IN THE HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(LABOUR DIVISION)

REVISION APPLICATION NO. 25 OF 2022

(Arising from CMA/KLM/MOS/ARB/01/2019 – Moshi)

TPC LTD..... APPLLICANT

VERSUS

FIDELIS MUSHI .....RESPONDENT

JUDGMENT

19th December 2022 & 2nd February, 2023

A.P.KILIMI, J.:

The respondent filed a labour dispute at Commission for Mediation and Arbitration at Moshi, hereinafter (CMA) against applicant who was his employer claiming compensation and contractual benefits after being terminated as employee. After the hearing CMA resolved that the respondent's employment was terminated unfairly hence ruled that the respondent is entitled to be paid compensation equal to 12 months salaries.

CMA thus ordered appellant to pay the respondent Tsh. 14,825,628/- within 14 days.

The applicant being aggrieved with the ruling of the CMA in the said Labour Dispute which was No. CMA/KLM/ARB/01/2019. He has filed this revision application moving this court under **Section 91 (l)(a), Section 91 (2)(b) and (c)** of the **Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019;** read together with **Rule 24 (1) (2) (a) (b) (c) (d) (e)** and **(f), 3 (a) (b) (c) and (d) and Rule 28 (1)(c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 and any other enabling provisions of the law.**

The Applicant prayed for the following orders:

1. That this honorable Court be pleased to call for records, revise and set aside the whole Award of the Commission for Mediation and Arbitration on dispute No. CMA/KLM/MOS/ARB/01/ 2019 and examine its legality, proprietiness and correctness of the decision and orders made thereon and quash and or revise the same as it deems appropriate so to do.

2. That this Honorable Court be pleased to determine the matter in the manner it considers appropriate and give any other relief It considers just to grant.

This application is supported by an affidavit duly sworn by the Applicant's advocate, in adverse side it was contested by the counter affidavit duly sworn by Ms. Magdalena Kaaya, the respondent's advocate.

Before I dwell in into arguments of the parties in respect to above prayers, let me briefly highlight the background of the dispute. The applicant had employed the respondent as the Railway Track Supervisor. In 2018 the applicant decided to terminate the employment contract with the respondent following an alleged act of insubordination by the respondent towards the employer. The termination was preceded by a disciplinary hearing where the respondent was charged and heard. The respondent was dissatisfied with the reasons for termination of his employment and the procedure followed before he was terminated. This is what led the respondent to rush to the CMA where he sued the applicant for breach of contract and unfair termination.

Before the CMA parties were heard on the following agreed issues; first whether the reasons for termination of employment were fair, second was whether the procedure followed before termination was fair and third was whether the complainant was entitled to the reliefs claimed. Following the hearing the CMA decided in favour of the respondent and awarded him a compensation as afore stated.

In this court, the Applicant counsel's affidavit in support of the application, raises the following issues for determination by the court: -

First, whether the Respondent properly moved the Commission for Mediation and Arbitration. Second; whether the Respondent concealed the fact that he was employed by the Applicant on a fixed term contract of employment. Third; whether the Respondent was furnished with unlawful compensation, a compensation if carefully examined by the Arbitrator would not have been allowed to stand. And fourth; whether the Arbitrator was biased in the course of hearing and determining the Complaint before the Commission for Mediation and Arbitration.

At the hearing of this application, the applicant was represented by Mr. David Shiratu learned advocate while the respondent enjoyed the service of Ms. Magdalena Kaaya learned counsel, it was agreed and the court acceded to it that this application be argued by way of written submission, I applaud both counsels for timely submission as per given schedule. I will refer to them whenever necessary.

In his submission Mr. Shiratu adopted his affidavit and further regarding to first issue raised submitted that, the Respondent was employed by the Applicant under Fixed Term Employment Contract. Therefore its termination requires to be challenged before the Commission for Mediation and Arbitration under the "Breach of Contract", and not under unfair termination as he did. Thus, Compensation if awarded to a contracted employee under fixed term contracted, compensation does not fall under the ambit of an employee employed under open ended or permanent and pensionable employee, instead if a contracted employee satisfactory proof that his/her employment contract was breached by the Employer the only remedy to the employee shall always be compensation on the remaining period of the contract.

The applicant's counsel further submitted that the respondent had improperly moved the CMA under section 40 (1) of to determine his employment cause on unfair termination as if he was not employed under a fixed term contract. Thus, the only remedy available for a dispute under fixed term contract was payment for compensation on the remaining period of the contract contrary to what CMA decided. To buttress his stance Mr. Shiratu cited the case of Mtambua **Shamte and 64 Others Vs Care sanitation and Suppliers**, Revision No. 154 of 2010 Precision **Air Service PLC Vs David Jibo** Consolidated Revision No. 921 of 2019, **Jordan University College Vs Mark Ambrose** Revision No. 37 of 2019 and **Malaika B. Kamugisha Vs Lake Cement** Revision No. 591 of 2019 (All unreported)

In regard to the second issue he raised Mr. Shiratu submitted that, the respondent had concealed the fact that he was employed under a fixed term contract, he never disclosed before the (CMA) that his employment contract with the Applicant had remained only with six months before the same expires. The fact which misleads the CMA leading to an unlawful award of compensation. He further argued that, under normal context the Respondent before the Commission for Mediation and Arbitration was bound to prove that there existed a contract of employment between him and the Applicant

whether fixed term contract or otherwise, and this was the burden of proof to the Respondent, but he concealed the same. Therefore Mr. Shiratu called upon this court to draw adverse inference to the respondent by citing the case of **KCB Bank Tanzania Limited v. Sunlon General Building Constructors Ltd & 2 Others**, Commercial Case No. 73 of 2013 HCT Commercial Division Dar es Salaam (Unreported).

Arguing in respect to the third issue as to whether the Respondent was furnished with unlawful compensation, a compensation if carefully examined by the Arbitrator would not be allowed to stand submitted, the fact that the Arbitrator did went on Awarding the respondent unlawful entitlements that goes very much beyond the amount he was entitled, makes the Award to be null and void ab initio.

In the final issue the counsel of Applicant contended that the Arbitrator was biased in the course of hearing and determining the Complainant before the Commission for Mediation and Arbitration because it said Respondent was never given the right to bring witnesses, while was furnished a charge sheet which provide that avenue as a prescribe form and lastly it is a law if one aggrieved by the decision of the Arbitrator can challenge the decision

before the Labour Court within 42 days from the date of the decision, but rather the Award issued by CMA was compelling the Applicant to pay the Respondent within 14 days without any legal justification that allows the Arbitrator to issue such an order.

Responding to the above, counsel for respondent avers that applicant's claim is not valid because when filing his dispute and the CMA in CMA F.1 he ticked both unfair termination and breach of contract as causes of action. The respondent further contends that termination of a fixed term contract in any mode which is unfair is as good as breach of contract, to buttress her stand he cited the case of **Stella Lyimo v. CFAO Motors Tanzania Limited**, Civil Appeal No. 378 of 2019 CAT at Dsm (unreported)

In respect to the second issue raised by the applicant, the respondent's counsel contended that the issue of him concealing some material facts is a new issue that the applicant is raising and that is contrary to the legal principle which prohibits raising of new issue at the appellate stage which was not deliberated at the trial court. He further contends that at the CMA both parties had agreed upon existence of the employment contract in their opening statements so mode of contract was not an issue. To maintain her

stance the counsel cited the case of **Juma Vs. Manager PBZ Ltd & others** [2004] 1 EA 62.

The counsel for respondent responding on the third issue contended that, In the first place, as long as it was decided by the Court of Appeal of Tanzania that breach of contract is as good as unfair termination, then this issue lacks legs to stand. On the second place, as longer as the issue of duration of contract was not challenged before the CMA, then the lawfulness and unlawfulness of the compensation lacks legs to stand also. And in the last issue of bias the counsel contended that Arbitrator was not bias when reaching at the conclusion she reached because she listed facts that used to determine the unfairness of procedure at the disciplinary hearing.

In his rejoinder, the applicant's counsel briefly contended that the fact that respondent checked both unfair termination and breach of contract, then the burden of proving these facts rested on who substantially asserted the affirmative of the issue and not upon the party who denies it. He also added that parties are bound by their own pleadings and that no party should be allowed to depart from his pleadings. To buttress his position the counsel cited the case of **Paulina Samson Ndawavya Vs Theresia Thomas**

Madaha Civil Appeal No. 45 of 2017 (Unreported) and **James Funke Gwagilo Vs Attorney General** [2004] TLR 161

Having considered both submissions from the parties, the issues raised by the applicant and the record of CMA. I find it convenient to direct myself on examination of legality, proprieties and correctness of the decision and orders thereto made by CMA. This move will cut across all issues raised by the applicant except issue number four which will be argued separately.

It is a trite law that, unfair termination is one and the same as breach of contract by termination other than what is regarded as fair termination under the law. (See **Stella Lyimo v. CFAO Motors Tanzania Limited** (supra). Whilst Section 35 of the Employment and Labour Relations Act [Cap 366 R.E 2019] hereinafter ELRA provides that the provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts. That sub part deals with Unfair termination of employment, therefore, the principle of unfair termination under the ELRA do not apply to fixed term contract unless the employees establish a reasonable expectation of renewal as provided under Section 36 (a) (iii) of the ELRA. Moreover, Rule 4 (2) of the

Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 provides that:

> *"Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provides otherwise."*

Based on the facts pleaded and the law applicable the fact the CMA was properly moved to determine the dispute cannot be answered without examining the contract in question. Having gone through the records, the same reveal that during hearing at the CMA, the employment contract between parties was never tendered as evidence by either party.

According to Applicants' submission the respondent's contract of employment was one of a fixed term, a fact which the respondent did not deny. Nevertheless, the applicant representative one Emmanuel Anthony Ngaiza on 20th day of March, 2019 filed list of documents to be relied upon and one of those documents was "M1" Limited Duration Employment Contract, but the same was neither tendered at the CMA as evidence, nor prompted the CMA to refer to it and inquire its validity and status.

It is trite that, Section 37(2) (a) of the ELRA places the burden of proving that the termination of employment is fair on the employer by proving that the reason for termination was valid. The words of this provisions are clear and unambiguous, it is a trite law if the words of the statute are plain and unambiguous and admit only one meaning, there is no need for construction. See for instance, **the Board of Trustees of the National Social Security Funds v. the New Kilimanjaro Bazaar Limited,** Civil Appeal No. 16 of 2004 and **Dongote Industries Ltd Tanzania v. Warnercom (T) Limited,** Civil Appeal No. 13 of 2021 (both unreported).

That means if the employer proves that the reason for termination was valid then the termination of employment becomes fair. In the present case the applicant being the employer ought to have proved that the termination was fair and this could not have been done without proof of breach of the contract by the employee which would have also required the employer to provide the employment contract as evidence. Therefore, it is therefore unbecoming for the applicant to blame the respondent for having concealed some facts regarding the type of his employment contract. Nonetheless, despite of being provoked about the important of the said contract of

employment was not tendered as evidence. This is reflected on the record on 10/11/2021 one Oliva Justin Tarimo Human Resource Officer testified at the CMA, where at page 60 of the typed proceeding, when she was cross examined had this to say:

> *"swali: Ni sahihi kuwa kutunza kumbukumbu ni jukumu lako?*
> *Jibu: Ndiyo*
> *Swali: Mikataba ya ajira ni sehemu ya kumbukumbu?*
> *Jibu: Ndiyo*
> *Swali: Ni sahihi kuna haki nyingine zinaweza kuwa kwenye mkataba na siyo kwenye salary slips?*
> *Jibu: Ndiyo*
> *Swali: Mfano gani la faida?*
> *Jibu: Ndiyo*
> *swali: Hilo suala lipo kwenye mkataba wa mlalamikaji?*
> *Jibu: Ndiyo*
> *Swali: Sina swali*
> *Re- Examination*
> *Sina Zaidi"*

In the instant application no any evidence was adduced at the CMA to prove that the status of the respondent's Contract of Employment, either fixed, renewed or permanent. only this could have been known is through employment contract. On the same hand, provision of Rule 8(1) (a) of the GN. No. 42 of 2007 allows the employer to terminate the employment of the employee as long as he complies with the provision of the contract relating

to termination. Now, having noted the importance of evidence of the employment contract alleged to have been terminated in the determination of this dispute between parties, I find that its absence in evidence makes the whole decision of the CMA wanting. The CMA was also required to examine the employment contract in order to arrive at a proper decision.

I am mindful that, under the provisions of sections 91 (2) (a) - (c) of ELRA this Court has powers to revise the award made by the Arbitrator. (See the case of **Selcom Gaming Limited Vs Gaming Management (T) and Gaming Board of Tanzania** (2006) TLR 200.) At page 18 of the typed Award, the CMA observed as follows;

> *"It has been established that the complainant's employment was terminated unfairly hence the Commission finds that the complainant is entitled to compensation equal to 12 months salaries. DW1 testified the complainant's salary was 1,235,469/- as can be seen in his salary slip (exhibit R-7) and in that case 12 months salaries are equal to 14,825,628/."*

In line with what I have discussed above, and in responding to the second issue as to whether the award was lawful, it is my considered opinion that the award was not lawful. The compensation of 12 months salaries was not justified, whether accrue from permanent contract of employment or fixed term contract, and it could have proven to fixed term contract, there were a

need-to-know months remained on the said contract to expire and that could have been the right of the respondent as the law requires. (See the case of **Precision Air Service PLC v. David Jibo** and **Jordan University College v. Mark Ambrose** (supra)

In line with the above cited provision of the law, since the respondent's claim at the CMA was that of unfair termination the applicant was duty bound to prove that there was a material breach by the respondent. This would also require the applicant to have produced as part of evidence the employment contract during the hearing of the dispute. This would in turn prove that the termination was fair because of a fair reason. Therefore, having observed above, I am settled that, the said CMA award cannot be said to have been lawful if the hearing procedure is wanting for missing some important evidence that would lead to proper determination of the dispute.

The above notwithstanding, I find it compelling to look at the issue where, the applicant alleged that the Arbitrator was bias, in order to appreciate the legitimacy or otherwise of what is alleged to be bias, need arises for having the term "bias" defined. West's **Encyclopedia of American Law**, 2nd Edn., 2008, defines bias in the following words:

> *"Predisposition of a judge, arbitrator, prospective juror, or anyone making a judicial decision, against or in favour of one of the parties or a class of persons. This can be shown by remarks, decisions contrary to fact, reason or law, or other unfair conduct."*

The definition goes further to lay a description of bias by stating as follows:

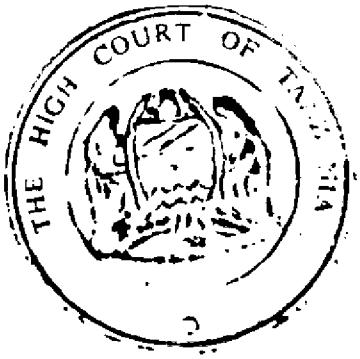
> *"A particular influential power which sways the judgment; the inclination or propensity of mind towards a particular object.... Justice requires that the judge should have no bias for or against any individual; and that his mind should be perfectly free to act as the law requires."*

I have considered the facts establishes the said bias by the applicant, I do not think the learned advocate for applicant is correct in his submission that the arbitrator was bias. This is because to my view does not feature on the above principles rather than misapprehension of facts and the law done on part of the Arbitrator, and this is merely on how he did not clutch the hearing form which is a standard form, which clearly indicates availability of an employee to call witnesses if any and the order the Applicant to pay the Respondent within 14 days instead of retaining the days of the right of appeal for any aggrieved party. Thus, the same has no merit and dismissed.

In conclusion thereof, I find that the CMA arbitral award was improperly procured. As result, I find that the revision application has merits and consequently is allowed. The Commission proceedings is hereby quashed and its award is set aside. The Respondent is hereby granted leave to file a fresh dispute before the CMA within 90 days from the date of this judgment if he is still interested to pursue the matter, and the same be heard by another different Arbitrator.

This being a labour matter, I make no order as to costs.

DATED at MOSHI this 2nd day of February, 2023



A. P. KILIMI

JUDGE

2/02/2022

Court: - Ruling delivered today on 2nd day of February, 2023 in the presence of Emanuel Anthony counsel for respondent and David Shiratu counsel for applicant.

Sgd: A. P. KILIMI

JUDGE

2/02/2022

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI

JUDGE

2/02/2022