IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION APPLICATION NO. 83 OF 2020

(Originating from CMA/ARS/ARS/19/19/46/19)

ST. THERESA OF THE CHILD JESUS SECONDARY SCHOOL.....APPLICANT

VERSUS

RAPHAEL GWANDU SULLE.....RESPONDENT

JUDGMENT

23/08/2021 & 30/11/2021

GWAE, J

This application for revision was referred to this Court by the applicant, St. Theresa of the Child Jesus Secondary School against her former employee Raphael Gwandu Sulle challenging the decision and award of the Commission for Mediation and Arbitration of Arusha at Arusha (CMA) which was delivered in favour of the respondent. The application is supported by an affidavit duly sworn by the principal officer of the applicant one Paul Sebastian Malisa where reasons for this revision have been stated.

Briefly, the facts leading to this application for revision arise out of the following backgrounds; that, on the 11th July 2017 the respondent was

employed by applicant for a fixed term contract of two years which was expected to end on the 11th July 2019. However, the respondent was prematurely terminated from his employment on the 1st February 2019 by the applicant.

Aggrieved by the CMA's decision, the respondent filed a complaint to the CMA claiming for unfair termination both substantive and procedural. Before hearing three issues were framed by the parties, these were; whether the applicant had valid reason for termination, whether the applicant followed termination due procedure and extent of reliefs that the parties are entitled.

Upon hearing the parties, finally, the CMA delivered its award in favour of the respondent on reasons that, the termination letter (Exh D1) did not state reasons for the respondent's termination. The learned Arbitrator was therefore of the view that, the applicant had no reasons to terminate the respondent. Another irregularity that was observed by the Commission was on procedures aspect for the termination, it was observed that, the applicant terminated the respondent without following proper procedures. In the end result, the Arbitrator then awarded the applicant one-month salary in lieu of

statutory notice, salaries for the remaining period of six (6) months and a certificate of service.

At the hearing of this application, the applicant and respondent were represented by the learned advocates namely; Mr. John Materu and Mr. Ahmed Hamis respectively.

Arguing in support of the application Mr. Materu submitted that the dispute between the parties was decided on the basis of a new issue raised by the Arbitrator in the course of composing the judgment, according to the applicant's leaned counsel, that was improper as cases as it is the requirement of the law that cases should be decided on issues framed by the court and agreed upon by the parties. In support of this argument the learned counsel cited the case of **Scan-Tan Tours Ltd vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012, (Unreported).

In furtherance of his argument, the learned counsel for the applicant submitted that the termination of the respondent based on clause 11 (a) of the employment contract which allows termination of the employment after giving relevant notice. More so, the counsel argued that, Rule 8 (1) (a) of

the Employment and Labour Relations (Code of Good Practice) Rules GN No. 42 of 2007 allows the employer to terminate the employment contract by complying with the provisions of the contract. He thus insisted that the clause that was used to terminate the respondent did not require the applicant to give any reason for terminating the contract or to hear the respondent before giving notice to terminate. It is for this reason the learned counsel vigorously argued that, the respondent's employment contract was legally terminated.

The learned counsel for the applicant similarly faulted the arbitrator's award that, the respondent was unlawfully denied right to work for the remaining period of six (6) months. According to him the remaining period of the contract counted from 01/02/2019 to 04/07/2019 is five (5) months and not six (6) months as held by the Hon. Arbitrator.

Responding to the applicant's submission, Mr. Ahmed supported the award of the Hon. Arbitrator that the applicant had no reason to terminate the respondent and also procedures for termination were not followed. As to the new issue raised by the Hon. Arbitrator, the counsel was of the view that the issue was so important to be looked at, and he was of further view that the same did not affect the interest of either party. Mr. Ahmed also argued

that, the case of **Scan-Tan** (supra) cited by the applicant's counsel is distinguishable from the circumstances as no new issue was raised by the Arbitrator.

After carefully going through the CMA's records, both advocates' submissions as well as relevant applicable laws, I find the issues for my determination are; whether the Arbitrator was legally justified to decide on an issue that was not framed, whether the arbitrator was justified to hold that the respondent's termination of the employment was both substantive and procedural unfair and whether the award payment of six months salaries being for remaining period was erroneous.

CMA records are such that; on 30/05/2019 the Commission and the parties framed three issues named above, however 20/06/2020 one Mpula, the CMA's arbitrator who was in a special crash program for back logs clearance took over the matter and proceeded with hearing of the case. However, before hearing the Arbitrator remarked that he had realized that the disputable issues were based on breach of contract and not termination and therefore the complainant who alleged on the breach of contract commenced to give his testimony.

After hearing of the parties' evidence, on giving his decision at page 2 of the typed award, the Arbitrator stated the following and I quote;

> "Under the guidance of the Commission, the parties framed the following disputable issues;
>
> 1. Whether or not the respondent had a valid and fair reason to terminate the complainant.
> 2. Whether or not the respondent complied with procedures before terminating the complainant.
> 3. Whether or not the respondent breached the employment contract with the complainant.
> 4. To what reliefs are the parties entitled to."

From what is quoted above, I am of the firm view that, the Arbitrator would have himself by holding that, the parties herein framed four issues as complained of by the applicant's advocate as the records are so clear that, the parties framed only three (3) issues as earlier indicated. But as long as before commencement of the hearing, he lucidly notified the parties that, the complainant now respondent would start the hearing because the contentious issues are essentially based on breach of contract. With this observation, issue number three appears to have been framed by the Arbitrator himself not only while procuring his award but also before

commencement of hearing of the parties who were also informed that is why the respondent started proving his complaint.

On one hand the Arbitrator could have misdirected himself if he did not notify the parties of the issue on breach of the employment contract but on the other hand it is established principle that, each case must be decided according to its own set of facts. Moreover, our courts are currently required to focus on substantive justice rather than into technicalities. In the matter at hand, it is apparent that, the findings from the new issue framed did not go far from what was testified by the parties as can be gleaned from the award. More so, the parties were vividly informed of the issue on breach of contract before commencement of hearing of the parties' evidence.

It has been the principle of the law that, cases must be decided on the issues framed and on record and where it is desired to raise another issue, it must be placed on record for parties to be given an opportunity to address the commission or court of law, as the case may be. Failure to do so, courts have been nullifying judgments and proceedings on reasons of violation of the principle of natural justice that requires a party to a legal proceeding to be accorded an opportunity of being heard. This position of the law has been consistently stressed by our court for instance in **Scan**

Tours Ltd. vs. The Registered Trustees of the Catholic Diocese of Mbulu (supra) and (**VIP Engineering and Marketing Limited and Others vs. City Bank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported-CAT).

However, this principle does not bar an adjudicator from deciding on any new issue that he/she has discovered and he thinks fit to be addressed provided that he or she accords the parties an opportunity to address the court on such new issue. In the absence of doing so, the parties will be denied their fundamental right to be heard, the denial which always vitiates a decision or order of the court or tribunal on appeal or revision as the case here.

In the instant dispute, I do not see any miscarriage of justice to either party taking into account that the parties were informed, the breach of the contract of employment or otherwise, in view and in the circumstance of this matter requires no other pieces of evidence than that on record. Examining the testimonies of the parties together with the exhibits tendered and received by the Commission, it is clearly envisaged that no more evidence that the Commission or this court would inquire into as far as the new issue is concerned.

That being said and done in respect of the applicant's first ground for the sought revision, I now proceed to determine as to whether the Arbitrator was correct in holding that, the respondent was unfairly terminated in terms of substantive and procedural aspect.

On the aspect of validity of reasons for termination, it is the finding of the learned Arbitrator that, the applicant had no valid reason to terminate the respondent. His findings based on section 41 (3) (i) of the Employment and Labour Relations Act Cap 366 Revised Edition, 2019 which provides that, the notice of termination shall be in writing and it must state among others, the reason for termination.

I fully coincide with the Arbitrator's holding that, exh. D1 which is a letter of termination dated 31st December 2018 did not state any reason for terminating the respondent's employment save for a school board meeting that passed a resolution to terminate the respondent's employment contract. The termination went further stating that the respondent's termination was in accordance with clause 11 (a) of the employment contract entered by the parties which I find it appose to reproduce herein under;

> "(a) The employer may at any time terminate the teacher's engagement by giving to the teacher one month notice in

writing or by paying him / her one month's salary in lieu of notice."

In his written submission Mr. Materu contended that the clause used to terminate the contract did not require the applicant to give any reason for terminating the contract and / or hear the respondent before giving notice to terminate the contract. with due respect to the learned counsel this is a misdirection and misinterpretation of the said clause 11 (a) of the employment contract as reading the whole clause 11 there is nowhere stated that, the employer shall not give reasons for termination of his employee's contract nor does it state that the employer shall not hear the employee before terminating his/her contract. I do agree that an employment contract may specify modes of termination of the employment contract however the same has to be in line with the statutory requirements. The contract whose terms are contrary to the mandatory requirements of the law is regarded as void ab initial. The intention of the legislature is to require employers to terminate employees only with valid reasons and not at their own will or whims but must be in accordance with the existing law where requirement of reason for termination is provided (See **James Gwagilo v. Attorney General** (1994) TZHC. 2 (10th January 1994)

Clearly, the applicant is found to be trying to run from his own shadow, because even DW1 who testified on her behalf did not state the reason for terminating the respondent's employment contract as he stated that the respondent was never accused of either negligence or misconduct. It is trite law that an employer shall terminate an employee's contract only on valid reasons and not otherwise. Reason should be stated in the letter of termination of employment (See section 37 (2) of the ELRA). It follows that, in the absence of valid reason the Arbitrator was legally justified to hold that termination was substantively unfair.

As to the procures, this need not detain me much as it is plainly clear that, the applicant in this case did not follow any procedure in terminating the respondent. Section 37 (2) (c) of the ELRA read together with Rule 8 (1) (c) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 requires termination of employment be in accordance with fair procedures. Equally, I join hands with the Hon. Arbitrator that termination was procedurally unfair.

As to the reliefs, it is the submission of the applicant's counsel that, the award is unjustifiable as to him the remaining period of the contract is five (5) months and not six months pursuant to the notice and since the

respondent was paid his salary for January 2019 which he did not work for. According to Exh P1, the applicant's employment commenced effectively from 11th July 2017 and the same was expected to end on 11th July 2019, nevertheless exhibit D1 is to the effect that the respondent termination was with effect from 01/02/2019 simple calculations shows that, the respondent was remaining with 5 months and 10 days. This being a specific contract the respondent is entitled to payment for the remaining period of time which in this case is five (5) months and 11 days. The rest of the reliefs are as they were awarded and equally dismissed by the Arbitrator.

Consequently, this application is dismissed save to the above extent that is the award of payment of six months' salaries awarded of months remaining period by the Commission is reduced to five (5) and 10 days months' salaries otherwise the CMA's award is confirmed. No order as to costs is made since this application was not frivolously preferred.

It is so ordered.

M. R. GWAE
JUDGE
30/11/2021