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

**(LABOUR DIVISION)**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LABOUR REVISION No. 39 of 2020**

*(C/f Labour Dispute No. CMA/KLM/MOS/ARB/77/2020 Commission for Mediation and Arbitration of Kilimanjaro at Moshi)*

**MANPOWER SOLUTION LTD. ..... APPLICANT**

**VERSUS**

**ALLY SALIMU SEGE ..... RESPONDENT**

**JUDGEMENT**

***30/11/2021 & 22/03/2022***

**MWENEMPAZI, J.**

The Applicant is dissatisfied with the Award p Commission for Mediation and Arbitration for Kilimanjaro at Moshi (CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/77/2020 dated 11th September, 2020 issued by G.P. Migire – Arbitrator.

The applicant has moved this Court under the provision of section 91 (1) (a), 91 (2) (a), (b) and 94 (1) (b) (i) of the **Employment and Labour Relations Act**, No. 6 of 2004 (the ELRA) read together with Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and 28 (1) (c) (d) and (e) of the **Labour Court Rules, 2007 GN. 106 of 2007** (Labour Court Rules) praying for the following orders;

1. That, this Court be pleased to call for the entire records, inspect and examine the record of the Commission in the Labour Dispute No. CMA/KLM/MOS/ARB/77/2020 and revise the findings and an Award delivered by Hon Arbitrator G.P. Migire on 11th September, 2020, for being improperly procured, illegal, erroneous and acted beyond jurisdiction.
2. That, this Court be pleased to make any other relevant and appropriate orders on the circumstances of this application, as it deems fit and just to grant in the interest of justice.
3. Cost of the Application be provided for.

Brief background of this dispute is to the effect that, the applicant is a company dealing with recruiting people to work with Bonite Bottlers Ltd. The respondent was employed through the applicant to work as a Bottle Inspector at Bonite Bottlers Co. Ltd since 1st July, 2012 until 5th June, 2020 when he was retrenched on the ground of low production due to COVID-19. According to respondent the termination was unfair, he was not paid his dues thus he filed his complaint at the CMA claiming for compensation for unfair termination. On the other side the applicant alleged that, due to COVID-19, production decreased at Bonite Bottlers Co. Ltd hence the employees were asked to work and be paid as vibarua. The respondent refused and claim to end his contract which they did by giving him all his dues, the termination letter and clean Certificate of Service. Thus, the applicant was of the view that he was fairly terminated.

The CMA decided on respondent's favour by declaring that the termination was unfair hence the current revision in which the applicant challenges the

Award in its entirety. Grounds for revision are set out under paragraph 13 (i) to (vi) of the applicant's affidavit as follows;

i. That, the Arbitrator erred in law and fact in holding that the procedure for termination was unfair and awarded the respondent TZS. 5,991,474/=.
ii. That, the Arbitrator acted beyond the jurisdiction conferred to him by the law, when nullified the contract of five months and 14 days entered between the applicant and the respondent and extended it into a period of one year.
iii. That, the Award was improperly procured as the Arbitrator awarded 12 months salaries as a compensation for unfair termination to the respondent while the respondent was employed for a fixed term contract. Thus, the respondent was only entitled for the claim of breach of contract, particularly the payment of remained months salaries to wit only the three months.
iv. That, the CMA Award was illegal, improperly procured and tainted with illegalities as the Arbitrator awarded the respondent TZS. 758,610/= as severance payment contrary to the law.
v. That, the Arbitrator erred in law and fact in in failing to evaluate and address properly the evidence given during hearing
vi. That, the Arbitrator erred in law and fact in deciding in delivering an Award which was unlawful and irrational.

During hearing of the application which was done by way of filing written submissions, the applicant was represented by Mr. Wilhad Kitaly, learned advocate whereas the respondent was represented by Mr. Manase

Mwaunguru from TASIWU. I commend them both for filling their submissions timely. Supporting the application, Mr. Kitaly submitted on the 1st and 3rd grounds jointly that, all reasonable procedures and steps were taken before the respondent was terminated as the record show that a meeting was convened by the applicant with other employees respondent inclusive and were told on the low production due to COVID-19. They were offered to work on another job, others agreed but the respondent refused hence he was written a letter showing end of his employment. He was given one month salary in lieu of notice, unpaid leave and a Certificate of Service. In the circumstances, both procedure and reasons for respondent's termination was fair.

In respect of the 2nd ground, learned counsel argued that, the Arbitrator acted beyond his power by nullifying the contract of 5 months and 14 days entered between the parties and extended it to one year contract. Cementing this argument, he cited the case of **Miriam E. Maro Vs. Bank of Tanzania Civil Appeal No. 22 of 2017** as Court of Appeal while relying in persuasive decision of Supreme Court of Nigeria, underscored the importance of Courts not to interfere or change contractual clauses and terms agreed freely between the parties when determining cases.

Regarding the 3rd and 6th grounds, Mr. Kitaly submitted that, the Arbitrator erred in awarding 12 months compensation for unfair termination. Instead, the respondent had a fixed term contract of 5 months and 14 days he was only entitled to be paid salaries for the remaining month for a breach of contract. He cited the cases of **Good Samaritan Vs. Joseph Munthu, Rev. No. 165 of 2011 and Mtambua Shamte & 64 Others Vs. Care**

**Sanitation and Suppliers, Rev. No. 154 of 2010** both from HC Labour Division, Dar es Salaam which insisted that, the principles of unfair termination do not apply to the specific or fixed term contracts. This also applies to the 4th ground, as learned counsel submitted that, it was erroneous for the Arbitrator to Award Severance payment tuning TZS 758,610/= to the respondent while parties had a fixed term contract. He therefore prayed that this Court quash and set aside the Award and proceeding of the CMA in Labour Dispute No. CMA/KLM/MOS/ARB/77/2020.

In reply, Mr. Mwaunguru submitted that, the respondent has been working for Bonite Bottlers as Bottlers inspector after being recruited by the applicant since 1st July, 2012 non-stop until 5th June, 2020 when he was unfairly terminated. He argued that, the respondent had been working without any fixed term contract as alleged by the applicant thus the CMA did not error in rewarding him TZS. 5,991,474/= as reliefs for unfair termination.

Mr. Mwaunguru further asserted that, CMA also did not error in declaring the contract between the parties illegal and thus nullify the same. The same applies to the Severance Payment, as the respondent was entitled TZS. 758,610/= for 7 years he had been working with the applicant. He argued that, no proper procedure such as meetings or minutes showing what actually transpired before terminating the respondent. Thus, COVID-19 being a ground for termination is an afterthought as the same is not even reflected in the termination letter. He prayed that this revision be dismissed and the CMA's decision be upheld.

In his brief rejoinder, Mr. Kitaly reiterated his earlier submission and insisted that there was a valid reason and proper procedures were followed before the respondent was terminated.

After going through the parties' submissions and CMA's records, I will now proceed to deal with grounds of revision as they appear. Starting with the 1st and 5th ground on whether the procedure for termination was fair. The respondent's termination letter to the applicant which was admitted as Exhibit A1 reads;

"***YAH: MWISHO WA MKATABA WAKO***

*Tafadhali rejea somo tajwa hapo juu.*
*Mkataba wako utafikia tamati tarehe 05/06/2020 na tunapenda kukutaarifu kuwa kampuni haitarudia mkataba wako.*
*Hivyo basi, utalipwa mafao yafuatayo;*

1. *Mshahara wako hadi tarehe* ***30/06/2020*** *kiasi cha* ***Tshs. 402,528/=***
2. *Likizo ya siku 14 ambayo ni* ***Tshs. 187,840/=***

***Jumla kuu ni Tshs 590,328/=***

*Kwa barua hii unajulishwa mwisho wa mkataba wako na malipo yako yatokanayo na Mkataba huo, utalipwa baada ya kukatwa kodi za kisheria.*
*Unashauriwa kufuatilia mafao yako katka mfuko wa NSSF ambapo ulikuwa ukichangia kama Mwanachama kwa kuwa Kampuni iliwasilisha kama taratibu zilivyo.*
*Wako*
*Sgd*
*Zacharia Nyaki*
*Afisa Rasilimali watu*
*K.n.y. Manpower Solution Ltd."*

According to the applicant, the respondent was terminated due to low sales leading to low production of Bonite Bottles Co. Ltd caused by COVID-19. In that regard, some employees, including the respondent were changed job description to casual works (vibarua) and were to be paid on daily basis. Others agreed but the respondent refused and claimed to be paid all his dues and move on with life but filed his complaint at the CMA instead. However, neither the letter quoted above nor the evidence given at the CMA, suggested that there was a proper meeting conducted by the applicant to validate their move.

Given the circumstances, it is my considered opinion that, following the operational changes that took place in the Applicant's business, compliance to **section 38 of the ELRA** was mandatory. **Section 38 (1) (a)(b)(c) of ELRA** provides that;

> ***38***.*-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall-*
> *(a) give notice of any intention to retrench as soon as it is contemplated;*
> *(b) disclose all relevant information on the intended retrenchment for the purpose of*
> *proper consultation;*
> *(i) the reasons for the intended retrenchment;*
> *(ii) any measures to avoid or minimize the intended retrenchment;*
> *(iii) the method of selection of the employees to be retrenched'*
> *(iv) the timing of the retrenchments; and*
> *(v) severance pay in respect of the retrenchments,*

This clearly shows what has to take place once there is a change of operation of applicant's business and after failing to reach consensus with the respondent during consultation process, the applicant had to comply to **section 38(2) of the ELRA** and refer the matter to CMA. None of this was done before terminating the respondent's employment.

Assuming that there was some communication between the parties, there is no proof of the required consultative meeting conducted as per section 38 of the ELRA. Nevertheless, the applicant failed to prove as per **Section 37 (2) of the ELRA** which provides that, in labour dispute it is the duty of the employer to prove the fairness of termination. In the case of **Stamili M. Emmanuel V. Omega Nitro (T) Ltd** Lab. Div. DSM Revision No. 213 of 2014 LCCD 2015 page 17, it was held *inter alia* that;

> *"I have no doubt that the intention of the legislature is to require employers to terminate employee only basing on valid reasons and not their will or whims. This is also the position of the international Labour Organization Convention (ILO) 158 of 1982 Article 4. In that spirit employers are required to examine the concept of unfair termination on bases of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees".*

In light of the above, it is my considered opinion that, the reason as well as the procedure used to terminate the respondent's employment was not fair. This ground fails.

Having declared that the respondent's termination was unfair, I now proceed to the 2nd ground on the contract between parties. According to the applicant they initially entered into a fixed term contract with the respondent for the period of 5 Months and 14 days commencing on 1st July, 2012 to 15th December, 2012. This contract was never renewed until 2nd March, 2016 to 16th August, 2016 on the same terms. Copy of these contracts were admitted at the CMA as Exhibit A2 and A3 respectively. In his Award, the learned arbitrator declared such contracts a nullity by virtue of **Rule 11 of the Employment and Labour Relations (General) Regulations, 2017, GN. No. 47 of 2017** which reads;

> *"A contract for a specified period referred to under section 14 (1)(b) of the Act, shall not be for a period of less than twelve months"*

He then proceeded to change the terms to 12 months. As rightly argued by the applicant, the Arbitrator erred in changing the contractual terms of the employment contract of 5 months and 14 days to twelve months since he was under no obligation to do so. After declaring the same a nullity, he should have proceeded to give the remedy for the same. This ground has merit and the same is allowed.

As to the 3rd, and 4th grounds which all touch the reliefs granted in unfair termination, it is clear that since 16th August, 2016 when the last contract ended to 5th June, 2020 when the respondent was terminated, (almost five years later) no other contracts were entered between the parties. This implies that the contract between the parties was no longer on a fixed term basis but on an unspecified term as per **section 14 (1)(a) of the ELRA**.

In the circumstances, since it is undisputed that the respondent had been working for Bonite Bottlers since 2012, the compensation awarded by the CMA to the respondent as to one month salary in lieu of notice, 12 months salaries in respect of unfair termination and Severance pay were fair and justifiable. I thus find no reason to fault the CMA's Award on these grounds. These grounds also fail.

Lastly on the 6th ground, this Court find that CMA properly analysed the evidence of the dispute before it and came up with rational decision that the procedure used to end respondent's employment was unfair. I am of the same view, as explained herein above. This application for Revision is therefore dismissed for want of merit. This being a labour dispute, I give no orders as to costs.

It is so ordered.

Dated and delivered at Moshi this 22nd day of March, 2022.

**T. M. MWENEMPAZI**

**JUDGE**

Judgement delivered in court this 22nd day of March, 2022 in the presence of Mr. Wilhard Kitali, learned advocate for the applicant and Mr. Manase Gideoni, Personal Respondent.

**T. M. MWENEMPAZI**

**JUDGE**