IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]

AT ARUSHA

CONSOLIDATED REVISION APPLICATIONS NO. 13 AND 14 OF 2023

(Originating from the Commission for Mediation and Arbitration at Arusha, Labour Dispute No. CMA/ARS/184/21/105/21)

NICHOLAUS OKETA ..... APPLICANT

VERSUS

TANELEC LIMITED ..... RESPONDENT

JUDGMENT

29th November, 2024 & 7th February, 2024

MWASEBA, J.

Nicholaus Obedi Oketa the applicant herein, referred his dispute to the Commission for Mediation and Arbitration for Arusha (hereinafter "the CMA") vide Dispute No. CMA/ARS/184/21/105/21 against the Respondent herein, who was his employer. To the CMA, the applicant complained for unfair termination of his employment by the respondent. According to the pleadings and the evidence adduced, the applicant was employed by the respondent in the winding section, from 2017, on contractual basis renewable for one year. On 02/01/2021, the applicant and respondent signed another contract that would expire on 31/12/2021 (exhibit P1).

On 17/02/2021, the applicant was permitted to go to hospital at 12:30hrs, but he went at the hospital at 05:00hrs. He did not surrender the sick sheet to the employer, until after two days lapsed. On 25/02/2021, he was served with a letter from the production foreman, requiring him to state in writing why he decided to join the ED of three days given to him with the Off-days, which was contrary to the company policy. On 03/03/2021 the applicant was issued with suspension letter for fourteen days, with right to appeal if he so wished. On 19/03/2021, the applicant was served with another letter issued by the Human Resource Officer to show cause why disciplinary action should not be taken against him for what she alleged giving untrue statements to the company, showing clear conduct of disobedience, mistrust and disrespect to his seniors at various levels of the company. The show cause letter was admitted as exhibit D2. On the same day, the applicant responded to the show cause letter denying the allegations levelled against him. The reply letter was admitted as exhibit D3. On 23/03/2021, the applicant was served with summons to attend disciplinary hearing on 25/03/2021 at 2:00 pm. The summons was admitted as exhibit D4. The hearing form was admitted as exhibit D5. The applicant appealed to the Manager, but his appeal was barren of fruits. The appeal form and the findings thereon were admitted as

exhibit D6 collectively. On 29/04/2021, the applicant was terminated from employment on the alleged grounds of gross dishonesty, mistrust and disrespect to his immediate supervisor and Management. The termination letter was admitted as exhibit D7.

After being terminated, the applicant referred the dispute of unfair termination to the CMA as above hinted. In the CMA F1, the applicant claimed among others compensation for thirty-six months which he calculated to the tune of TZS 13,680,000/=, one months' notice to the tune of TZS 380,000/= and severance pay at the tune of TZS 560,000/=. The applicant also claimed to be paid overtime and certificate of service.

After full trial, in its award handed down on 05/01/2023, the arbitrator found that the claim was based on breach of contract and not unfair termination as preferred by the applicant. The respondent was found to have breached the employment contract for terminating the applicant without valid reason. The respondent was ordered to pay the applicant a total of TZS 3,423,749.94, being eight month's salary that was due in the contract and one month salary serving as notice of termination.

Both the applicant and respondent were aggrieved by the decision of the CMA, they preferred separate Revisions in this court. Whereas the

applicant preferred Revision Application No. 13 of 2023, the respondent preferred Revision Application No. 14 of 2023. Thus, I ordered consolidation of the same. At the hearing of both applications, the applicant appeared in person, unrepresented while the respondent was represented by Mr. Aggrey Kamazima, learned advocate. Hearing of the applications was through filing of written submissions.

My perusal of both applications reveals that the point the parties lock horns is one major point, whether it was proper for the learned arbitrator to find that the claim was based on breach of contract and proceed to determine the same while at the CMA, the cause of action was predicated on unfair termination.

In their submissions, both the applicant and counsel for the respondent prayed to adopt the affidavits in support of their respective positions forming part of their submissions. In his submission in chief, the applicant raised three issues as follows:

a) *Whether the applicant was entitled to overwork payment;*
b) *Whether the arbitrator erred in law for failure to rule out that there was unfair termination of employment; and*
c) *Whether the arbitrator erred in law in holding that the arbitral award be paid within a year.*

On his part, counsel for the applicant in the cross revision also raised three points of grievances as follows:

a) *The honourable arbitrator erred in law and fact by entertaining the dispute of breach of contract while the cause of action that was filed before him was of unfair termination;*
b) *The honourable arbitrator erred in law and fact by deciding that the reason for termination was unfair; and*
c) *The honourable arbitrator erred in law and fact by failure to consider the strong evidence adduced by the applicant and generally failed to evaluate the evidence on record.*

Submitting on the second issue in the application in chief which was the subject of discussion by Mr. Kamazima in the 1st and 3rd grounds of complaint in the counter revision, both the submission in chief and reply submission the applicant contended that it was wrong for the arbitrator to hold that the principle of unfair termination does not apply to the employee with fixed term contract because the law is settled that the principles of unfair termination apply to all types of contracts. He referred recent decision of the Court of Appeal, in the case of **St. Joseph Kolping Secondary School v. Alvera Kashushura,** Civil Appeal 377 of 2021) [2022] TZCA 445 (18 July 2022). He maintained that all conditions under **Section 37 of the Employment and Labour Relations Act,** (hereinafter "ELRA") are mandatory therefore applicable to all employment contracts. In line with the above authorities, the applicant also referred other decisions such as: **Stella Lyimo v. CFAO Motor Vehicle Limited,** Civil Appeal No. 378 of 2019

and **City Square Hotel v. Kassim Copriance**, Revision Application No. 373 of 2022 [2023] THLD 1129 (February 2023). In the latter case, the applicant insisted that since the principles of unfair termination apply to all types of contracts as specified under **Section 14 of ELRA**, the arbitrator was correct to determine the dispute irrespective of whether it was pleaded under unfair termination or breach of contract. It was counsel's submissions that he prefaced his dispute under **Section 37(1)(2) of the ELRA**. During hearing of the dispute, the applicant led evidence to prove that he was unfairly terminated because there was warning letter issued to the applicant on 03/03/2021, inquiring him to abstain from committing any misconduct for a period of twelve months.

According to the applicant, relying on the letter, it was self-explanatory that the contract automatically renewed because the twelve months period would lapse on 03/03/2022, while the contract showed that it would lapse on 31/12/2021. He maintained that the issues of breach of contract were absolved hence what ought to have been the focus at that material time was upon the arbitrator to consider whether there were valid reasons for termination and whether fair procedures for terminating him were adhered to the law.

On his part, Mr. Kamazima in both the submission in chief and reply submission in respect of the above issue, which was also the crux

of the 1st and 3rd complaints in the counter revision, amplified that the applicant had fixed term contract with the respondent which commenced on 01/01/2021 and would expire in December, 2021, making reference to exhibit P1. He also made reference to **Rule 4(1) of the Employment and Labour Relations (Code of Good Practice)**, G.N No. 42 of 2007 (hereinafter referred as "G.N No. 42 of 2007"), arguing that termination of employment contract shall be in accordance with the agreement. According to Mr. Kamazima, the evidence on record as well as exhibits P1 and D1 unilaterally showed that the applicant admitted that he had fixed term contract with the respondent. He relied on the principle that parties are bound by their pleadings adding that no party shall be taken at a surprise during hearing of the matter. He relied on the famous case of **James Funke Gwagilo v. Attorney General** [2004] TLR 161.

The learned counsel for the respondent submitted that the principles of unfair termination do not apply to fixed term contracts of employment. On authority, he referred this court's decision in **Jordan University College v. Mark Ambrose**, Revision No. 37 of 2019 which made reference to the case of **Mtambua Shamte & 64 Others v. Care Sanitation and Supplies**, Revision No. 154 of 2010. In his view, the arbitrator misled himself for changing the cause of action of unfair

termination preferred by the applicant replacing it with breach of contract in the cause of composing the award. He stressed that the arbitrator violated the enshrined principle of civil law that parties are bound by their pleadings as echoed in the case of **James Funke Gwagilo** (supra). By so doing, the arbitrator made a U-turn, respondent's counsel amplified. He urged the court to set aside the orders issued by the arbitrator because he had no mandate to entertain claim of breach of contract where the pleadings were pegged on unfair termination.

On the second ground, it was Mr. Kamazima's contention that having found that the arbitrator was precluded from determining whether the reason for termination was fair or otherwise because the provisions of Subpart E of the ELRA do not apply to employees with fixed term contracts. To reinforce his contention, he referred the Court of Appeal decision in **Asanterabi Mkonyi v. TANESCO**, Civil Appeal No. 53 of 2019. He implored the court to find merits in the second limb and allow his application. He prayed that the application be allowed by quashing and setting aside the arbitral award of the CMA.

In the first ground, the applicant claimed overtime payments in terms of **Section 19(1)(2)(3) and (4) of the ELRA**. He insisted that the law mandates employee to work for nine hours a day and maximum

of 45 hours in a week. Overtime hours are subject to payment, he added. He insisted that exhibit D1 was self-evident that he worked overtime from 7:00 to 6:00, and his evidence in that respect was uncontroverted. He relied on the following decisions to augment his proposition: **Upami Agro Business Ltd v. Hizani Abdul Kayanda**, Revision No. 10 of 2022 and **Benjamin M. Kimu v. Real Security Group and Marine Services**, Revision No. 199 of 2013.

Regarding the overtime payments, it was the contention of the respondent's counsel that in terms of **Section 19(1) and (3)(a) of the ELRA**, in order for an employee to claim for overtime payments, there must exist an agreement exclusively providing that the employee will be paid overtime. Further, the employee must claim the overtime payment at the end of each month worked. He relied on the authority cited by the applicant, in the case of **Upami Agro Businesss Ltd v. Hizani Abdul Kayanda** (supra). It was his insist that in order to be entitled for overtime payment, the overtime works must be provided and must be claimed at the end of each month when they accrue. He relied on the case of **Faisal Haroub v. Mohamed Enterprises Tanzania Limited**, Revision No. 925 of 2019, to augment his proposition. In the light of the case at hand, there was no evidence by the applicant to prove specific overtime and the claim of overtime by the applicant is

time barred as they were not claimed within 60 days from the time they accrued.

In his rejoinder submission, the applicant contended that the undisputed evidence that he worked overtime is the employment contract which specified that the applicant was to work from 7:00 to 6:00. His oral evidence also supported the evidence that he worked overtime hours without being paid. The respondent did not dispute his evidence to that effect, therefore in terms of **Section 123 of TEA**, they are estopped from denying it at this stage because it is tantamount to afterthought.

Similarly, in his rejoinder submission, Mr. Kamazima strenuously submitted that facts in the case of **Stella Lyimo** (supra) are distinguishable from the facts of the case at hand because in that case the applicant properly preferred her dispute in the CMA as breach of contract and not as unfair termination. He maintained that there is no authority giving power to the arbitrator to determine the dispute of unfair termination while the cause of action is breach of contract. He relied on another authority of this court in the case of **Glory Pancrasy Njau v. Vehicle Consulting Company**, Revision Application No. 134 of 2021, arguing that a claim preferred under unfair termination ought to be dismissed once the arbitrator resolved that the same ought to be

preferred under breach of contract. Both the applicant and counsel for the respondent reiterated prayers made in their respective submissions in chief and reply submissions.

I have duly considered the grounds under which the applications are preferred and the submissions by the applicant/respondent and the counsel for the respondent/ applicant. The main issues for determination are basically two. ***First,*** whether it was appropriate for the arbitrator to determine the dispute of breach of contract while the same was preferred as unfair termination; ***and second***, whether the applicant was entitled to overtime payments.

In resolving the first issue, both the applicant and respondent's counsel in their respective revisions locked horns on whether it was lawful for the CMA arbitrator to determine the dispute on merits bearing in mind that the same was preferred as unfair termination of employment while it ought to be preferred on the basis of breach of contract. Having revisited the CMA record, the applicant preferred the dispute claiming compensation for unfair termination. He claimed to be paid compensation of thirty-six months' salary for unfair termination. While composing the award, as apparent at page 2 of the typed award, the learned arbitrator remarked:

"Niende kwa haraka tu katika kuamua kiini cha kwanza kwa kusema kuwa, kwa kuzingatia maelezo pamoja na ushahidi wa Tume hii nimebaini kuwa, mlalamikaji hataweza kulalamika kuachishwa kazi mbele ya Tume hii. Jambo hilo linatokana na sababu kwamba, mlalamikaji alikuwa na ajira ya mkataba wa muda maalum na mlalamikiwa. Kwa mujibu wa kifungu cha 36(1)(a) cha sheria ya Ajira na Mahusiano Kazini Sura 366 Toleo la 2019 (hapa sheria), mwajiriwa aliye kwenye ajira ya namna hiyo hawezi kulalamika kuachishwa kazi isivyo halali bali, anaweza kulalamika kuvunjiwa mkataba wake wa ajira kinyume na sheria (breach of contract)."

From the above prescript, and applying an informal translation, the arbitrator opined that an employee with fixed term contract cannot refer his/her dispute to the CMA based on unfair termination. In his determination the arbitrator had the following to say:

"kwa sababu hiyo, kwa kuwa ajira ya mlalamikaji ilikuwa ni ya muda maalum, kwa mujibu wa kifungu cha Sheria hapo juu, mlalamikaji anastahili kulalamika kuvunjiwa mkataba kinyume na sheria zijulikanazo kama common law."

The arbitrator proceeded to determine the fairness of termination of the applicant's employment based on breach of contract of employment and at the end he was convinced that there was no fair reason for terminating the applicant's employment. The question which has tasked my mind is whether the arbitrator was justified in the

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approach he embarked on, by determining the fairness of the reasons for termination having resolved that the applicant ought to sue on breach of contract. Correctly as submitted by the applicant, the conditions under **Section 37 of the ELRA** are applicable in all forms of contracts. On authority, the case of **St. Joseph Kolping Secondary School v. Alvera Kashushura** (supra), relied on by the applicant, is instructive.

The import of the above section is easy to discern. An employment contract be it fixed or otherwise, cannot be terminated awkwardly without there being valid reasons and fair procedure for termination. In contracts for fixed term employment, the employer has no mandate to terminate the employee without adhering to the conditions stipulated under **Section 37 of the ELRA**. That was the holding of the Court of Appeal in **St. Joseph Kolping Secondary School** (supra), when the Court restated:

> "***We also do not agree with him that, under our laws a fixed term contract of service can be prematurely terminated without assigning reasons***. *This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. (See section 35 of the*

ELRA). In addition, creation of a specific duration of contract gives the employee legitimate expectation that if everything remains constant, he or she will be in the service throughout the contractual period. The expectation is defeated, ***if the same can be terminated at any time without reason****."*(Emphasis added)

In as much as I agree with him, I also dare say that **Section 37 of the ELRA** was purposely enacted to protect the employees from being arbitrarily terminated from employment. Any employee, be it under a fixed term or permanent contract, cannot be terminated without there being valid reasons and fair procedure for termination. That is why the Court of Appeal in the case of **Stella Lyimo** (supra) stretched the applicability of **Section 37 of the ELRA** in all forms of contracts, irrespective of their duration. In that case the Court stressed:

"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."*(Emphasis added)

In the light of the two authoritative decisions of the Court of Appeal, one may note that, all forms of employment contracts other than those falling under **Section 35 of the ELRA** are applicable in view of **Section 37 of ELRA**. The rationale of the authorities is to protect the employees from being arbitrarily terminated. Applicability of **Section 37 of ELRA** to all forms of contracts is only limited to the extent of adherence to valid reason and fair procedures before terminating an employee. It does not extend to reliefs one is entitled to, after being found unfairly terminated. While in breach of contracts the employee is paid the salary due for the term of the contract, the reliefs in the case of unfair termination are provided under **Section 40 of the ELRA**. It is trite to note however that, the principles of unfair termination do not apply to fixed term contracts or even special task contracts unless it is established that the employee reasonably expected renewal of the contract. See **Asanterabi Mkonyi v. TANESCO** (supra) and **Mtambua Shamte** (supra).

In the matter at hand, the applicant submitted that he expected renewal of his employment contract based on the warning letter (exhibit P2) which suspended him for twelve months. The applicant's line of argument is without merits, misconceived. The applicant cannot rely on exhibit P2 to conclude that there was legitimate expectation of the

renewal of the contract. The warning letter cannot act to supersede the explicit terms of the fixed contract signed by the two on 02/01/2021. It is therefore apt to confirm the decision of the CMA in this respect that there was no expectation of renewal of the contract by the applicant.

Having discounted that there was no expectation of renewal of the employment contract, and bearing the position of the law that principles of unfair termination are inapplicable in fixed term contracts, it is my considered view that the dispute was improperly preferred under unfair termination grounds. This court in numerous decisions has held that once the applicant prefers the dispute under breach of contract, the arbitrator is not enjoined to determine the dispute based on unfair termination. In this respect the following cases are illuminating: **Jordan University College v. Flavia Joseph** (supra), **Abell Kikoti and 5 Others v. Tropical Contractors Ltd**, Revision. No. 305 of 2019 and **Glory Pancrasy Njau v. VCS Vehicle Consulting Company** (supra).

Since the applicant in this matter preferred the dispute under unfair termination, the arbitrator was not justified to determine the dispute based on breach of contract. That, as submitted by counsel for the respondent, contravened the rule against pleadings that parties are bound by their own pleadings. The court cannot give what you did not ask. The Court of Appeal in **Melchiades John Mwenda v. Gizelle**

Mbaga (Administratrix of the Estate of John Japhet Mbaga - deceased) & 2 Others, Civil Appeal No. 57 of 2018 (unreported) at page 24, was dealing with land matter where the trial High Court fell into error when it declared the second respondent in that appeal the lawful owner of the disputed land while he did not plead ownership by way of counter claim. It was restated:

> *"It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for-see also* ***James Funke Gwagilo vs Attorney General*** *[2004] T.L.R. 161 and Hotel* ***Travertine Limited & 2 Others vs National Bank of Commerce*** *[2006JT.L.R. 133."*

The applicant has misconstrued the two decisions of the Court of Appeal he relied upon. He simply picked out some few sentences to suit his position without reading the reasoning of the Court holistically. The Court of Appeal overemphasized the duty to read the reasoning of the judgment holistically without picking up some few phrases. In the case of **Tumaini Massaro v. Tanzania Ports Authority**, Civil Appeal No. 36 of 2018, had the following to say:

> *"It is unfortunate that Mr. Waissaka culled out some few paragraphs and sentences from the judgment and read them out of the context of the entire judgment to drive home his argument that there was no reason given by the learned Judge.* ***It is a cardinal principle that a reason in a***

judgment has to be read in as a whole in the context of the issue that was before the court to have its true meaning and logic. "(Emphasis added)

Since the applicant did not pray to be awarded compensation of salary of the remaining duration of contract, it was highly irregular for the arbitrator to step into the shoes of the applicant granting him reliefs which were incompatible with what he prayed in the CMA F1. The first issue is resolved against the applicant that the arbitrator grossly erred by determining the dispute on the basis of breach of contract while the same was preferred as unfair termination. Having resolved the first issue in the affirmative, I find no compelling reasons to determine the second issue because the first issue goes to the jurisdictional aspect of the arbitrator to entertain the dispute.

Fortified by the above reasons and deliberations, the revision by the applicant is devoid of merits. Invoking the revisional powers bestowed upon me, I hereby quash and set aside the arbitral award of the CMA. The cross revision by the respondent is hereby allowed in its entirety. The CMA order compensating the applicant at the tune of TZS 3,423,749.94, is hereby quashed and set aside. This being labour dispute, I make no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 14th February, 2024.

N. R MWASEBA

JUDGE