

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

LABOUR REVISION NO. 5 OF 2022

(Originating from Labour Dispute No. CMA/NYAM/198/2021)

SABRINA HALFAN ABDULRAZAQ APPLICANT

Versus

SAYONA DRINKS LTD RESPONDENT

JUDGMENT

1st November 2022 & 28th April 2023

ITEMBA, J:

This is an application for revision whereas **Sabrina Halfan Abdulrazaq** herein the applicant, is challenging the decision by the Commission for Mediation and Arbitration hereinafter CMA, issued in respondent's favour, on 29.12.2021.

Facts which led to this application are that, on 1st February, 2021, the applicant was employed by the respondent as a van sales lady. A few months later, on 27.6.2021, her employment was terminated. According to the termination letter, the ground for termination was that the applicant has been '*absent from work for more than six consecutive days without prior permission or any authorization from line Manager*'. The applicant referred the dispute to CMA alleging that the respondent has breached her employment contract. The CMA issued a decision

that the applicant's termination of employment was lawful and she is not entitled to any remedy. The applicant was aggrieved by this decision and she filed this application. Her supporting affidavit is coupled with the following grounds:

- a) That, the Honourable arbitrator erred in law and fact to hold that the respondent followed the procedure in terminating the applicant's contract.*
- b) That, the Honourable arbitrator erred in law and fact to hold in favor of the respondent while the applicant was not accorded the right to have her legal representative.*
- c) That, the Honourable arbitrator erred in law and fact to hold that the applicant did not show sufficient cause for her absence while she did so.*

In opposition, the respondent filed a counter affidavit deposed by one Paulo Almasi, the Human Resource Manager. At the hearing, both parties were represented by learned counsels namely; Messr. Majid Kangile and Andrew Buhigo for the applicant and respondent respectively. Upon being given an opportunity, the applicant's counsel chose to start by addressing the court on the issue of timeliness of the application before the CMA as it was raised by the defendant in his counter affidavit.

Mr. Kangile told the court that the applicant's dispute was based on breach contract. That, Regulation 10(1) (2) of the Labour Institution (Mediation and Arbitration Rules) GN 64 of 2007 states that all disputes shall be referred to CMA within 60 days except for disputes of unfair termination which has a limitation of 30 days. That, according to CMA Form No. 1, the nature of dispute is breach of contract and it was filed in less than 60 days therefore the counsel for respondent misled himself by stating that the dispute was therefore filed within time.

In reply, Mr. Buhigo insisted that the application was filed out of time at the CMA because the time limitation set is 30 days. That, it does not matter if the dispute was filed as an unfair termination or as 'any other dispute' which is not unfair termination. He argued that the opening statements and issues raised at CMA shows that the dispute was on termination of employment. He also cited the cases of **Penna Pura Oil Tanzania Ltd v Ekta V Karsanji, Revision no 317 of 2020, High Court Labour Division, DSM** and **St. Joseph Kolping Secondary School v Alvera Kashushura Civil Appeal No. 377 of 2022, CAT Bukoba**, which held that it does not matter the nature of contract if the dispute is on termination of employment, it has to be filled within 30 days.

In his rejoinder Mr. Kangile argued that the word 'all other disputes' in Regulation 10(2) 'includes breach of contract and that the case law cited should not be relied because the learned counsel has neither supplied the copies to the applicant nor mentioned the page or citation of the same.

For the reasons about to unfold, I will start deliberating this first ground because it touches the jurisdiction of the CMA. I find it important to underline the fact that this issue of time limitation is a jurisdictional issue and it can be raised at any stage of proceedings. In the case of **Mohamed Mohamed and Another v. Omar Khatib**, Civil Appeal No. 68 of 2011 (unreported) the Court held *inter alia* that;

"It is elementary that in our civil justice system parties are bound by their pleadings. In this case, the issue of time bar was not raised by the parties in their pleadings. In this sense, it was quite in order and absolutely perfect for the courts below not to deal with a matter which was not canvassed in the pleadings, notwithstanding the Order given by Dahoma, J., which we may respectfully say that it was given in the form of an advice, so to speak. In saying so, we do not mean to downplay the importance of the mandate given to courts for dealing with a jurisdictional issue even where it was not raised by the parties

in their pleadings. We are aware that the question of jurisdiction is fundamental and can be raised at any stage of the proceedings. However, in the justice of this case, we do not see how the point could be dealt with adequately without engaging ourselves in an exercise of ascertaining the facts in the case. We say so because it is from the facts and the evidence thereto that we can meaningfully be in a position to make a decision on whether or not the suit was time barred. Certainly, our preoccupation at this stage should be to deal with matters of law only. We are not expected to deal with a point whose proof might entail revisiting the factual evidence in the case."

(Emphasis is added)

See Also the case of **Yussuf Khamis Hamza v Juma Ali Abdalla** Civil Appeal No. 25 Of 2020, CAT Zanzibar among others decisions.

As to the time limitation of referring a dispute at CMA, **rule 10 of the Labour Institution (Mediation and Arbitration Rules) GN 64 of 2007** states thus:-

- i) *Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.*

ii) All other disputes must be referred to the Commission within sixty days from the date when the dispute arised.

It means, the difference between rule 10(1) and 2 is, when the dispute is over termination of employment it must be referred to the CMA within 30 days while all other disputes are referred within 60 days.

Back to the case at hand, according to CMA Form No. 1, the nature of dispute is breach of contract and it arose on 29.6.2021. The dispute was filed at CMA on 9.8.2021. Therefore, the applicant filed the dispute at CMA 41 days after the dispute arose. Basically, the applicant agrees that the dispute was filed at CMA beyond the time limitation of 30 days. His only disagreement is that the nature of applicants' dispute is not unfair termination but breach of contract and therefore, it does not fall under Rule 10(1) of GN 64 of 2007 which provides for 30 days but under Rule 10(2) which provides for 60 days.

On whether breach of contract falls under 'termination of employment' or 'any other dispute'. I find it apt to borrow a leaf from the Court of Appeal decision in **Stella Lyimo v CFAO Motors Tanzania Limited**, Civil Appeal No. 378 OF 2019. The Court was faced with an almost similar issue and it had this to say:

*'Despite Mr. Ndosi's attempt to argue against the application of the section to the appellant, we are not persuaded by his argument. Contrary to the learned advocate's submission that his client's case before the CMA was one of breach of employment contract distinct from unfair termination which is what is targeted by section 35 of the Act, the facts on the ground speak otherwise. First of all, we do not think the learned advocate is correct in his submission that breach of an employment contract is distinct from a complaint based on unfair termination. **It is trite, we think, that unfair termination is one and the same as a breach of contract by termination other than what is regarded as fair termination under section 36 (a)(i) of the Act. Obviously, there could be various forms of breaches of an employment contract not necessarily based on unfair termination.** However, the assertion that there was a breach of contract as the appellant did before the CMA attracting compensation of two years' salaries and damages falls squarely on a complaint that the respondent terminated the contract unfairly since the appellant considered herself to have been an employee of the respondent. **We find it difficult to follow the***

***appellant whose cause of action was, for all intents and purposes, predicated upon repudiation of the binding contract of employment asserting breach of such contract without regard to unfair termination.'* (emphasis added)**

Inclined to the wisdom in this decision, I am of the firm view that breach of contract is one among several forms of unfair termination. So long as the applicant was challenging the termination even if she will term it breach of contract, she is obviously challenging the unfairness termination. And without trying to overemphasize, under those circumstances, the applicant ought to have filed her application at the CMA within 30 days after the dispute arose. The applicant, having failed to do that, her application was time barred and the CMA was not vested with jurisdiction to proceed with Mediation and Arbitration.

In the premises, I proceed to quash the proceedings of the CMA and set aside the award and orders thereof. Since the revision application is predicated on a null decision of the CMA which is already quashed, there is no competent revision application to be entertained by this court.

The application is therefore struck out for being incompetent. The applicant is at liberty to make a fresh reference to CMA if she so wishes which is to be tried before another competent arbitrator but subject to

compliance with the mandatory requirement stipulated under the related laws.

This being a labour dispute, each party bears its own costs.

It is ordered accordingly.

DATED at **MWANZA** this 28th day of April, 2023.

