IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J. A., MASHAKA, J. A. And MAKUNGU, J.A.:)

CIVIL APPEAL NO. 278 OF 2021

MOROGORO INTERNATIONAL SCHOOL .....APPELLANT

VERSUS

HONGO MANYANYA ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Court Zone Centre at Morogoro)

(Mwipopo, J.)

dated the 4th day of June, 2021

in

Application for Revision No. 13 of 2020

JUDGMENT OF THE COURT

2nd & 10th May, 2023

MAKUNGU, J. A.:

On 4/6/2021, the High Court of Tanzania (Mwipopo, J), upheld the decision and award of the Commission for Mediation and Arbitration of Morogoro at Morogoro (the CMA) dated 17/01/2020 dismissing the appellant's revision. The appellant still believes that the termination of the respondent was substantively and procedurally fair. She is now before us with two points of grievance which are reproduced as under:

"1. That, the High Court Judge erred in law and facts when he misconceived the whole idea of a new issue (new employment) which was introduced by Arbitrator at the Commission, leaving aside the issue framed and recorded in the case file.

2. That, the High Court Judge erred in law when he treated unfair termination situation in the same way as a breach of contract when handling remedies aspects."

A brief historical background to this appeal reads as follows: The respondent herein was employed by the appellant in the capacity of ICT coordinator and ICT teacher for a contract of two years (exh. MKW1), from 1st August, 2016 up to 31st August, 2018. He enjoyed his employment until on 31st July, 2017. He was terminated for reason that the appellant was facing economic hardship. He was not satisfied with the appellant's reason for his termination. He successfully challenged that termination on account of substance and procedure being unfair and sought to be compensated with twelve (12) months' salary in the tune of TZS

25,435,200/= pending in his contract, and twelve (12) months' salary in the tune of TZS 25,435,200/= for unfair termination. He won the battle before the CMA. He emerged a winner in a subsequent Revision No. 13 of 2020 lodged by the appellant before the High Court Labour Division, at Morogoro. Being aggrieved, the appellant has preferred this appeal on the grounds indicated above.

At the hearing on 02/05/2023, the appellant was represented by Ms. Ester Elias Shoo, learned counsel. The respondent was in attendance, self-represented. The appellant had earlier filed written submissions on 30/09/2021 and the respondent had followed up with written submissions in reply which was filed on 27/10/2021.

Ms. Shoo adopted the written submissions in support of the appeal. In the written submissions, Ms. Shoo prayed to add ground No. 3 which reads:

> " *That the High Court Judge erred in law when abandoned the issues listed in the revision case at page 175 and adopted his own issues which were not brought to the attention of the parties for discussion."*

We granted the prayer sought. The appellant's learned counsel confidently, said that the submissions sufficiently clarified

the grounds of appeal. She prayed that the grounds of appeal be allowed.

In reply, the respondent adopted his written submissions and contended that the High Court Judge was right as there is no basis upon which to fault him. He beseeched the Court to find that the appeal is devoid of merit and dismiss it.

In the written submissions, the appellant contended, in respect of the first ground of appeal, that it was wrong for the arbitrator and the learned High Court Judge to accommodate a new issue and make it the basis of the decision without affording the appellant an opportunity to address it. The appellant argued that the issue of new employment was not pleaded by any party to the proceedings. She added that the rule that parties are bound by their own pleadings and issues framed in determining cases was not given weight at all. The appellant relied on financial constraints, which were pleaded and proved. To bolster her submission, the appellant cited three cases: **Frank M. Marealle v. Paul Kyauka Njau** [1982] TLR 32; **James Funke Gwagilo v. AG** [2004] TLR 161 and **Jaffer Juma v. Meneja PBZ Ltd and Others,** Civil Appeal No. 7 of 2002 (unreported) for the proposition that the court

could deal with unpleaded issue after inviting the parties to address the said matter.

As for the second ground, the appellant argued, in essence, that the parties entered into a two years contract (fixed term contract) which provided clearly the terms and conditions to be followed by each party. She argued further that following the terms and conditions of that contract the appellant exercised her right of terminating the contract on sound reasons. She cited the case of **Philip Joseph Lukonde v. Faraji Ally Said**, Civil Appeal No. 74 of 2019 (unreported) in which this Court adopted the position in Kenya on parties being guided by terms of contract. She faulted the learned Judge for awarding salaries for remaining period of contract. She claimed that the issue of breach of contract was not addressed before the court.

To the last ground of appeal, the appellant submitted that the Revision case had a list of issues at page 175 of the record of appeal which guided the submissions in court, but surprisingly, when composing the judgment, the learned Judge raised his own issues as reflected on page 241 of the record of appeal. She argued that it was an error and it was against the principles laid

down by this Court in **Frank M. Marealle** case (supra). She therefore prayed that this appeal be allowed.

Replying, on the first and second grounds of appeal, in his written submission, the respondent briefly stated that the learned Judge acted and decided judiciously and fairly after having considered the facts and the weight of evidence adduced by both parties based on the issues framed thereof during the hearing. He did not respond to the third added ground of appeal. He prayed the Court to dismiss the appeal and uphold the judgment and decree of the High Court.

We have examined the record of appeal and considered the contending submissions of the parties as well as the authorities cited. In our view, the appeal turns on two main issues; first, whether there was a new issue raised by the CMA and confirmed by the High Court which was not pleaded and recorded in the case file; and secondly, if the remedies awarded were fit for unfair termination not in breach of contract.

Starting with the first issue, it is noteworthy from the impugned judgment, at pages 243 and 244 of the record of appeal, that the learned Judge observed that the CMA rightly considered

the whole evidence in assessing the validity of the reasons for termination of contract advanced by the appellant. The learned Judge agreed with the reasons of the CMA that the act of the appellant of recruiting new employees defeated the reasons of terminating the respondent on the financial crises basis. It was the learned Judge's firm opinion that no new issue was raised in which the parties were not heard.

In the above light, we agree with the High Court decision on that complaint that there was no new issue raised by the CMA out of the agreed issues appearing at page 85 of the record of appeal. It is from those three (3) agreed issues the CMA made its determination as reflected on page 147 of the record. The agreed issues were that, **one;** whether there was a valid reason for termination, **two;** whether the procedure for termination was adhered to and **three;** to what reliefs are the parties entitled. The appellant argument that the new employment as the new issue has no basis since the same was forming part of the evidence adduced by the respondent as reflected on page 130 of the record of appeal and the appellant opted not to challenge it in cross – examination. In the case of **Nyerere Nyague v. Republic,** Criminal Appeal No.

67 of 2010 (unreported) the Court had this on the failure to cross-examine the witness on certain matter;

> *" As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

For the foregoing reasons, we are satisfied that there was no new issue raised by the CMA and confirmed by the High Court as alleged by the appellant. This ground of appeal has no merit.

As regards the second ground of appeal, we think the same has no substance. It is our firm view that the law governing the matter at hand is purely labour laws, henceforth it was rightly decided by the High Court Judge that since the respondent's fixed term contract was terminated by the appellant while still in existence, henceforth the monthly salary for the remaining period in that contract has to be paid by the appellant. We are in agreement with the learned Judge that, the principle of unfair termination is inapplicable to this case because the contract of employment was a fixed term contract. Further, the law under Rule 4(2) of the

Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 (the Code) says:

> *" Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise."*
>
> *Whereas, Rule 8(2) (a) and (c) of the Code provides;*
>
> *(2) Compliance with the provisions of the contract relating to termination shall depend on whether the contract is for a fixed term or indefinite in duration. This means that: -*
>
> *a) where an employer has employed an employee on a fixed term contract,* ***the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract.*** *(Emphasis added).*
>
> *(c) where the contract is for indefinite duration, the employer must have a fair reason to terminate and follow a fair procedure".*

Therefore, the law is clear that, where the contract of employment is for a fixed term, the contract expires automatically when the contract period expires unless the employee breaches the contract before the expiry in which case the employer may terminate the contract. On the other hand, the employer must have a fair reason to terminate the contract in case of the indefinite contract of employment and must follow a fair procedure in that regard.

The foregoing proves that the appellant did not have the right to terminate the fixed term contract unless the respondent breaches it before its expiry. This was not the case because the appellant was the one who terminated the contract based on the reason of financial constraints. In that regard the High Court decision was right when it treated the matter as a breach of contract when handling the remedies respects.

In the circumstances, we think the learned Judge cannot be faulted in his judgment. We see no merit in ground- two of appeal which we dismiss.

The foregoing determination, in our view, is sufficient to dispose of the appeal. On that basis, we find no pressing need to

deal with the third ground of appeal. Accordingly, this appeal is hereby dismissed. This being a labour matter we make no order as to costs.

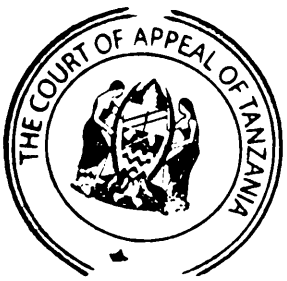
DATED at **MOROGORO** this 10th day of May, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 10th day of May, 2023 in the presence of Ms. Ester Shoo, learned counsel for the Appellant and the respondent appeared in person via Video Link from Court of Appeal of Tanzania at Dar es Salaam, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL