

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LABOUR REVISION APPLICATION NO. 34 OF 2020**

(Arising from Labour Dispute No. CMA/KLM/MOS/ARB/51/2020)

**THE REGISTERED TRUSTEES OF KIRUA CHILDREN**

**FOUNDATION (KCCF) .....APPLICANT**

**VERSUS**

**HAILESY M NJAU ..... RESPONDENT**

**JUDGEMENT**

**MUTUNGI .J.**

The applicant, **THE REGISTERED TRUSTEES OF KIRUA CHILDREN FOUNDATION (KCCF)** filed this application pursuant to section 91(1)(a), 91(2)(b) (c) and 94(1)(b)(i) of the Employment and Labour Relations Act, No 6 of 2004(as amended from time to time) read together with Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f), (3)(a)(b)(c)(d) and Rule 28(1)(c)(d) and (e) Labour Court Rules, GN 106/2007.

The Application is supported by an affidavit sworn by Mr. Bruno Evod Mlay who is the Principal Officer working as an Administrator of the Applicant.

The applicant in the chamber summons prayed for orders that;

- (a) The Award delivered by Honourable G. P. Migire on the 17<sup>th</sup> day of July 2020 be revised and set aside by this Honourable Court.
- (b) Any other or further orders as the court may deem fit.

The background of this revision was an application preferred by the respondent after termination of his employment. The respondent was employed by the Applicant as a security guard under a two years renewable fixed term contract with six months period of probation. While continuing with his duties on 4<sup>th</sup> March 2020 the Respondent requested for permission to undergo further medication and promised to be back on 5<sup>th</sup> day of March 2020. The permission was granted to him. On the day when he was supposed to report, he did not show up. On 25<sup>th</sup> day of March 2020 the Applicant wrote a termination letter which was not served on the respondent. On 28<sup>th</sup> day of March the respondent appeared with a letter of resignation but to his surprise he found there was already a termination letter. Following such termination, the Respondent filed an employment dispute with the CMA of Kilimanjaro seeking to be compensated for the breach of contract. The commission ordered the Applicant to pay Tshs. 4,600,000/= which is salary for 22months remaining in the contract and Tshs. 200,000/- a monthly salary in lieu of notice.

Aggrieved by the Arbitral Award, the applicant has appealed to this court on the grounds stated in the Affidavit. The major ones being that: -

- (a) The Honourable Commission erred in law and in fact in holding that there was no valid reason for termination of employment contract without considering that the Respondent was on a probation period and the Applicant was not satisfied with the work performance of the employee according to employment contract.
- (b) That the Honourable Commission erred in law and fact in holding that, there is no valid reason for termination of contract without considering that the respondent being absent from employment without any notification, information whatsoever, is a sufficient reason for termination of employment of contract.
- (c) That the honourable Commission erred in law and fact in holding in favour of the Respondent without taking into consideration that, the Respondent resigned himself from employment of contract which suffices and supports termination of contract by the Applicant.
- (d) That the honourable Commission erred in law and facts for failure to evaluate the evidence on record.
- (e) That the Honourable Commission erred in law and facts in holding that there was no fair reason preceding the termination of employment of the Respondent.

- (f) That the Honourable Commission erred in law and facts awarding payment of a total sum of Tshs. 4,600,000/= to the Respondent while the termination was fair.

At the hearing of this application, the Applicant enjoyed the service of Mr. Charles Mwangani learned advocate while the respondent appeared in person and the parties agreed to proceed orally.

Mr. Mwangani on the outset narrated the historical background of the dispute where he stated, the respondent was employed as a watchman under a two year contract with six months of probation upon which the employer could engage him if he found the employee's character suitable. On 4/3/2020 he prayed through a written letter to go for medical checkup and he was to return on duty on 5/3/2020 but he did not. The applicant tried to find him but the exercise proved futile. On 28/3/2020 the respondent reported at work with a resignation a letter. To the Applicant's surprise the Respondent filed a complainant on the ground of breach of contract the claim which was decided in favour of Respondent where the CMA ordered the respondent to be paid Tshs. 4,600,000/=

The counsel further submitted aggrieved by such award they challenge the arbitral award which held, there was no reason for termination while in fact the respondent's abscondment without any reason is a good ground for termination.

The learned advocate avers that the CMA failed to note, the respondent was under a probation period hence was not permitted to file a complainant to the CMA as he had not worked for even 3 months. Further the CMA failed to note that the respondent himself voluntarily resigned on his own will. Mr. Mwangani further contended, had the CMA evaluated the evidence properly they could have noted, the respondent had breached the work regulations and Labour laws and would not have awarded him compensation on resignation.

He further submitted that the CMA failed to discover that, the Respondent filed the complainant premised on breach of contract yet he centered his evidence on unfair termination and for that the evidence doesn't tally the course of action. In light of Mr. Mwangani's submission he summed up by praying the court revises and sets aside the Award granted.

In reply thereof the Respondent submitted, he had asked for permission to go for checkup as he was sick. He was given 3 days, after which he reported to the HRO named Angela Mbwambo. His condition had become very serious. In lieu therefore decided to resign on 28<sup>th</sup> and asked for his rights. The applicant decided to ignore his letter and instead issued him a termination letter dated 25/3/2020 which was written by the secretary. By the time Angela Mbwambo who permitted him to go for checkup had also been terminated.



The Respondent further elaborated, the contract provided for 60 days of sick leave and after that the employee is given a notice of 14 days. He stated the applicant did not consider Labour laws governing such a situation. He had hence to seek for assistance from the CMA. He further submitted that the CMA did consider the medical documents and the evidence of Angela Mbwambo who knew that he was sick and had made a follow up on his health status.

Submitting on the issue of reliefs, the Respondent stated, the CMA summoned one Bruno to pay him two million as gesture to settlement the matter amicably but they refused on the ground that the matter is to be heard on merits. He concluded by stating that, the CMA found the applicant was not ready to pay him despite the fact they had breached the Labour laws. To cap it all they were not fair to him that is why the CMA ordered compensation.

In rejoinder, the Applicant's advocate reiterated, the CMA relied on the evidence of the Respondent which did not support the allegation he was making. He stressed the HRO'S evidence should be looked into to know the truth. He concluded, by all standards the Award should be set aside.

I have gone through the CMA records and submissions by the conflicting parties and I find the issues for determination are: -

1. *Whether the CMA was competent to entertain this dispute.*
2. *Whether applicant was in breach of the employment contract.*
3. *What are the reliefs if any?*

I choose to start with the first issue as it touches on the jurisdiction of the CMA to try the matter. The vital complaint by the Applicant is that the CMA entertained this dispute without considering that the respondent was still under probation and he was not permitted to file the complainant before the CMA. He had worked for less than 3 months for that he violated the Labour Laws. The applicant's counsel didn't cite which laws had been violated by the Respondent.

Having visited the different Labour laws I find under **Section 35 of ELRA** it is provided: -

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

In the case of **David Nzaligo vs. National Microfinance Bank PLC, Civil Appeal No 61 of 2016** after finding that the employee was under probation, at page 21 the court had this to say: -

*"Section 35 of ELRA provides that the provision of Part III Sub part E shall not apply to an employee with less than 6 months employment with the same employer, whether under one or more contract, means that a worker with less than 6months of employment may not bring an unfair termination claim against the employee, as held by the judge.*

*...we are of the view that a probationer in such a situation, cannot enjoy the rights and benefits enjoyed by a confirmed employee"*

From the above cited provision, it is undisputed that the employee cannot claim for unfair termination while under probation.

Coming back to the instant application, I join hands with the applicant's advocate that the Respondent while still on probation could not claim or be awarded the benefit out of unfair termination.

I have further painstakingly gone through the record at the CMA, Especially CMA F 1 and found that the Respondent filed a dispute which states; ***the breach of contract since***



***no valid reason and proper procedure were followed by employer.***

The court finds in line with the cause of action the first issue framed for determination was ***whether the reason for termination of contract of employment was valid or not***, it is hence true that the cause of action was pegged on breach of contract. On the same footing the CMA has jurisdiction to arbitrate Labour disputes arising from breach of contract as provided for under **section 88(1)(b)(ii) of ELRA**, which reads;

“88.- (1) For the purposes of this section, a dispute means—

(a) a dispute of interest if the parties to the dispute are engaged in an essential service;

(b) a complaint over-

(i) the fairness or lawfulness of an employee's termination of employment;

(ii) any other contravention of this Act or any other labour law or **breach of contract** or any employment or labour matter falling under common law, tortious liability and vicarious liability (Emphasis mine).

See also the case of **Good Samaritan vs. Joseph Robert Savari Munthu Labour Revision No. 165 of 2011 at DSM.**

The issue is whether there were good grounds for termination of the contract of employment. The Hon. Arbitrator found the termination of contract was not fair as the employer acted instantly and against the rules of fairness and humanity. The employee was sick and the employer was well aware of that condition.

I support the reasons by the Arbitrator because the referral was granted from the Hospital where the employee works and for that the employer was aware that the employee was sick. This can be observed through the evidence of **Godbless Elieza Matowo** for ease of reference I quote: -

*"I was sent by Human Resource to uncle of Hailesy to ask if he is at home. I find 2 uncles; they said Hailesy is not at home. He was sick by then they said since when he went to hospital he did not come back home."*

At the time when the employee returned to work the termination letter had already been written by the employer despite the fact that he knew about the respondent's health status. The resignation letter was far

from barring the fact that, the employer had in clear terms terminated the contract of employment. Needless to say it was presented on 28/3/2020 after the termination letter written by the applicant on 25/3/2020.

I further took time to scroll through the contract of employment and under item 13 it reads;

**“13. ukomo wa ajira**

a) wakati wa kipindi cha majaribio kama itatokea upande wowote utapenda kusitisha mkataba, taarifa itolewe katika kipindi **kisichopungua wiki mbili(2)**.

b) ....

c) **Mwajiriwa atatoa kwa maandishi taarifa tangulizi ya kusitisha mkataba**, iwapo mwajiriwa atakiuka kwa kiasi kikubwa masharti na makubaliano ya mkataba au kukutwa na makosa ya kiuhalifu au kukiuka miiko ya kazi husika. (Emphasis mine)

Basing on this item, sub a) and c) these were not observed by the employer as the letter of termination was written on 25/03/2020 and the termination of contract was from that date. I am in all fours with the Arbitrator that the employer acted quickly and in breach of the terms of the employment contract.

As for the reliefs granted, I find they are in place and well-reasoned, I need not interfere with the same.

Having analyzed as above, the court finds the reasons advanced by the applicant's counsel are not good enough to move this court to revise the decision by the honourable Arbitrator. On the same stance the application is dismissed for lack of merits.

  
**B. R. MUTUNGI**  
**JUDGE**  
**27/5/2021**

Judgment read this day of 27/5/2021 in presence of the respondent and in absence of the applicant dully notified.

  
**B. R. MUTUNGI**  
**JUDGE**  
**27/5/2021**

RIGHT OF APPEAL EXPLAINED.

  
**B. R. MUTUNGI**  
**JUDGE**  
**27/5/2021**