particulars thereof. He added that, respondent was not served with Hearing Form (exhibit D2) to fill within 5 days contrary to the provisions of Rule 13 of GN. No. 42 of 2007(supra). He further cited Rule 13 of GN. No.

42 of 2007(supra)and submit that applicant did not call witness during the disciplinary hearing to prove the allegations against the respondent. Counsel for the respondent concluded that procedures were not adhered to.

On the 3rd ground, Mr. Masoud submitted that, salary of the respondent was TZS 2,058,000/= as evidenced by the salary slip (exhibit P3) that was admitted without objection.

Responding to the 4th ground, counsel for the respondent submitted that, compensation was properly awarded. He submitted further that, the Arbitrator asked the respondent as to whether the two are in good terms or not. He added that, evidence of the applicant shows that applicant had no faith with the respondent and that the arbitrator invoked properly Rule 32(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 in not reinstating the respondent. He submitted further that; 12 months' salary compensation was justifiable. He distinguished the ***Amiyo's case*** (supra) hence not applicable to the application at hand. Counsel for the respondent finalized his submissions by praying that the application be dismissed for want of merit.

In rejoinder submissions, Ms. Nchimbi, counsel for the applicant reiterated her submissions in chief that the dispute was filed on the 32nd day hence it was time barred.

I have examined the CMA record and considered submissions made on behalf of the parties and wish, in disposing this application, to start with issues raised by the court on competence of the dispute before CMA and on whether CMA had jurisdiction to determine the dispute.

It is undisputed fact that in CMA F1, respondent indicated that the nature of his dispute was termination of employment. It is further undisputed that in part A of the CMA F1, respondent indicated that the dispute arose on 30th August 2021 while in part B, he indicated that the dispute arose on 27th August 2021. It is my firm view that, since the CMA F1 is a pleading which initiates the dispute before CMA, it was improperly filled by indicating two different dates on which the dispute purportedly arose. In my view, that rendered the said CMA F1 to be defective hence, the dispute was incompetent before CMA. On such basis, the proceedings and the award which arose from a defective CMA F1 are null and void as it was held by this court in the case of ***Ngorongoro***

Conservation Area Authority V. Amiyo Tlaa Amiyo & Another (supra).

On time within which the dispute was filed at CMA, it was submitted by counsel for the applicant that it was filed out of 30 days provided for under the law while counsel for the respondent submitted that it was filed within time. It is settled law that the issue of time limitation touches the jurisdiction of the Court to determine the case as stated in a number of cases. In the case of **Swilla Secondary School vs. Japhet Petro**, Civil Appeal No. 362 of 2019 (unreported) where it was held that: -

> *"The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. Courts or tribunals are enjoined not to entertain any matter which is time-barred and in any event they did so, the Court unsparingly declare the proceedings and the consequential orders a nullity."*

In terms of Rule 10(1) of GN. No. 64 of 2007(supra), respondent was supposed to file the dispute relating to termination of his employment before CMA within 30 days from the date of termination. I have examined the termination letter (exhibit P6) and find that there is no doubt that respondent was terminated on 27th August 2021. Counsel for the respondent argued that respondent was served with termination letter on

30th August 2021. With due respect to counsel for the respondent, that submission is not supported by evidence on record. Nothing was stated by the respondent that he was served with termination letter on 30th August 2021. Naima Makata (DW1) testified that respondent was called on 27th August 2021 to collect his termination letter and that respondent collected the said letter on that day after and signed the Disciplinary Hearing Form(exhibit D5). That evidence was not contradicted by evidence of the respondent. I believe that if respondent received the termination letter as he alleged, the same would have been reflected in exhibit D5 when he signed. It is clear that from the date of termination to wit, 27th August 2021 to the date of filing the application namely 28th September 2021, it is about thirty-two (32) days after exclusion the first day. Respondent filed the dispute at CMA out being of time for two days. He was therefore, prior to filing the dispute, to file an application for condonation because he was out of time. Since no application was sought and granted, the dispute was improperly heard at CMA and CMA lacked jurisdiction. Respondent knew that he was late for two days which is why he wrote the exact date of termination and the other date i.e., 30th August 2021 knowing that the latter date will serve him from not being out of time for two days. The least

I Can say is that respondent was not properly advised because it was much easier to state the correct date and apply for condonation stating reasons for the delay for the said two days. Since he chose to lie in the CMA F1, he will bear the consequences thereof. As I have pointed out, it was open to the applicant to seek for extension of time prior to filing the dispute at CMA. Since he didn't and proceeded to file it while out of time, my hands are tied by jurisdictional issue hence unable to exercise whatever type of lenience. This court and the Court of Appeal has held several times that limitation of action knows no sympathy or equity. Some of the cases with that position are ***Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni,*** Civil Appeal No. 19 of 2016 [2021] TZCA 202 and ***M/s. P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA),*** Civil Appeal No. 265 of 2020 [2021] TZCA *248*. In ***Mchemi's case***, (supra), the Court of Appeal that: -

> "*However unfortunate it may be for the plaintiff, the law of limitation on actions knows no sympathy or equity. It is a merciless sword that cut across and deep into all those who get into all those who get caught".*

Since the dispute was filed out of time at CMA without condonation, CMA lacked jurisdiction. I therefore hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Since the issues raised by the court has disposed the whole application, I find no need to labour on determining the grounds for revision raised by the applicant.

Dated in Dar es Salaam on this 16th December 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 16th December 2022 in chambers in the presence of Prisca Nchimbi, Advocate for the Applicant and Nelson Ng'ida, the Respondent.

B. E. K. Mganga
JUDGE