

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA
REVISION NO. 50 OF 2017**

(Originate from Complaint No. CMA/MBY/19/2016)

**MORAVIAN CHURCH IN TANZANIA
(SOUTH WEST PROVINCE).....APPLICANT
VERSUS
ADAMSON MWASEBA.....RESPONDENT**

JUDGMENT

Date of last order: 18/12/2019

Date of Judgment: 17/02/2020

NDUNGURU, J.

This is an application for revision of Commission for Mediation and Arbitration (CMA) award dated 15/09/2017. It was moved into this Court by Notice of application under Section 91 (1) a, 91 (2) (b) and (c) 91 (4) (a) and (b) and Section 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004 Act No. 6 of 2004 (as amended) and Rules 24 (1), 24 (2) (a), (b), (c), (d), (e) (f), 24 (3) (a), (b), (c), (d) and Rule 28 (1) (b), (c)

(d) of the Labour Court Rules 2007 of GN. 106/2007 the Notice of application is supported by the affidavit sworn by one Stephano Mbalwa the Secretary General and the Principal Officer of the applicant. The application is opposed by the respondent.

Briefly, the respondent who was the complainant before the Commission for Mediation and Arbitration was challenging termination done by the applicant that it was unfair and claimed for reliefs as set forth in the CMAT.1 which referred the dispute. The record reveals that the respondent was employed on 1st October, 2003 as Internal Auditor on permanent terms basis but later he was served with a letter for salary increase, but the same letter informed him on the changes on the terms of employment contract from permanent to two years employment contract.

When the two years term was about to expire the respondent was served with the notice of termination the notice barred the respondent from renewing the contract after the expiry of two years. The letter expressed the reason of barring the respondent from renewing the contract it was to minimize the costs. The respondent viewed it to amount to retrenchment, and thus the retrenchment procedures were not followed.

On his part the applicant stated that the termination was fair as he served the complainant with a notice as his two years employment contract had expired and the respondent (complainant) was paid terminal entitlements.

The CMA having heard the evidence from both parties was of the conclusion that the employer's (applicant) reasons for termination was economic and not the expiration of contract thus it amounted to termination on operational requirement of which the applicant (employer) failed to produce the existence of operational requirement and therefore held the termination to be unfair.

With that conclusion/decision the CMA went on awarding the respondent 12 months' salary payment for unfair termination to the tune of 7,632,000/= and general damages in the tune of 7,632,000/= to make a total of 15,264,000/=.

The applicant dissatisfied with the CMA award filed the present revision. The grounds for this revision are set forth at paragraph 11 of the applicant's affidavit. The grounds are the following:

- (i) That the Hon. Arbitrator committed a gross error by reading the

law and in spite of the clear provision of the law on the meaning legal personality and the capacity of being sued by the Trustees Incorporation Act, Cap 318 Revised Edition 2002.

- (ii) The Hon. Arbitrator failed to consider the final submission that the applicant has no legal capacity of being sued as the proper party is a REGISTERED TRUSTEES OF MORAVIAN CHURCH TANZANIA (SOUTH WEST PROVINCE).
- (iii) The Hon. Arbitrator failed to construe procedure of termination for the one who contract for specific period comes to an end and one whose contract is for unspecific period.
- (iv) The Hon. Arbitrator exercised his power improperly when awarded general damage of Tshs. 7,762,000/=.

In this application, the parties were represented by the learned advocates. Ms. Joyce Kasebwa learned counsel represented the applicant while Mr. Benedict Sahwi represented the respondent. Hearing proceeded by way of written submissions.

Submitting for grounds of revision, Ms. Kasebwa consolidated the 1st and 2nd grounds of revision and submitted to the effect that, the respondent failed to sue the right and proper party in his complaint

CMA/MBY/19/2016, he sued the party who does not exist and not recognized by the law as having the locus of suing or being sued. Ms. Kasebwa cited Section 8 (1) of the Trustees Incorporation Act, Cap 318 Revised Edition 2002 which provides that:

8 (1) Upon the grant of certificate under subsection 1 of Section 5 the Trustee of Trustees shall become a body corporate by the name described in the certificate and shall have:-

- (a) Perpetual succession and common seal*
- (b) Power to sue and be sued in such corporate name;*

Basing on the above cited provision of law Ms. Kasebwa submitted that the applicant's corporate name is REGISTERED TRUSTEE OF MORAVIAN CHURCH OF TANZANIA, SOUTH WEST PROVINCE and she is the one supposed to be sued not MORAVIAN CHURCH IN TANZANIA, SOUTH WEST PROVINCE. The counsel referred the case of **Christina Mrimi v. Coca Cola Kwanza Bottles Ltd.**, Civil Appeal No. 112 of 2008 Court of Appeal of Tanzania, **Registered Trustees of Umoja wa Wazazi wa Tanzania v. Uswege Msika & 2 Others**, Misc. Application No. 19 of 2017 High Court, **National Oil v. Aloyce Hobokela**, Misc. Labour Application No. 212 of 2013 High Court (all unreported) and **Juma**

B. Kadala v. Laurent Mnkande (1983) T. L. R. 103. The counsel relying on the above cited authorities urged the application be allowed.

On the 3rd ground of revision the counsel for applicant submitted, that the respondent entered into the permanent employment with the applicant on 01/10/2003, then in 2014 the respondent applied for the job again and secured a fixed two years contract that is from 01/01/2014 up to 31/12/2015. The counsel submitted further that before the end of the two years term the respondent issued a notice intention for non renewal of the contract. At the end of the term the applicant paid the respondent all his statutory benefits. The termination cannot amount to operational requirement (retrenchment) as held by the Arbitrator. She submitted that the Arbitrator has failed to understand that the respondent was serving a fixed term contract which is one of the types of employment contracts as provided under Section 14 (1) (b) of the Employment and Labour Relations Act, No.6 of 2004.

On the same footing the counsel for the applicant further submitted that the respondent understood the nature of employment and that is why he signed the agreement/contract and when it approached the end he wrote the letter requesting to renew the contract.

On the question of sponsorship, Ms. Kasebwa submitted that the applicant was not privy to the agreement on the sponsorship but as the employer of the respondent just recommended for him to get sponsorship but the respondent had a private arrangement with MISSION 21 who sponsored the respondent. She thus said the termination of sponsorship was not resulted from the applicant's ending up the contract with the respondent. Thus the award of general damage which is associated with the loss of sponsorship was unreasonable and wrong. She referred to the annexure ADM2 and ADM5. The counsel submitted that all those was a result of arbitrator's failure to consider the evidence adduced by the parties. Thus urged the application be allowed.

Responding to the applicant's counsel submission Mr. Sahwi, the learned counsel submitted that the counsel for the applicant was representing the applicant at CMA but all the way she never raised such a fact to assist the CMA to reach to the justifiable decision thus to raise it at this stage is to hinder justice to be reached. Further that the counsel for the applicant did not specify when the constitution of the Moravian Church was made and when it became operative. It is his submission that the respondent sued a proper and existing part. Thus the submission on such a

fact be ignored and cited authorities be disregarded for being irrelevant in the circumstances of this case.

He further submitted that the respondent's contract was terminated on operational requirement not that it expired, because the respondent was given study leave, the applicant played an effective role in the process and finally going to pursue studies as seen in ADM3 the minutes of higher learning Committee scholarship, ADM2 scholarship application form, recommendation of church and ADM8 release letter. Further study permission was with condition that the respondent had to commit himself to work for five years with the church which means from 2011 to 2015 as per ADM2 and ADM 9 therefore, termination done in 2015 immediately after the respondent completed the studies was a breach of a clause and a contract as well.

The counsel went further submitting to the effect that the change of contract by the applicant was done without consulting to the respondent taking into account the nature of the changes made on the contract and was done when the respondent was on study leave such a scenario shoes that the applicant intended to terminate the respondent after the expiry of two years. He stated that according to SWP-2 and the testimony of DW1

the employment was terminated because the applicant intended to minimize expenditure which suggests that the applicant decided to retrench employees. The counsel submitted that being retrenchment the applicant was required to with the dictate of Section 38 (1) (c) (i) and (ii) of the Employment and Labour Relations Act No. 6 of 2004. Hence failure to comply with the said provision the retrenchment was procedural thus the termination of the respondent was unfair. He thus concluded that the arbitrator was right to award the respondent compensation for unfair termination and general damages.

In her rejoinder, the counsel reiterated her submission in chief and added that the point of law can be raised at any stage it does not amount to afterthought after all the same was raised even in the applicant's final submission before CMA. Further that the issue of enactment of the applicant's constitution was dealt with during hearing of the complaint at the CMA. The counsel insisted that the contract of the respondent was not terminated but expired, that why immediately before expiry the respondent applied for renewal of the same. The condition that the respondent had to work for five years was not part of the contract. Further that the respondent having received the letter which changed the terms of

employment never objected it he continued working with the applicant having signed the new periodical contract. The termination was not a retrenchment as there could have meaning to retrench the employee whose contract had to the end. She prayed the revision be allowed and award of CMA be set aside.

I had ample time to go through the records of CMA grounds of revision and submissions made by the parties. The only question is whether the revision has merit.

Responding to the above raised question I will to go through and responded on almost all grounds of appeal basing on what is in the record of CMA and the submission raised with reference to what the law provides . This is due to the different nature of the orders the court can issue where ground is held successful or otherwise.

On the first and second ground of revision the law on Trustees is very clear. Section 8 (1) of the Trustees Incorporation Act provides:

8 (1) *Upon the grant of certificate under subsection 1 of Section 5 the Trustee of Trustees shall become a body corporate by the name described in the certificate and shall have:-*

(a) Perpetual succession and common seal

(b) Power to sue and be sued in such corporate name;

That being the position of law I am in agreement with the counsel for the applicant that the respondent was required to sue the Registered Trustees of Moravian Church of Tanzania, West Province and not Moravian Church in Tanzania, South West Province. The one sued has no legal personality to be sued. This was the position in the case of **Christina Mrimi v. Coca Cola Kwanza Bottles Ltd**, Civil Appeal No. 112 of 2008 Court of Appeal of Tanzania (unreported), see also National **Oil v. Aloyce Hobokela**, Misc Labour Application No. 212 of 2013 High Court (unreported). In my considered opinion the REGISTERED NAME is fundamental to the whole of the case because it is the registered trustee who owns all the properties of the church. It is not and cannot be disputed that all the churches in Tanzania must be registered before they start operating. This is the requirement of law and there is no option and the operational law is the **Trustees Incorporation Act Cap 318 R.E. 2002**. It is my considered opinion therefore, that the respondent was required to sue the Registered Trustee of the Church not and not particular local

church. Thus I find this application is incompetent because it founded in wrong foundation.

The fact that the counsel for the applicant was aware of the fact when the matter was at CMA as submitted by the counsel for respondent, her failure to raise it at the earliest stage cannot be a blessing to this court, after all that is the requirement of the law and not party's whim. I hence agree that, the respondent sued the party who is not recognized by law.

On the 3rd ground, the Arbitrator was of the decision that the respondent was terminated on operation requirement but the employer did not adhere to the procedural requirement as provided under Section 38 of Employment and Labour Relations Act. It is the evidence on the record that the Contract of 2003 ended on 2013 and on 2014 the respondent entered into two years contract which was renewable the end but before expiry of the contract in 2015. The respondent served the applicant for two years under the newly signed contract and enjoyed the benefit of his labour without any complain. Nowhere the respondent was heard to have complained that he was not consulted when the contract changed nor that he was served with the new contract while on leave or otherwise, this implies that the respondent accepted the new contract with new terms.

This can also be comprehended by act of the respondent of applying to renew the contract.

The respondent issued a notice of renewal of the contract and the applicant showed his intention of not to renew it and the respondent was paid all terminal statutory benefit as evidenced in the record the same is reflected at page 8 para 3 of the typed award. From the above facts, I am of the firm opinion that the respondent's contract was for affixed term which had to end upon expiry of the contractual term. The fact that the respondent had received all his terminal benefit it was not appropriate on his part to open a dispute if he was not satisfied with the termination he could have filed a dispute before receiving the terminal benefit. This position was articulated in **Bulyankuru Gold Mining Ltd v. Chama Stanslaus Ngeleja**, Labour Revision No. 12 of 2011 High (unreported), **Pangea Minerals Ltd v. Ernest Wililo** Labour Revision No. 161 of 2013 High Court (unreported), in the later case the court had this to say:

"Once employee is paid terminal benefit cannot re-open the matter."

The only fact that in the notice the applicant stated that he wants to minimize costs. To my view that alone could not amount to retrenchment

because the term of the contract was at the end. Further the notice of the applicant of her intention not to continue with the contract was reasonable.

Having so said, I am of the settled opinion that the termination was lawful as the contract entered reached the end and on her part the applicant had no intention to renew and she communicated to the respondent at reasonable time.

In the premises I allow the application, the Award issued by CMA is hereby quashed.



D. B. Ndunguru

D. B. NDUNGURU
JUDGE
17/02/2020

Date: 17/02/2020

Coram: D. B. Ndunguru, J

Applicant:

For the Applicant: Mr. Luko Deda Advocate

Respondent: Present

For the Respondent: Mr. Amani Mwakolo Advocate holding brief of Mr. Sahwi Advocate

B/C: M. Mihayo

Mr. Aman Mwakolo – Advocate:

My lord, I hold brief of Mr. Sahwi Advocate for the respondent, we are ready for judgment.

Mr. Luko Deda – Advocate;

We are ready.

Court: Judgment delivered in the presence of Mr. Aman Mwakolo Advocate holding brief of Mr. Sahwi Advocate for the respondent and Mr. Luko Deda for the applicant.



**D. B. NDUNGURU
JUDGE
17/02/2020**

Right of Appeal explained.