**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)**

**CIVIL APPEAL NO. 378 OF 2019**

**STELLA LYIMO..... ...................................................................APPELLANT**

**VERSUS**

**CFAO MOTORS TANZANIA LIMITED ........................................RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania (Labour Division) at Dar es Salaam)**

**(Muruke, J.)**

**dated the 9th day of October, 2019**

**in**

**Revision Application No. 718 of 2018**

**...............**

## JUDGMENT OF THE COURT

02nd & 24th November, 2022

**MWANDAMBO, J.A.:**

This appeal involves issues from facts in which parties are relatively not in dispute but rarely dealt with by the courts under our labour legal regime. The appeal arises from an alleged breach of contract of employment for which the appellant claimed compensation and general damages before the Commission for Mediation and Arbitration (the CMA).

The material background leading to the complaint before the CMA goes thus; on 05/07/2016, the respondent CFAO Motors Tanzania Limited extended an offer of employment to the appellant, Stella Lyimo for the

position of Human Resource Manager for two years. It did so through a recruitment agent going by the name of Rada Recruitment, henceforth, Rada, by way of a forwarding e-mail of the same date. The appellant was required to signify her acceptance to the offer by 15/07/2016. Three days towards the deadline set for the acceptance of the offer two events occurred in a span of less than two hours. The first was the appellant's acceptance of the offer made by the respondent. The second was the respondent's revocation of the offer communicated by e-mail sent at 12:30 pm on 12/07/2016 to Rada for onward transmission to the appellant. Having accepted the offer, the appellant for her part, sent a signed copy thereof to Rada by an e-mail shown to have been sent on 12/07/2016 at 14:08 pm.

Whilst the appellant claimed that the respondent was in breach of a binding employment contract after the acceptance of the offer, the respondent claimed that no contract capable of being breached had come into existence upon revocation of the offer. Upon a disagreement on the stalemate, the appellant lodged a complaint before the CMA claiming breach of contract from which she asked compensation in the sum of TZS 96,000,000.00 equivalent to two years' contract salaries and TZS 20,000,000.00 by way of general damages.

The appellant's case before the CMA was that she had a binding contract of employment with the respondent which was unfairly terminated judged from the opening statement. The respondent for her part, maintained her stance that no employment contract came into existence following revocation of the offer.

One of the issues the CMA framed for its determination was whether the appellant was an employee of the respondent. Mindful of the provisions of section 61 (1) of the Labour Institutions Act, henceforth, the LIA, the CMA made a finding that the respondent had not led evidence proving that she was an employee of the respondent. It indeed sustained the respondent's case that no contract of employment capable of being breached or terminated ever came into existence at any point. In effect, the answer to the first issue rendered the rest of the issues superfluous even though the CMA dealt with them but answered all against the appellant. In the aftermath, the CMA dismissed the appellant's complaint resulting into an application for revision before the High Court (Labour Division).

The High Court was called upon to revise the award of the CMA under several provisions amongst others, section 91(1) of the Employment and Labour Relations Act (the Act). The application was also predicated upon

rule 28(1) (c), (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007 which vests powers in the Labour Court to revise the proceedings of any responsible person or body, the CMA included, on application of any party or on its own motion on any of the following grounds, namely; **one**, exercise of jurisdiction not vested in it by the law; **two**, failure to exercise jurisdiction so vested; **three**, acting in the exercise of its jurisdiction illegally or with material irregularity and; **four**, that there has been an error material to the merits of the subject matter involving injustice.

It is apparent that the High Court was preoccupied with the issue whether there was any material to the merits of the impugned award in which the CMA had concluded that there was no binding contract between the appellant and respondent. Unlike the CMA, the High Court (Muruke, J.), concluded that a valid and binding contract of employment had been formed between the parties upon the appellant accepting the offer. The learned Judge took the view that, as long as the respondent did not communicate its revocation to the appellant earlier, her acceptance to the offer, created a binding contract which was breached by the respondent resulting into damages. Having so found, the learned Judge revised the award in which the CMA had held against the appellant. All the same, it

dismissed the appellant's claim for compensation but sustained an award of TZS 20,000,000.00 in general damages.

That decision aggrieved both the appellant and respondent. The appellant's resent is against the refusal to sustain the claim for compensation of two years' salaries whereas, through a notice of cross appeal, the respondent faults the finding that there existed a valid contract between the parties notwithstanding the revocation. She is equally aggrieved by the finding that the appellant suffered damage as a result of the failure by the respondent's agent; Rada to inform her of the revocation of the offer.

Before us, the appellant had the services of Mr. David Ndosi, learned advocate, to prosecute her appeal and oppose the cross appeal through written submissions filed earlier on. Mr. George Ambrose Shayo, learned advocate, who represented the respondent before the High Court had equally filed written submissions in opposition to the appeal and in support of the cross appeal. We are grateful to the learned advocates' respective submissions on the issues before us but we may be excused for our inability to deal with most of them in view of the approach we have taken in disposing of this appeal.

At the beginning of the hearing of the appeal, we invited both learned advocates to address the Court on whether the CMA had jurisdiction to deal with the complaint involving alleged breach of a contract independent of the revocation of the offer. In the course of the hearing and at the Court's prompting, the learned advocates addressed us on the CMA's jurisdiction in the light of the provisions of section 35 of the Act regarding restriction of application of the provisions involving unfair termination to employees with less than six months in employment.

Not surprisingly, Mr. Ndosi's response was that the CMA was properly seized with jurisdiction in both instances. As to the first issue, Mr. Ndosi contended that, it was within the competence of the CMA to determine the existence of an employment contract in pursuance of section 14 (1) of the LIA. The learned advocate contended further that, section 61 of the LIA on the basis of which the CMA determined the complaint holding that there was no proof that the appellant was an employee, was erroneously applied because the issue before it did not relate to ascertainment of the status of the appellant viz-a-viz the respondent. Instead, he argued, the CMA should have resorted to section 10 of the Law of Contract Act to determine the existence of employment contract.

In relation to the application of section 35 of the Act, it was Mr. Ndosi's submission that the section could only be relevant had the complaint related to unfair termination but the complaint before the CMA was purely on breach of contract for which the appellant claimed compensation and general damages.

For his part, Mr. Shayo invited the Court to hold that the CMA lacked jurisdiction in both cases. First, the learned advocate argued that since no contract of employment came into existence, the CMA was not competent to determine whether such contract existed and if so, whether the respondent was in breach of it considering that the appellant had not started working for the respondent. Mr. Shayo was resolute that the appellant's remedy for the alleged breach lied elsewhere other than with the CMA. Mr. Shayo submitted that, at any rate, had the appellant been an employee of the respondent, she could not have resorted to referring a dispute before the CMA for breach of contract unless she was in such employment for a period of more than six months in terms of section 35 of the Act. It was his further submission that the appellant's remedy lied in suing for specific performance rather than a complaint before the CMA which was barred by the law.

From the submissions of the learned advocates for and against the issues we asked the learned advocates to address us on, it will be inevitable to discuss them without making a determination on the status of the appellant as the core issue before the CMA and the High Court. The learned advocate for the respondent resents the decision of the High Court in an application for revision quashing the decision of the CMA which had held that the applicant did not prove her status as an employee of the respondent.

For a start, we note that the learned Judge was influenced by her appreciation of the facts to the general law of contract independent of the Act. Regardless of the outcome, we think she was bound to determine the issues before her with reference to the Act. This became necessary by reason of the provisions of section 3 of the Act which requires that the interpretation of the Act must have regard to its principal objects particularly those set out under section 3(f) and (g) to wit:

> *(f) to give effect to the provisions of the Constitution of the United Republic of Tanzania of 1977 in so far as they apply to the employment and labour relations and conditions of work; and;*
> *(g) generally, to give effect to the core conventions of the International Labour Organisation and other ratified conventions.*

Needless to say, we have no doubt that the learned Judge was right in holding as she did that, unless an offer is revoked before it is accepted by the offeree, a contract comes into existence immediately upon its acceptance. She was equally correct in holding that the appellant communicated her acceptance of the offer before it was revoked regardless of the time interval between the two involving a period of less than two hours and thus, a contract of employment was concluded effectively placing the appellant in the position of an employee of the respondent.

The above notwithstanding, we find it compelling to look at the issue from the parameters of the Act and attendant jurisprudence to see whether it agrees with that reasoning and the conclusion. We start from the premise that the dispute referred to the CMA presented a relatively novel issue which, as alluded to at the beginning of this judgment, has hardly been tested in our courts be it the High Court or this Court. At the hearing of the appeal, the learned advocate for the appellant could only avail us a fairly recent decision of the High Court in **Lillian Sifael v. Mbeya Water and Sanitation Authority**, Civil Revision No. 11 of 2020 (unreported). Our own research landed into **Thomas Peter Ogunde Mboya v. Grand Royal Swiss Hotel** [2022] eKLR, a decision of the

Employment and Labour Relations Court of Kenya (the Employment Court) relying on a decision of the Labour Appeal Court of South Africa in **Wyeth SA (Pty) Ltd. v. Manqele & Others** (2005) 6 BLLR 523 which dealt with facts on the effect of withdrawal of an offer of employment after its acceptance before the employee starts work.

The facts in **Thomas Peter Ogunde Mboya v. Grand Royal Swiss Hotel** (supra) were that, the applicant was offered an employment after a successful interview following which, he duly accepted an offer for a fixed term contract lasting for two years. Acting on the instructions of the Human Resource Manager of the respondent, the applicant printed and signed a copy of the contract the respondent had sent electronically through an email and thereafter sent a scanned copy to the respondent by email. He subsequently delivered a signed hard copy to the respondent's offices in Kisumu. However, it turned out that the initial scanned copy sent earlier on by email had not yet been counter-signed by the CEO allegedly due to his engagement in other commitments. The appellant could not commence work. Subsequently, the respondent purported to withdraw the offer.

The Employment Court before which the appellant lodged his complaint acknowledged the fact that there was no provision in the local

statute catering for the situation. It thus sought reliance from the decision of the Labour Appeal Court of South Africa in **Wyeth SA (Pty) Ltd.** (supra) which it considered to be of comparable jurisprudence and determined the complaint in favour of the applicant. Drawing inspiration from **Wyeth SA (Pty) Ltd**. the Employment Court concluded that an offer of employment even if accepted verbally, constitutes a legally binding employment contract. It also considered the effect of the revocation and held that it constituted repudiation of the contract before the claimant could begin to fulfil his obligations therein.

Stripped of the unique details, the material facts in **Wyeth SA (Pty) Ltd** were more or less similar to the facts in **Thomas Ogunde Mboya** in that, both cases involved facts in which employers purported to withdraw offers of employment after acceptance and the employees had presented themselves to start work. The Labour Appeal Court adopted a purposive construction of statutes to find out whether the appellant became an employee of the respondent upon acceptance of the offer of employment. It did so having realised that the literal interpretation of section 213 of the Labour Relations Act, 1995 (the LRA) would be too narrow construction resulting into absurdity. It stated at para 52:

> *"The ultimate conclusion this Court arrives at is that the definition of employee in s 213 of the LRA*

> ***can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates.*** *The construction which counsel for the appellant seeks to place on s 213 is, in the circumstances, untenable as it leads to manifest ambiguity, absurdity and hardship." [Bolding added for emphasis].*

Back home, in **Lillian Sifael v. Mbeya Water and Sanitation Authority** (supra), the High Court was faced with an issue of a similar nature. The applicant in that case reported for work on the date she had indicated in the letter of offer which she accepted but was not allowed to work by reason of a letter from the CEO "cancelling the offer". The CMA ruled in favour of the respondent employer. In an application for revision, Karayemaha, J. treated the letter of offer accepted by the appellant as constituting a legally binding contract of employment notwithstanding the requirement for the employer to provide the employee with a written contract in pursuance of section 14 (1) and (2) of the Act.

It is to be noted that none of the decisions referred to are binding on this Court but considering that they are based on interpretation of employment statutes of comparable nature they carry with them

significant relevance to this appeal. We find more reason to subscribe to the reasoning of the High Court in **Lillian Sifaeli** to the extent it relates to the issue under consideration.

Applying our minds to the above decisions, we sustain the reasoning and the conclusion regarding the status of the appellant. We have no slightest doubt that the appellant fell into the definition of an employee under section 4 of the Act having entered into a contract with the respondent with an undertaking to work for her personally as an independent individual. Like the learned judge of the High Court, we hold that since the appellant accepted the offer of employment prior to communication of the respondent's revocation, a legally binding contract of employment came into being creating a relationship of employee and employer. That was regardless of the fact that the appellant had not yet commenced work. We share the same view with the Employment Court in **Thomas Ogunde Mboya** that the respondent's email revoking the offer communicated after its acceptance was no less than repudiating the contract before the appellant could begin to discharge her obligations therein; reporting for work on the agreed date.

It is significant that the Employment Court did not deal with any jurisdictional issue. That issue arose before the court in **Wyeth SA (Pty)**

**Ltd** whereby the Commission for Mediation, Conciliation Arbitration (the CCMA) had declined jurisdiction to conciliate the dispute having held the view that the claimant did not fall within the definition of an employee. Having concluded that the respondent Manqele was an employee, the Labour Appeal Court concluded that the employee was justified in approaching the CCMA. Ordinarily, that would be sufficient for us to hold likewise in answer to the first issue, but for the fact the CMA determined the complaint on its merits. This takes us to the second issue regarding the jurisdiction of CMA in the light of section 35 of the Act.

Despite our holding in answer to the first issue that the tenability of the appellant's complaint was subject to the provisions of section 35 of the Act which stipulates: -

> *"The provisions of this Sub-Part shall not apply to an employee with iess than 6 months' employment with the same employer, whether under one or more contracts".*

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 ail, 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. On the contrary, her own opening statement before the CMA appearing at pages 18 and 19 of the record of appeal reveals the following: -

> *"That, the complainant [was] contracted by the respondent as Human Resource and*

*Administration Manager from 08th July, 2016 and [illegally] and unfairly her contract terminated after tendering a resignation letter from her former employer as instructed by the respondent. The applicant was contracted with the basic salary of Four Million Tanzanian shillings (Tsh. 4,000,000/=).*

*That, the complainant contract was terminated by the respondent with neither reasonable reason nor justifiable procedures therefore her termination had no any valid or legitimate reason. The respondent gave the complainant valid offer and let her sign the same but iater on said that it has to be terminated with no reasons".*

She contended further that:

> *"...the respondent terminated the Complainant without giving her a chance to be heard, no chances to bring witnesses, representation and any documentations for her defence.* ***The hearing was not conducted and the Complainant was unfairly terminated*** *on the mentioned date above." [bolding added for emphasis]*

It is beyond peradventure that her case before the CMA was breach of contract of employment by unfair termination. That was regardless of

the fact that the respondent denied that the appellant had never been her employee as no contract of employment came into existence following revocation of the offer. Whatever the merits in the appellant's case, in so far as it was founded on unfair termination, it was expressly barred by section 35 of the Act. We had occasion to pronounce ourselves on this aspect in **Serenity on the Lake Ltd v. Dorcus Martin Nyanda,** Civil Appeal No. 33 of 2018 (unreported) and held that a challenge on unfair termination is not available to an employee with less than six months' contract and we reiterate that stance here.

It is apparent that the High Court determined the application on its merits in pursuance of rule 28(1) (c) of Labour Court Rules which resulted into setting aside the CMA award. It so acted because the appellant moved that court to revise the award on its merits oblivious of the fact that the CMA acted without jurisdiction in making the award, subject of the application, for revision as alluded to above. With respect, the High Court was enjoined by rule 28(1) (a) of the Labour Court Rules to revise the award for lack of jurisdiction but it failed to exercise that power. Section 4(2) of the Appellate Jurisdiction Act (the AJA) vests the Court with the powers of revision, authority and jurisdiction vested in the court from which the appeal is brought. We are of the firm view that it is opportune for us to

step into the shoes of the High Court and invoke rule 28(1) (a) of the Labour Court Rules by revising the impugned award as we hereby do and quash it for being a nullity as the CMA made it without jurisdiction. Having quashed the decision of the CMA, it follows that the decision of the High Court awarding the appellant TZS 20,000,000.00 as general damages cannot stand. It is hereby quashed and set aside.

Order accordingly.

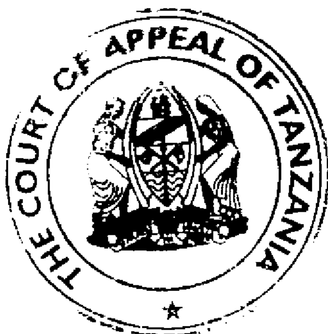
**DATED** at **DAR ES SALAAM** this 23rd day of November, 2022.

S. A. LILA
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

The Judgment delivered this 24th day of November, 2022 in the presence of Mr. David Ndossi learned counsel for the Appellant and holding brief for Mr. George Shayo learned counsel for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**