IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 68 OF 2019

(Original CMA/MZ/NYAM/50, 51, 52/2019)

UPENDO MALISA ---------- APPLICANT

VERSUS

KASSA CHARITY SECONDARY SCHOOL ---------- RESPONDENT

JUDGMENT

24th July & 09th October, 2020

TIGANGA, J

In this application, the court was moved under section 91 (1), (a), (b) (2) (b), (c), (4) (a), (b) and section 94 (i) all of the Employment and Labour Relations Act No. 6 of 2004 and Rule 24 (1) (2) (a) (b) (c), (d), (e), (f) and 3 (a) (b) (c) (d) and Rule 28 (1), (b) (c) (d) and (e) of the Labour Court Rules GN. 106 of 2007, to call for and examine the records of the proceedings before the Commission for Mediation and Arbitration, herein referred to as CMA, of Mwanza for the purpose of satisfying itself to the correctness, legality, rationality, regularity and propriety of the award made by the CMA in the Labour Dispute No. CMA/MZ/NYAM/50,51 and 52/2019 dated 12/07/2019, on the ground which can be paraphrased, without missing any point, as follows;

i. The Arbitrator erred in finding that there was no breach of contract by the respondent while disregarding the evidence which proved that there was breach of contract of employment.

ii. That the Arbitrator failed to evaluate properly the evidence adduced by the applicant which failure led to the wrong conclusion that the applicant absconded from work.

iii. That the Arbitrator erred in his findings that, the applicant failed to prove the breach of contract of employment.

iv. That the Arbitrator erred in her findings that the applicant has no cause of action against the respondent.

v. That the Arbitrator erred in findings that there was automatic renewal of employment contract while the applicant's employment contract was breached while ongoing.

vi. That the Arbitrator erred in ordering the applicant to be re - instated without pay without offering genuine justification.

These grounds are as contained in the notice of application.

Together with it a chamber summons was filed also asking this court to invoke its revisionary powers to examine the records of CMA for purposes of satisfying itself as to the correctness, legality, rationality, regularity and propriety of the award made by CMA, in the above referred labour dispute.

The court has been called to, after having so done, to set aside the said award and make evaluation of evidence and enter judgment in favour

of the applicant, and to issue any other relief as the court may deem fit and just to grant.

The application has been supported by the affidavit sworn and filed by the applicant, in which the following were advanced as the statement of legal issues, namely;

a) Whether the award dated 12/07/2019 was properly procured.
b) Whether the applicant employment contract was breached by the respondent.
c) Whether the applicant has cause of action against the respondent.
d) Whether the Arbitrator was right to order reinstatement without payment of remunerations.

The affidavit also put forth the background information of the employment of the applicant which gave rise to the labour dispute subject of this revision. The background is that the applicant, a professional teacher was employed for a fixed term of one year, commencing in 2016 to 2017, renewable which was renewed in May 2018 and was to end 30/05/2019.

However, according to her, the said contract did not reach to an end, it was ended by the respondent on 24/01/2019, when the applicant was ordered to stop teaching and involving herself in the business of the Respondent on the ground that she lacked academic qualification.

Thereafter, she complied and started to make follow up on her entitlements. According to her such entitlements were not paid, it was

when she commenced these proceedings before the CMA for breach of contract on 05/02/2019.

Despite the fact that her counsel issued a notice to produce the employment contract, the employer refused to produce it, and that the allegation by the respondent that, she abandoned school with no reasons had never been proved.

Further to that, her contract was terminated orally five months before its end, that is the reasons, she raised a complaint that the evidence she tendered were not considered in the award, and that the relief she was awarded, was not part of her prayer. It is also her complaint that the Arbitrator did not even bother to consider her closing arguments which she filed by the order of CMA.

The application was opposed by the notice of opposition and the counter affidavit sworn by one Albert Kassa, who disputed to have terminated the applicant, or to have found her as one of the teachers whose academic qualification was wanting. He said there was nothing to prove in the contract that is why they did not produce it.

Further to that, he submitted that, there is nothing submitted as a proof of the breach of the contract, as the *onus probandi* lies on the person who alleges. Last, that the CMA Arbitrator considered all the evidence adduced at the trial and found that there was no breach of contract that is why she was ordered to continue with discharging her contractual duty.

In his opinion, the central issue for determination by the court is;

a) Whether the applicant's employment contract was breached by the respondent.

He at the end prayed the court to dismiss the application for want of merits. With leave of the court, the application was argued by written submissions, in which submission the applicant reiterated and expounded what was contained in the affidavit filed in support of the application.

Further to that, by way of elaboration, he complained of the failure of the arbitrator to make adverse inference for respondent failure to produce the contract of employment.

She insisted that the respondent breached the contract as, through the headmaster, he stopped the applicant from working and ordered her to work and handover the tools of work. She also insisted that she asked for the terminal benefits from the director but she was not paid, and so as the termination letter, which all these evidence were not totally considered by the arbitrator.

That the contract was ended without following fair procedure, and that the evidence of DW1 that the applicant was not terminated but abandoned work has not been substantiated.

Further to that, she submitted that the headmaster was an important witness, but he was not called without any reason. He asked the court to rely on the authority in the case of **Hemedi Said vs Mohamed Mbilu** [1984] TLR. 114, that the failure to call material witness entitles the court

to make adverse inference against the person who was supposed to call him.

The other complaint is on the failure of the Arbitrator to consider the closing submission. The counsel also asked the court to take judicial notice that the filed counter affidavit did not controvert the contents of the affidavit. The fact that the content was not controverted entitles this court to grant an application and reverse the award. He asked the court to be guided by the authority in the case of **East African Cables (T) Limited vs Spencon Services Limited,** Misc. Application No. 61 of 2016 (HC).

Furthermore, the counsel submitted that the order for re - instatement suggests that the arbitrator was satisfied that there was a breach of contract, however, he failed to make an order for her accrued salaries in terms of section 40 (1) (a) of the Employment and Labour Relations Act (supra). He termed this to be a very serious illegality which needs this court's intervention for correction for proper administration of justice in accordance with the law.

Further to that, he submitted that, the order for re - instatement was not proper in the circumstances of the case because firstly that, the life span of the contract had already expired, secondly, parties have lost confidence and trust in their relationship therefore could not work together again.

He asked this court to be persuaded by the authority in the decision of **Good Samaritan vs Joseph Robert Savari Munthu,** Labour Revision

No. 165 of 2011 reported in High Court Labour Digest No 09 of 2013 in which it was held that;

> *"when an employer terminate a fixed term contract the loss of salary by the employee of the remaining period un expired term is a direct foreseeable and reasonable consequence of the employers wrongful action. Therefore in this case, probable consequence of the applicant's action was loss of salary for the remaining period of the employment contract which was 21 months. To that extent, the arbitrator's award is sound in law and I see no basis to revisit it"*

In the end, the counsel for the applicant prayed this court to hold that the applicant was entitled to the monthly payment of salaries for the remaining period, the leave due and three months notice for termination as to per the contract of employment as well as clean certificate of service as prayed in CMA - F1.

The respondent through the service of Mr. Paul N. Bomani learned counsel, started by attacking the application on the ground that it was defective for lack of notice of representation contrary to section 56 (c) of the Labour Institutions Act, No. 07 of 2004 and Rule 43 (1) of the Labour Court Rules 2007 which provides for mandatory requirement of filing the notice of representation.

He submitted that failure to file notice of the applicant's representative lacks audience to appear and represent him. He cited the

decision in the case of **Royal Furnishers Limited Vs Nicodems Jackson Mkwai -** Revision No. 943 of 2018 HC - Labour Division DSM by Hon. S. A. N. Wambura, J. He consequently asked for the application to be dismissed for non compliance of the mandatory provision of the law.

Back on the merit of the application, the counsel for the respondent submitted that CMA F.1 filed by the applicant on 05/02/2019 complained of the breach of the contract of employment, that means, the applicant was required to confine herself on the issue pleaded in CMA - F1.

He submitted further that, section 60 (2) (a) of the Labour Institutions Act No. 07 of 2004 as interpreted in the Case of **A- one product and Bottlers Limited vs Flora Paulo and 32 others** (2015) LCCD 1 at page 68, provides that the person who alleges that the labour law was contravened has a burden of proof to prove that it was really contravened.

He submitted that the applicant and respondent had no quarrel, between themselves. However on 24th day of January 2019, the applicant declined to appear in school and organised her fellow teachers who were terminated on the ground of operational requirement to file the dispute before the CMA on the ground of the breach of contract.

It is his submission further that instead of focusing on the issue in dispute, which is the breach of contract, he directed his evidence to prove unfair termination, while leaving unproved the vital matter in dispute which was the breach of contract.

The counsel further submitted that, the respondent during the CMA trial argued unfair termination of employment as opposed to the breach of contract which has very different elements.

He asked this court to be guided by the principle in the case of **Lion of Judah Academy vs Juma Samson,** Revision No. 50 of 2018, which held in effect that, an award which is reflected in CMA F1 denies the respondent a right to be heard, According to him luckily indeed, the CMA award based on the CMA - F1 (CMA Form No. 1).

He submitted that the CMA F1 through which the dispute was referred, mentioned the breach of employment contract. The record shows that the applicant argued a case of unfair termination, but the CMA decided that the case of breach of contract was not proved by the applicant. In the end, he submitted that, the application at hand has no merit and asked for its dismissal.

In rejoinder, the counsel for applicant submitted that, the notice of application signed and filed by the applicant notified the Court at page 2 that;

> *"take notice that the applicant appoints Mr. Salehe Nasoro and Mr. Innocent Benard Kamugisha, Advocates as the applicant's representative in this matter".*

It is his submission that the notice is sufficient and is in compliance with the provision alleged to have been violated. He submitted that the authority in **Royal Furnishers Limited vs Nicodemus Jackson Kwai**

(supra) is distinguishable; he asked the preliminary objection like raised by the respondent to be overruled.

Turning to the rejoinder of the submission on the merits of the application, the counsel for the respondent reiterated what he submitted in the submission in chief.

He submitted that the other issues are not legal arguments but issues of facts which were supposed to be indicated in the counter affidavit but did not feature in the counter affidavit. He asked the court to neglect them as they are mere assertions from the bar; they have no foundation from the proceedings.

On the allegations that the applicant argued the case of unfair termination instead of the breach of contract as per CMA F1, he submitted that with all due respect to the counsel, his entire submission on the issue was misplaced. It is the counsel's opinion that, the counsel for respondent he missed the point that an employee with a fixed term contract like that of the applicant, can sue under the cover of the breach of contract, he cited the case of **Good Samaritan vs Joseph Robert Savari Munthu** Labour Revision No. 165/2011 (supra).

He also made reference to ILO convention No. 158, the termination of Employment convention, 1982, which under article 2 (2) 2(3) of the convention, excludes the employee of specified period of time to lodge the claim of unfair termination. However, it requires their legal right to be protected by law, and he reminded this court that the so cited convention

is applicable in our jurisdiction by virtue of section 3 (g) of Employment and Labour Relations Act (supra).

In the end, he submitted that the arbitrator misdirected herself for her failure to find that the act of compelling the applicant to handover the working tools and stopping her from teaching is nothing but the breach of the ongoing contract unfairly. He asked this court to treat the case cited by the applicant as distinguishable and allow the application at hand.

That being a comprehensive summary of what the parties presented before the court; I should, as a matter of procedure start with the issues of law raised by the respondent before going to the factual issues.

As earlier on pointed out, in his submission in reply, the respondent challenged the application for being filed without the notice of representation thus violating the provision of section 56 (c) of the Labour Institutions Act, (supra) read together with Rule 43 (1) of the Labour Court Rules (supra). It is not in dispute that the provision is mandatory in that, in any application where the applicant or respondent needs to be represented by another, must file a notice of representation introducing that other person who would represent him.

In the application at hand the said notice was not filed in a separate document, but the information of who will represent the applicant is contained in the notice of application. The submission by Mr. Paul Bomani, is that it is not proper as the same needs to be in a separate document, filed under the relevant provisions. While Mr. Innocent Benard, submits that, it is enough to mention the same even in the Notice of Application, as

what is required is that the said Notice is clearly informing the Court and the other party of the names of the representative.

I have keenly considered the arguments by both parties; I think this issue need not detain me much. First and foremost, the intention of the law, in requiring the representative to be mentioned in the documents commencing the application and or opposing the same was to ensure that the party who is represented has actually authorized that person to represent him.

Secondly, that the court and the other party are aware of the identity and the address of the representative for the purpose of service. In this matter the applicant's information regarding the representative is contained in the notice of application. In my considered opinion, the information is sufficient to inform the Court and the other party who is representing the applicant in this application that is the reason why even the notice of opposition and counter affidavit were copied and served by the respondent's counsel to the very advocate who were introduced as the representative of the applicant. This ground has actually no merit, it is dismissed as such.

Now back to the merit of the application, examined from the contents of the notice of application, the chamber summons and the submissions by the applicant, a number of issues were raised, about six issues have been raised in the notice of application from paragraph (a) to (f), while four other issues were raised as legal issues in paragraph 16, sub paragraph (a), (b), (c) and (d) of the affidavit filed in support of the application.

Gazing at all these issues, it goes without saying, that from all the issues, two main issues may be deduced and framed therefrom as follows;

(i) Whether the dispute before the CMA was on the breach of contract or unfair termination of employment.

(ii) Whichever is proved to be the actual dispute between the two above, whether the evidence before CMA proved the claim by the applicant to entitle her any award?

Now in resolving these two main issues, it is important to look at what the records of the trial CMA is offering. From the record, particularly the proceedings recorded before the trial CMA, it was not disputed that the applicant had a contract of employment with the respondent which was ending in May 2019. Her complaint before the CMA is that, in early January 2019, she was stopped to work by the employer and ordered to submit the working tools, which act she termed as termination or breach of contract.

The respondent disputed to have ordered her to submit the tools of work and to stop her from working; he alleges instead that, the applicant absented herself from work. This means, the issue which the applicant was supposed to prove is whether she was ordered by the respondent to handover the working tools and stopped to working. As the evidence shows that the contract was ending in May 2019, but she was stopped in January. That by plain meaning is a breach of the employment contract. That should not only be deduced from the definition of what happened, but also from the nature of complaint which the applicant referred to the CMA via the CMA F1. Reading CMA F1, as the document which commenced the

complaint, it registered the complaint for breach of employment contract by the respondent.

Further to that, to prove that the nature of dispute was breach of contract, even the first issue framed was "whether there was a breach of contract".

Having framed that issue of course from the pleadings CMA F1, it was the applicant who was supposed to begin, as opposed to where the issue is on unfair termination, where the employer must begin. This means the nature of disputes was breach of contract, as opposed to the unfair termination of employment. That said, the first issue is therefore resolved in negative. This means, the applicant was duty bound to prove the breach of the contract employment and not otherwise.

In so doing, she was supposed to prove the following facts; first, that she was stopped by the employer from working. This throughout the evidence given by the applicant, it was not proved that she was so stopped from working. She brought no evidence except her testimony which has not been substantiated; she tendered no termination letter or called any witness who heard the headmaster stopping her from working.

In the premises, she could not have expected the Arbitrator to hold that the employer breached the contract, without herself proving that the said contract was so breached. Therefore the Arbitrator was actually justified when she found that the breach of contract was not proved. As the employer claimed in his evidence that, he has never stopped from

working, that being the case then the employer was therefore prepared to accept her if she would return to work.

It is also a principle of law, labour law, that, employees are paid salaries for the works they are employed to perform, or where the employee is able and ready to work but the employer assigned her/him no job/work to do.

In this matter, there is no evidence that the applicant was in any way stopped from working or stopped from coming to school premises; this means she on her own failed to do the work she was employed to perform.

That being the case, I thus find that there is no materials submitted before this court upon which the award by the Arbitrator can be faulted. In consequence I dismiss the application, with no order as to costs.

It is so ordered.

DATED at **MWANZA** this 09th day of October, 2020

J. C. Tiganga
Judge
09/10/2020