

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 5 OF 2020

(Arising from Labour Dispute No. CMA/MBY/42/2015)

BETWEEN

FAIMA SIRAJI.....APPLICANT

AND

MBEYA URBAN WATER AND SEWERAGE AUTHORITY.....RESPONDENT

RULING

Date of last order: 28.09.2021

Date of Ruling: 26.11.2021

Ebrahim, J.

The applicant FAIMA SIRAJI being aggrieved with the award of the Commission for Mediation and Arbitration for Mbeya, at Mbeya in Labour Dispute no. CMA/ MBY/42/2015 dated 28/02/2020, filed the instant application seeking to revise and set aside the award. The application was supported by an affidavit of the applicant herself. The same was challenged by the respondent's counter affidavit sworn by Simon Bukuku, the respondent's counsel.

The brief facts leading to the present application is that, the applicant was employed by the respondent as an internal auditor on a three years contract which started on 01/01/2009. On November 2011 the contract was renewed for another three years which expired on 31/12/2014. After the expiration of the second term contract, the applicant worked for two months i.e January and February, 2015 and she was paid her salary. Thereafter the applicant received a letter on 23/02/2015 informing her that the contract would not be renewed. The letter also informed her about the end of employee employer relationship. Upon receiving the letter, the applicant instituted a labour case for unfair termination claiming a total of Tanzania Shillings 607,741,169/= as terminal benefits and general damages for loss of her employment.

After hearing the evidence of both parties, the CMA decided in favour of the applicant. It however, awarded her a total of Tshs. 31,713,000/= being one month salary in lieu of notice, one month salary for Annual leave, 12 months' salary compensation for unfair termination and subsistence allowance. Aggrieved, the applicant preferred the instant application.

The grounds for the application as can be gathered from paragraph 12 -14 of the applicant's affidavit were as follows:

- That the honourable arbitrator did not resolve the issue of fairness of the reasons for termination but used the same unresolved issue as justification to award minimum compensation for unfair termination.
- That the arbitrator after having found that the applicant's contract was renewed by default did not take into account the compensation for the remained unexpired period which was renewed by default and she saved it for only two months.
- That the arbitrator having found and recognized an agreement between the parties which had restrictive clause on employment, did not order any relief towards two years which was secured but unfairly terminated.

Owing to these complaints the applicant prayed for this court to find that; she was substantively unfairly terminated; and that the arbitrator did not exercised her discretional powers Judiciously; she also prayed for the court to set aside the impugned award and order another statutory compensation. She further prayed for

compensation order of the remained period which was renewed by default and all the prayers made in the chamber summons.

At the hearing of the application, the applicant was represented by Mr. Isaya Mwanri, learned Advocate whereas the respondent was represented by Ms. Silivia Mwalwisi, learned counsel from the respondent's legal unit. The application was heard by way of written submissions. I commend counsels for adhering to the set schedule and for their commendable research. However, I shall not reproduce their arguments for I will be referring to them in course of determining the merits of the application according to the issues suggested by the parties.

To start with, Ms. Mwalwisi in her replying submissions invited this court to determine two legal issues of whether the applicant in the instant case claims for unfair termination or breach of contract; and whether or not the applicant was in probation period. According to her, regarding the first issue, breach of contract and unfair termination are two distinct course of actions and cannot be combined. She referred to Form No. 1 which the applicant filed to initiate the dispute before the CMA which shows that the applicant

was claiming for unfair termination. She also referred to the applicant's counsel submission which was to the effect that the honourable Arbitrator misconceived herself when awarded minimum compensation of twelve months for unfair termination instead of the remaining period in the fixed term of employment contract.

Ms. Mwalwisi contended further that the applicant's counsel submission based on the issue of breach of contract and raised new claims which was not pleaded before the CMA. She cited the decisions in the cases of **Bosco Stephen v. Ng'amba Secondary School, Revision No. 38 of 2017 HC. LD at Mbeya** (unreported) and **Upendo Malisa v. Kassa Charity Secondary School, Revision No. 68 of 2019 HCLD, at Mwanza** (unreported) where it was resolved that breach of contract and unfair termination are different courses of action and the two cannot be combined. Ms. Mwalwisi also cited the case of **Bahari Oil Field Services FPZ Ltd v. Peter Wilson, Civil Appeal No. 157 of 2020, CAT at Mtwara** (unreported) to substantiate her contention that parties are bound by their own pleadings. She thus urged this court to find the application unmeritorious.

Regarding the second legal issue, Ms. Mwalwisi argued that since the applicant was employed on fixed term contract, and since the first term had already terminated, and in the second term the applicant was informed that the contract was renewed on the same terms and conditions as in the first contract; it means, in the alleged third term, the terms and conditions of the first contract applied. Ms. Mwalwisi referred this court to clause 4 of the said contract (Exhibit C1) which provided for probation period of six (6) months.

Ms. Mwalwisi further contended that since the first contract's terms and conditions applied to the alleged third term contract, the applicant was under probation as per clause 4 of the contract. She thus concluded that the applicant was not supposed to claim for unfair termination because **section 35 of the Employment and Labour Relations Act, Cap. 366 R.E 2019** excludes an employee with less than six months' employment to claim for unfair termination. Ms. Mwalwisi therefore urged this court to find that the CMA wronged to entertain the matter on unfair termination hence the instant application is invalid.

Responding to those two issues through his rejoinder submissions, Mr. Mwanri started by referring to **Rule 24(4) and (5) of the Labour Court Rules G.N. No. 108 of 2007** which requires parties to file their respective affidavit and counter affidavit containing statements of facts in dispute. He wondered why the concern raised by Ms. Mwalwisi in her replying submissions was not raised by Advocate Bukuku in his counter affidavit. Nevertheless, Mr. Mwanri contended that he had neither raised nor made submissions on new issues, all what have been submitted were in line with what transpired before the CMA. He also argued that when a fixed term contract is renewed or declared to have been renewed by default, it amounts to unfair termination. Thus, in the instant matter, there is no issue of breach of contract.

Regarding the issue that the applicant was under probation period therefore not entitled to claim unfair termination. Mr. Mwanri argued that the essence of probation period is for the employee to be under practical interview and after being confirmed the probation period comes to an end. He substantiated his contention by the decisions in the cases of **Stella Temu v. Tanzania Revenue**

Authority [2005] TLR 178 and David Nzaligo v. National Microfinance Bank PLC, Civil Appeal No. 61 of 2016 CAT at Dar es Salaam (unreported).

In answering the above legal issues raised by the respondent's counsel it is viable firstly to state that counsel for applicant was of the view that the issues raised by the respondent's counsel were neither raised by the respondent in her counter affidavit nor the respondent did apply for revision to challenge the award of the CMA. In my view, since it is a principle that a legal issue can be raised at any stage of the proceedings, I am obliged to firstly consider them before I embark on the merits of the application. This principle was illustrated by the Court of Appeal in the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila & Another, Civil Application No. 3 of 2004, CAT at Mwanza** (unreported).

Regarding the first legal issue, I agree with Ms. Mwalwisi that breach of contract and unfair termination are two distinct course of actions and cannot be combined. However, I do not see where the two were mixed in the instant application. What counsel for the applicant was trying to do in his submissions was just to impress this

court to decide that the CMA awarded a minimal compensation for unfair termination while the law (probably case law) requires that the compensation for unfair termination on a fixed term contract is equal to the loss of salary by the employee for the remaining period of the unexpired term. I therefore, find that counsel for the respondent misconceived the arguments by Mr. Mwanri and I hereby discard the first legal issue.

The 2nd issue on probation period shall not detain me. This is because, it is illogical to think that the same employee with the same employer in a continuous and same employment on fixed contractual term can be subjected to probation period in each term of renewing the contract. Ms. Mwalwisi forcefully wanted this court to hold that, since in the first contract there was a clause for probation period, and since in the second term the employer renewed the employment contract under the same terms and conditions, it meant that the employee was again to be under probation. As it was correctly argued by the applicant's counsel; the intention of the probation period is to allow an employer to test whether a new employee is fit for the business. This is what was

referred to as "practical interview" in the case of **Stella Temu v. Tanzania Revenue Authority** (supra). It is thus, my concerted view that in the instant matter, there was no issue of probation period on part of the applicant after had completed two terms contract of three years each. I therefore, discard this issue as well.

Reverting back to the merits of the instant application, parties pressed a total of six issues to be determined by this court as follows:

- i. Whether the honourable Arbitrator determined the issue of fairness of the reasons for termination.
- ii. Whether it was proper for honourable Arbitrator to make decision on an issue which was not resolved.
- iii. Whether the arbitrator properly exercised her discretional power by awarding the minimum compensation for unfair termination.
- iv. Whether it was proper for the arbitrator not to award any relief on the remained period of employment upon finding that a fixed term contract was renewed by default.

- v. Whether it was proper for the arbitrator not to award any relief on a sponsorship agreement which contains employment restrictions which was terminated unfairly.
- vi. To what reliefs do parties entitled.

I shall resolve all the issues as suggested by the parties. However, I shall combine the 1st and 2nd issues together. I shall also combine and determine the 3rd, 4th and 5th issues together. Lastly, the 6th issue.

As to the 1st and 2nd issues, Mr. Mwanri complained that after the arbitrator found that the employment contract between the applicant and the respondent was renewed by default and was terminated, she ought to make it clear if it was substantively and procedurally fair or not. He contended that the arbitrator followed the truck as if she was resolving the issue of fair reasons for termination but did not give a clear answer. Mr. Mwanri further complained that had the Arbitrator gave clear answer to the fairness of reasons for termination, would have reached to the different decision in awarding the compensation. This is because, substantive unfairness attracts a heavier penalty than procedural

unfairness, he argued. To substantiate his argument, he cited the CAT case in **Felician Rutazwa v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, at Bukoba.

Furthermore, Mr. Mwanri contended that the arbitrator erred for not determining the issue contrary to the requirement of the law that a judge is obliged to decide on each and every issue framed. For this argument he cited the cases of **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 CAT at Dar es Salaam (unreported) and **Jamaa Fast Food Ltd v. Boniphace Njalali**, Revision No. 789 of 2019 HCLD at Dar es Salaam (unreported). Mr. Mwanri thus, prayed for this court to step into the shoes of the Arbitrator and resolve the issue of substantive fairness.

In response, Mr. Bukuku in his counter affidavit for the respondent conceded to the complaint to the extent that the Arbitrator did not resolve the issue on substantive fairness. However, Ms. Mwalwisi in her replying submission forcefully opposed the complaint. She contended that the Arbitrator resolved the issue and found that the applicant was substantively fairly terminated. She referred this court at page 14 of the impugned award. Ms. Mwalwisi

also forcefully opposed the prayer by the applicant's counsel that this court should step into the shoes of the Arbitrator and determine the issue.

I have gone through the impugned award from pages 13 to 14 of the typed award, I found that the Arbitrator raised and resolved the issue on substantive fairness. However, I noted that the reasoning and the conclusion did not tally. For example, the Arbitrator in course of her reasoning had this to say:

"I wonder if the complainant had qualifications when she was being employed how came she lost those qualifications? Because if she was an Acting Accountant because she had no CPA as stated by DW3, if she was discovered to have no qualifications for the post she was acting, why would the respondent not return her to the former position that she was employed and was qualified? Unfortunately, the respondent did not bring any of her Policy, Scheme of Service, Staff Regulation or whatever document to prove whether or not the position which the complainant was employed with (Junior) Internal Auditor did exist and its qualifications to help the Commission answer these questions."

Upon making that reasoning without making another reasoning to the contrary, the arbitrator came to conclude that:

"Whatever the case, if the complainant was discovered to have no qualifications, that was a valid and fair reason for termination....."

That conclusion was the base for her reasons in awarding the compensation of 12 months' salary. This is found at page 18 of the typed award where she observed that:

".... Although she prayed for compensation of 50 months' salaries, I find 12 months' compensation reasonable considering the fact that she worked for only two months and the respondent had a valid reason for termination, but flouted the procedures for termination."

In my opinion, the applicant and her counsel would have complained the propriety of the findings on substantive fairness than to complain that the arbitrator did not resolve the issue.

That being the case, it follows therefore that, though counsel for respondent contended that it is absurd for this court to step into shoes of the Arbitrator and make its own findings, I am of the view that it is imperative for this court to make it clear that whether there was fairness of reasons for termination or not; my position stands on

Rule 28 (1) (d) and (c) of the Labour Courts Rules, G.N. No. 106 2007,

which empowers this court to make appropriate order when it finds an error material to the merits of the subject matter.

I went back through the record and look at the evidence adduced by the parties. Also, I was assisted by the light which was already shed by the Arbitrator in her reasoning that the applicant was employed for the post of a Junior Internal Auditor. That the position announced was for Senior Internal Auditor, that the applicant was later transferred to the finance department as expenditure accountant. The Arbitrator wondered why the applicant was not returned to her former position after the Controller and Audit General (CAG) report showing that she had no qualification i.e she had no Certified Public Accountant (CPA) on the position she was holding.

Indeed, after going through the testimonies of DW1, DW2 and DW3, as well as documentary evidence, i.e letter denying renewal of contract for third time (exhibit C4), first employment contract for three years (exhibit C1), and the CAG report (exhibit R4); I noted that the letter did not specify the reasons for termination, but the

CAG report, showed that the applicant had no qualification for the position of the Internal Auditor which she had been employed for. That being the case the reasons for not renewing the contract were those given by the Managing Director who testified as DW3, at page 33 of the typed proceedings. He said that the Board of Directors reached to the agreement that the applicant's contract should not be renewed since the CAG report showed that she had no qualifications on that position. He testified also that on the position of Acting Accountant the applicant had acted for so long and her position had already fulfilled by another qualified person. DW3 further testified at page 31 of the same proceedings that the applicant was employed on the position of internal auditor but due to the scarcity of employees she was transferred to the position of financial accountant as (expenditure accountant), that the transfer was orally made as so for job description.

At page 35 however, DW3 said that the applicant was employed as Junior Internal Auditor after having discovered that she had no CPA qualification for her to hold the position of senior Internal Auditor. Considering all what was testified by DW3, the same were

the sources for the Arbitrator to reason that why the applicant was not returned to her former position of junior internal auditor if she lacked qualifications on the position of senior internal auditor and /or of the accountant. The answer for this question remained difficult and unresolved due to the absence of the documents as highlighted by the arbitrator (i.e Policy, Scheme of Service, Staff Regulation or whatever document).

Following the above circumstances, and following the fact that the CMA already found that the contract by the applicant was renewed by default **per section 36 (a) (iii) of Cap. 366 and Rule 4 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007;** it is my concerted view that the respondent terminated the applicant's employment without fair reasons.

As to the 3rd, 4th, and 5th issue the complaints by the applicant's counsel were to the effect that the Arbitrator did not exercise her discretion powers judiciously by awarding minimum compensation of 12 months. According to him in awarding the compensation the Arbitrator was supposed to take into account the circumstance of

the case guided by the principle of natural justice, equity and common law. To buttress his argument, he cited the decision by the Court of Appeal cases of **Yusuph Same & Another v. Hadija Yusuph**, Civil Appeal No. 96 of 2002, CAT (unreported) and **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported).

Mr. Mwanri further submitted that the arbitrator having found that the employment contract of the applicant was renewed by default, she was required to award compensation of the salary of all months remained unserved. He cited a number of decided cases including **Generics & Specialties Ltd v. Kalenga Katete**, Revision No. 833 of 2019, HCLD at Dar es Salaam (unreported), and **Good Samaritan v. Joseph Robert Sawari Munthu**, Labour Division, Revision No. 165/2011 (2013) LCCD 1. In these two cases it was decided that where an employer renews the contract of employee by default and the termination of contract is unfair, the compensation should be the loss of salary of the remaining period of unexpired term.

Again, Mr. Mwanri complained for the arbitrator not awarding compensation for the contract which the applicant and the

respondent entered which had the binding condition to the applicant that after completion of her study should return and work for the respondent for a period of two years. He claimed that, the applicant was entitled for 24 months compensation, the period she expected to work for the respondent but terminated. On that regard, he cited the case of **AAR Healthcare Tanzania Limited v. Evard Peter Rwelamira**, Revision No. 08 of 2020, HC at Dar es Salaam (unreported).

Responding to the issues, Ms. Mwalwisi maintained her stance that the applicant was not entitled to any terminal benefit as far as unfair termination is concerned since she worked for less than six months. She cited **section 35 of Cap. 366**. Ms. Mwalwisi also maintained her stance that the claimed compensation was not pleaded by the applicant before the CMA. Ms. Mwalwisi cited the case of **Dr. Abraham Israel Shumashuma Muro v. National Institute for Medical Research & Another**, Civil Appeal No. 68 of 2020, Court of Appeal of Tanzania at Mwanza (unreported) where it was held that the settled law in our jurisdiction is that the court will only grant a relief which has been prayed for.

Moreover, Ms. Mwalwisi contended that the claimed compensation for the contract of studies entered between the applicant and the respondent could not be granted since the same does not form the reliefs provided under **section 40 (1) of Cap. 366**, as also observed in the case of **Felician Rutwaza** (supra).

Indeed, it is a principle that discretionary powers of the court shall be judiciously exercised. This means that the court should not exercise its discretionary powers arbitrarily. It is said that the court has exercised its discretionary powers judiciously when it gives reasons for the decision. That being the case, I hastily hold that the arbitrator in the instant case did exercise her discretion powers judiciously. She gave reasons for each relief she granted. The fact that the Arbitrator found the reasons for termination being fair, while this court found them not to be fair cannot be the ground to hold that she exercised her discretionary powers arbitrarily.

Nevertheless, since this court have found that the applicant was substantively unfairly terminated and since the Commission also found that she was un-procedurally and unfairly terminated then I partly concur with the counsel for the applicant that the proper

compensation was the remaining period of unexpired term. This is based on the celebrated principle of law that the compensation in any unfair termination of a fixed term employment contract is the remaining period of that contract. I have no any justifiable reason to deviate from it. The principle was well observed in the case of **Good Samaritan Vs. Joseph Robert Sevari Munthu**, (supra) where was held that:

"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a "direct, foreseeable and reasonable" consequence of the employer's 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..." [Emphasis added]

This is also the position in the case of **Benda Kasanda Ndassi V. Makufuli Motors Ltd., Rev. No. 25 of 2011 HC. DSM** (unreported) where it was held that:

"In the circumstances when termination is unfair and is of a fixed terms contract, the award of compensation of remaining period is appropriate."

Regarding the claim by the applicant's counsel that the applicant was also entitled for the compensation of 24 months' salary for the contract of studies entered between the respondent and the applicant. The same is not tenable for the following reasons; firstly, as correctly argued by the respondent's counsel the same was not pleaded in the claim schedule annexed to the CMA Form No. 1 hence was not discussed by the CMA.

Secondly, the nature of this matter being the claim for unfair termination and since the reliefs for unfair termination are provided by law **i.e section 40 (1) of Cap. 366** and by the case law as termination of the fixed contract; the CMA had nowhere to stand to grant the said claim.

Lastly but not listed, the grant of the said claim would amount to double payment after the applicant being awarded a compensation for unfair termination which would not set a good practice. See also the case of **Felician Rutwaza** (supra) where it was

observed that ordering for such payment and compensation at the same time would amount to a double payment and such payment is not one of the remedies for unfair termination under **section 40 (1) of ELRA.**

Now, as to the 6th issue of to what reliefs parties are entitled to; considering what I have found above, the applicant is entitled to 34 months compensation for termination of employment of a fixed term contract. This compensation defaults the 12 months compensation awarded by the CMA. This court upholds the other reliefs granted by the CMA i.e one month's salary in lieu of notice, annual leave and subsistence allowance.

At the end result, I hereby grant the application to the extent explained above. Being a labour matter, I make no order as to costs. Ordered accordingly.



Mbeya

26.11.2021

A handwritten signature in black ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim

JUDGE