IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA
LABOUR REVISION NO 03 OF 2021

JUMA ALOYCE CHANANJA.....1ST APPLICANT

JAFARI HAMIS .....2ND APPLICANT

VERSUS

KASERKANDIS CONSTRUCTION AND TRANSPORT CO. LTD .....RESPONDENT

(Original Labour Dispute Number CMA/MUS/37/2019)

JUDGMENT

28th July & 15th September, 2021

Kahyoza, J:.

Juma Aloyce Chananja (Chananja) and **Jafari Hamis** (**Hamis**) (applicants) were employed by Kaserkandis construction and Transport Co. Ltd (the Company). No party to the dispute specified terms of the employment contract. In 2019, the Company terminated the applicants' employment. Chananja and Hamis instituted a labour disputed complaining that the Company breached the contract by terminating them while there was expectation of renewal of the contract. The Company on its side contended that there was no breach of contract as there was no contractual relation between the applicants and the Company.

Aggrieved, Chananja and Hamis instituted revision proceedings seeking this Court to set aside the award and declare that the Company terminated them unfairly. They further prayed this Court to order the Company to pay 36 months' salaries and all terminal benefits.

Briefly, the undisputed facts are that Chananja and Hamis were employed by the Company on different dates in the position as operators. Chananja was employed in 2008 and Hamis employed on the 17th June, 2017. On the 3rd December, 2019, the Company terminated their employment contracts.

Chananja and Hamis complained as indicated in CMA Form 1 that the Company breached the contract by terminating them while there was expectation of renewal of the contract.

The Company's case as per the opening statement filed with before the CMA, was that Chananja and Hamis worked for her as operators until 9th May 2019 when their service came to an end. The company added that she paid Chananja and Hamis their statutory terminal dues.

Chananja and Hamis were represented at the hearing by Mr. Mhagama advocate who submitted that the issues to be considered by this Court are whether it was proper to rule out that there was no employment contract between the applicants and the respondent and whether it was proper for the arbitrator to rule that the respondent did not breach the contract.

As pointed out both parties were represented and made submission at length. I will produce their submission while answering the issues.

Was there an employment contract between the applicants and the Company?

Chananja and Hamis (the applicants) approached this Court with the first issue whether it was proper for the arbitrator to rule out that there was no employment contract between the applicants and the respondent. The applicants advocate submitted that Chananja and Hamis were employed by the Company and terminated. He added that Chananja tendered Exh.P1 a letter of termination and he was paid terminal benefits Exh.P2.

He submitted further that Hamis explained when he was employed and when he was terminated. On his part, he tendered Exh. P4, which was a letter of termination and that he was given terminal benefits as exhibited by Exh.P5. The advocate concluded that there was an employment relationship between the applicants and the Company. The company's advocate Mr. Sules did not submit in relation to the first issue.

Given the submissions and the evidence on record, it is self-evident that there existed an employment relationship between the applicants and the Company. The company employed the applicants on two different dates in the position as operators. There is ample evidence on record to prove that such a relationship existed. It is on record that the company admitted through her opening statement the applicants (complainants) were working for her in the position of operator up to May, 2019 when their services came to an end. The opening statement reads: -

"1. That the complainants were working for the respondent both in the position of operator which post they served up to May when their services came to an end, following their commission of misconduct.

2. that upon such end of service, the respondent on 9th/5/2019 paid the complainants all the statutory terminal dues as per law in force and the complainants signed the payment forms."

In addition to Company's admission that the applicants were her employees, the applicants tendered letters of termination. The company also paid terminal benefits to the applicants. The applicant tendered letters indicating the terminal benefits the company paid each applicant.

Given the evidence on record and the company's admission in the opening statement, I found it established beyond the balance of preponderance that there was employment relationship between the applicants and the Company. The arbitrator was wrong to hold otherwise. The arbitrator held that the applicants deposed that they had no employment contract. He misconstrued the applicants' evidence. The applicants must have meant they had no written document specifying terms of contract. I wish to produce what the arbitrator stated;

"Hivyo kwa kuwa walalamikaji wenyewe katika ushahidi wao wanakiri kuwa walikuwa hawana mikataba kati yao na mlalamikiwa basi ni wazi pia kwamba hapakuwa na uvunjivu wa mkataba"

The arbitrator was totally wrong. The law requires employer to provide employees with a written statement of particulars where there is no written contract. That requirement is mandatory. The applicants meant

and the arbitrator should have construed their disposition to mean they had no written contract but not that there was no contractual relationship. To hold that since the applicants had no employment relationship because they had no written employment contract would be to sanction a breach of labour laws. Section 15 of the **Employment and Labour Relations Act,** [Cap. 366] provides in the mandatory terms that an employer must issue the written statement of particulars, to an employee where there is no written contract. I wish to emphasize that to hold that when there is no written employment contract or where the employer does not issue an employee with a written statement of particulars, then there is no employment relationship, would be to condone breach of laws. There is no court of law or tribunal worthy its name should endorse violation of any law or by-law.

Section 15(1) and (2) provides that-

> *15.-(1) Subject to the provisions of subsection (2) of section 19, an* ***employer shall supply an employee****, when the employee commences employment, with the following particulars in writing, namely -*
>
> *(a) name, age, permanent address and sex of the employee;*
>
> *(b) place of recruitment;*
>
> *(c) job description;*
>
> *(d) date of commencement-*
>
> *(e) form and duration of the contract; place of work;*
>
> *(g) hours of work;*

(h) remuneration, the method of its calculation, and details of any benefits or payments in kind, and

(i) any other prescribed matter.

(2) If all the particulars referred to in subsection (1) are stated in a written contract and the employer has supplied the employee with that contract, then the employer may not furnish the written statement referred to in section 14.

I, therefore, find that it was wrong for the arbitrator to hold that there was no employment contract between the applicants and the company. The company employed the applicants and failed to provide them with written contracts or written statement of particulars.

Did the Company breach the contract?

The applicants' advocate submitted that the applicants indicated in the referral form (CMA Form No. 1) that the cause of action was breach of contract. They prayed for compensation. He added that the applicants adduced evidence to prove unfair termination. He submitted that the arbitrator had enough evidence to consider the issue of unfair termination. He referred this case to the case of **Stella Temu V. TRA** [2005] TLR 186.

In short, the applicants' advocate submission was that the arbitrator had jurisdiction or say duty to determine matters raised by evidence although not pleaded or which were not among the issues framed. He prayed the decision of the CMA to be set aside and this Court to declare that the applicants were unfairly terminated and award them compensation.

The Company's advocate submitted that the applicants indicated in the referral form that the nature of the dispute was breach of contract and not unfair termination. He added that the arbitrator drew issues basing on the nature of dispute. He submitted that CMA Form No. 1 is a pleading and that the arbitrator was required to base his decision on the pleadings. To buttress his argument, he cited the case of **Judicate Rumishael Shoo & 64 others V. The Guardian Ltd** (2011/2012) LCCD 20. Where this Court held that the CMA must make the decision on what has been pleaded in Form No. 1.

The Company's advocate submitted that the court may decide on issues raised in the pleadings and not otherwise. He cited the case of **Adriano V GIRO Guest Ltd & Another** [2001] TLR. 89. He added that the arbitrator was right to limit himself to the issues framed. He added that where issues are raised the court may be called upon to adjudicate upon those issues. He cited the case of **James Funke Gwagilo V. AG** [2004] T.L.R at page 168. He submitted further that it is not true that breach of contract is more less like unfair termination. He contended that they are different from each other. He added that rule 10 (1) & (2) of **the Labour Institutions** (Mediation and Arbitration) **Rules**, G.N. No. 64/2007 (G.N. No. 64/2007) states that claims for unfair termination should be filed within 30 days and others may be filed within 60 days.

He contended that breach of contract falls under rule 10 (2) of **GN. No. 64/2007**. He added that the applicants could only succeed by proving what they pleaded and that they were not allowed to set up a new case.

He contended that parties are bound by their pleadings. A party can only succeed on what he has averred and produced evidence. He cited the case of **Makori Wassana V. Joshua** [1957] TLR 88.

In his rejoinder, Mr. Mhagama, the applicants' advocate submitted that after the applicants explained the bases of the dispute, the CMA had a duty to ask the company regarding the dispute. He cited section 20 (1) (b) of the **Labour Institution Act**, [Cap. 300] which states that the arbitrator has mandate to question any person about any matter raised during the hearing. He added that there are some of the claims were not paid for, such as claims for reduction of salary, claims for compensation for unpaid leave.

I wish to point out at the outset that, there is no disagreement that the applicants pleaded in the referral form (CMA Form No.1) the nature of the disputed is breach of contract. They stipulated that the Company breached the contract by terminating them while there was expectation of renewal. The arbitrator framed three issues based on what he contemplated as the nature of the dispute. I also wish to point out that the applicants' evidence proved that they were unfairly terminated.

Given the submissions by the parties' advocate, there is no dispute that the referral form is a pleading in the labour laws. This court has in cases without number held so, see the cases of **Judicate R. Shoo & 64 others** (supra) cited by the Company's advocate, **Moses Muno V. TANESCO** (2014) LCCD, 49, where the court held that the applicants are

not entitled to reliefs which were not prayed for in the dispute referral form – CMA Form No. 1.

The parties' advocates diverged on the issue whether the arbitrator has mandate or jurisdiction to consider issues not raised in the referral form *suo mottu*. Having found that referral form – CMA Form No. 1 is a pleading, I will not dwell on the point whether the arbitrator may consider issues not raised in the referral form. It is settle law that the parties are bound by their pleadings and that the evidence produced by any of the parties which does not support the pleaded **facts or is at variance with the pleaded facts must be ignored**. See **James Funke Gwagilo v. AG** [2004] TLR 161, **Lawrence Surumbu Tara v. AG and 2 Others**, Civil Appeal No. 56 of 2012; **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012; and **Alliance Insurance Corporation Ltd v Arusha Art Limited**, Civil Appeal No. 297 of 2017.

The court can grant reliefs thought in the pleadings and proved by evidence. This Court has held and I see no reason to depart from that position, that "*there is no provision in the Employment and Labour Relation Act, or in the Labour Institution Act, ... allowing Mediator and Arbitrators to make changes suo mottu, on what appears on the referral form.*"

The Court took the above, stance in the case of **Power Roads (T) Ltd Vs Haji Omari Ngomero**, Rev No. 36/200 and referred to in the case

of **Leorpard Tours Ltd V. Rashid Juma and Abdallah Shaban** Lab. Div Arusha Rev. No. 55/2013.

Given the above position of which I consider to be the law currently in force, the arbitrator was entitled to treat the applicants' claims as breach of contract and not unfair termination. In addition, the applicants knew and intended their claim to be based on breach of contract as they opted not to fill part B of the referred form. A person whose claim is based on unfair termination is duty bound to fill also part B of the referral forms. The applicant did not fill that part.

The arbitrator framed issued basing on the nature of the dispute. I cannot fault him for not framing the issue whether the applicants were unfairly terminated. The applicants' advocate impressed on me that breach of contract was similar to unfair termination. The Company's advocate refuted the contention and averred that the two terms have different meaning in labour laws.

They maybe similar but the law made distinguished them by providing different procedures of instituting the dispute based on breach of contract from that based on unfair termination. The disputed based on unfair termination the complainant has to fill part B of the referral forms. This is first distinction.

The breach of contract is a claim based on breach of terms of contract. The terms maybe imposed by law breach of which, the labour Commissioner may be called upon to enforce them, or maybe agreed upon

between the parties or implied from general usage of the trade or business. If the terms agreed upon by parties or implied terms are violated the remedy is to seek the CMA to intervene. I know no term of an employment contract stating that an employee shall not be terminated, so that once he is terminated it amounts to breach of contract. The employers' common law right to fire an employee has not been taken away completely, but it has been limited. The employer can fire an employee on once he has reasons to do and upon following the fair produces. If the employer terminates an employee without following the procedure or without reason, that amounts to unfair termination and not breach of contract.

In the present case, the applicants not only did not raise the issue of unfair termination in the pleading but also the CMA did not frame the issue whether the applicants were unfairly terminated; in the circumstance the arbitrator had no justification to answer that.

The applicants contended that the arbitrator did not address other matters raised. The company's advocate contended that the arbitrator did consider them. I examined the award, and found that the arbitrator partly considered them. He considered all claims except the claim for deductions of salary which was raised by Jafari Hamis Mohamed. Hamis deposed that his salary was Tshs. 800,000/= and that the amount was reduced to Tzs 600,000/=. The arbitrator made no finding on this allegation.

I considered the evidence on record to find out if Hamis proved that his salary was reduced from Tzs 800,000/= to Tzs 600,000/= and found

none. Hamis tender a pay slip of the month of December 2017 showing that his salary was Tzs. 600,000/=. He did not tender any payslip to show that he was once paid a monthly salary of Tzs 800,000/=. I am of the firm view that even if the arbitrator would have considered the claim he would have dismissed it for want of proof.

I was unable to find the evidence for unpaid leave. The applicants' claim for unpaid leave is dismissed.

In the end, I find that the arbitrator was wrong to hold that there was no contractual relationship between the applicants and the Company. I uphold the finds that the applicants did not establish the claim of breach of contract and that the Company paid the applicants' claims. I also find that Hamis the second applicant did not establish the claim that the Company reduced his salary from Tzs 800,000/= to Tzs. 600,000/=.

The revision is partly allowed by holding that the arbitrator erred to ruled out that there was no employment relationship between the applicants and the Company and by upholding that the applicants failed to prove that the Company breached the contract.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
15/9/2021

Court: Judgment delivered in the presence of Ms. Mwambosya Adv. for the respondent and in the absence of the applicants. The applicants' advocate was reported present at 11:00 am the time fixed for the Judgment, before it was adjourned to 03:00pm. B/C Ms. Millinga Present.

J. R. Kahyoza
JUDGE
15/9/2021