

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 134 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARB/298/2020)

BETWEEN

GLORY PANCRASY NJAU.....APPLICANT

VERSUS

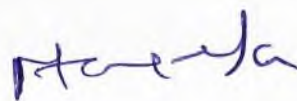
VCS VEHICLE CONSULTING COMPANY..... RESPONDENT

JUDGMENT

06.07.2022 & 17.08.2022

MWASEBA, J.

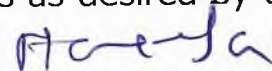
The Applicant herein is seeking for this court to revise the proceedings, orders and award of the Commission for Mediation and Arbitration (CMA) of Arusha in Labour Dispute No. CMA/ARS/ARB/298/2020 which dismissed her claims of unfair termination filed against the Respondent, VCS Vehicle Consulting Company, for the reason that since her contract was for a specific period of time, she was supposed to file a claim of breach of contract not unfair termination.



The application is supported by an affidavit sworn by the applicant herself and contested by a counter affidavit sworn by Caesar Shayo, learned counsel for the respondent.

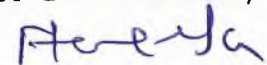
Briefly, the records reveal that the applicant was employed by the respondent on 2nd day of September, 2019 as a Sales Representative/ Executive for a one-year contract. Her contract was terminated on 3rd day of June 2020 for the reasons of unsatisfactory performance, misuse of company properties and leaving the workplace without permission. Being aggrieved with the termination the matter was referred to the Commission for Mediation and Arbitration (CMA) claiming to be unfairly terminated. After a full trial the CMA ruled out that as the applicant was working under a fixed term contract of 12 years a proper claim was a breach of contract and not unfair termination, for that reason her claim was dismissed. Aggrieved by that decision, the Applicant preferred this application seeking for revision of the CMA award.

At the hearing of the application the Applicant was represented by Mr Salvasia Kimario, learned counsel whereas the Respondent was under the services of Mr Machwa Hanson and Caesar Shayo, both learned counsels. The hearing proceeded by way of written submissions as desired by the parties.



Mr Kimario on behalf of the applicant argued that the applicant was unfairly terminated without the respondent following the procedures provided for under **Rule 18 of the Employment and Labour Relation (Code of Good Practice)** GN No. 42 of 2007 for failure to conduct disciplinary hearing. Further to that he alleged that the applicant was working under a permanent basis not a fixed term contract as alleged by the respondent. The issue framed at CMA was based on whether the applicant was fairly terminated not that there was a fixed term contract or not, therefore it was wrong for the arbitrator to determine the issue which was not agreed by both parties. He averred that the applicant was employed under a permanent contract and the said contract is in custodian of the respondent herein. He cited the case of **A-One Products and Bottlers Ltd Vs Flora Paulo and 2 Others**, Labour Div. DSM, Revision No. 356 of 2013 and **Safi Medics Vs Rose Peter and Others**, Revision No. 82 of 2010 (HC-Unreported).

It was his further submission that if the arbitrator found out that the employment was for a fixed term contract, he could have proceeded to award the applicant his remuneration for the remaining period of contract and other benefits instead of dismissing the claim. He buttresses his point with the case of **Jacob Gibons Nyonyoma Vs Mobisol UK Limited**,



Revision No. 32 of 2021 (HC-Unreported) and **Good Samaritan Vs Joseph Robert Savariv Munthu**, Revision No. 165 of 2011 (HC-Unreported). In the end, he prays for the application to be allowed and the applicant to be paid compensation of 36 months for unfair termination and other benefits.

On his side, Mr. Shayo contesting the application he submitted that the applicant was employed under a fixed term contract of one year (12 months). He added that the applicant was issued with a one month notice as required by the law. Currently the applicant is seeking for 3 months compensation for unfair termination which was also her claim in CMA F.1. So long as the principles of unfair termination do not apply to specific term contract, Hon. Arbitrator was right to dismiss the claim of Unfair termination. His argument was supported by a recent case of **Ibrahim S/O Mgunga & 3 Others Vs African Muslim Agency**, Civil Appeal No. 476 of 2020.

More to that, Mr Shayo submitted that the burden of proof in this kind of contract lies with the employee as per **Rule 4 (2) of GN 42** of 2007. Therefore, the applicant was issued with a notice of termination and being paid pending salaries he has no claim against the respondent. And all the decision which are based on unfair termination cited by the counsel for

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the applicant are distinguishable in our case. So, he prayed for the application to be dismissed.

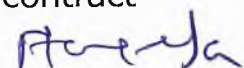
In his brief rejoinder, apart from reiterating what was submitted in their submission in chief, the learned counsel for the applicant averred that the applicant was neither given a notice of termination nor paid outstanding salaries as alleged by the respondent and that their claim is based on unfair termination and not breach of contract as alleged by the trial Commission.

Having duly considered the submissions of both parties, records and the law, the issues for determination before me are:

1. Whether the applicant's employment was a fixed term contract or a permanent one.
2. Whether the Commission was right to hold that the applicant's dispute was on breach of contract and not unfair termination

Having gone through the records of the trial court particularly Form No. 1 the applicant claimed for the following:

- i. Declaration that the termination of her employment was unfair
- ii. Salary for the remaining period of employment contract



- iii. Payment of 48 months' salary as compensation for unfair termination
- iv. Certificate of service.

However, during the hearing, the applicant alleged that she was employed under a permanent contract and the contract was under the care of the employer. An allegation which was contested by the respondent who averred that the applicant was employed under a specific term of contract which is twelve months. Upon hearing both parties, the Commission found that the applicant was employed under a fixed term contract therefore, her claim was supposed to be on the breach of contract and not unfair termination.

This court upon revisiting the records of the Commission do concur with the findings of the commission for the following reasons: Firstly, the applicant failed to prove that her contract was a permanent one and not a fixed term contract. The allegation that she signed a permanent contract which was left with the employer is just an afterthought since the records shows that she had a fixed term contract. In the first paragraph of her claim in the CMA F.1 it is pleaded as follows:

"1. That, the employee was employed by the employer under an employment contract for the period of 12 months

Atorney

from 2nd day of September, 2019 as a SALES REPRESENTATIVE/EXECUTIVE."

Moreover, she filed in court a list of additional documents of which a copy of Employment contract and contract termination letter were listed although they were not tendered and admitted as evidence for the reason best known to herself. Thus, the allegation that the applicant was employed on a permanent basis does not hold water as it contradicts her own pleadings. I agree with the trial arbitrator that parties are bound by their own pleadings. This has been stated in a number of cases including the case of **Yara Tanzania Limited Vs. Charles Aloyce Msemwa t/ a Msemwa Junior Agrovet & 2 Others**, Commercial Case No. 5 of 2013, Mwambegele J (as he then was) held that: -

" It is cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings ..."

Thus, with regard to the first issue, it is evidenced that the applicant had a fixed term contract of one year as pleaded and not permanent basis as alleged by her counsel in his submission.

Coming to the second issue, the commission after ascertaining that the contract between the applicant and the respondent was of a fixed term and not permanent it hold that the applicant's dispute was on a breach of contract and not unfair termination. It is my considered view that the

honourable arbitrator rightly held so due to the fact that unfair termination does not apply to a fixed term contract. This was well explained in the case of **Zuhura Omary Rashid & 4 Others Vs DYCC Board of Education & DYCC Yemen Schools**, Revision No. 50 of 2016 [2017] LCCD No. 67 that:

"According to the definition in relation to; DISMISSAL, DISCRIMINATION & UFAIR LABOUR PRACTICE, a treatise by John Grogan: Second Edition. JUTA & CO Ltd, Mtambua Shamte and 64 Others Vs Care Sanitation and Suppliers at Dar es Salaam. Hon. Rweyemamu J' "explained the principles of unfair termination do not apply to specific tasks or completion of a specific task. Under specific tasks or fixed term, the applicable principles apply under conditions specified under section 36 (a) (iii) of the Employment and Labour Relation Act, No. 6 of 2004 read together with rule 4 (4) of GN 42/2007."

Being persuaded by the cited authority and going through the records of the lower court it goes without saying that the applicant was employed under a fixed term contract of twelve months. Thus, I agree with the learned arbitrator that the claim was supposed to be the one of breach of contract. This is due to the facts that the relief given under a claim of unfair termination do differ with that under a breach of contract.



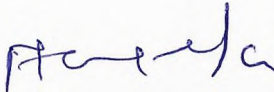
Regarding the allegation that the issue of breach of contract was not one of the issues raised at the commission, the same has no merit. Hon. Arbitrator upon evaluation of evidence he found that the claim was for breach of contract and not unfair termination that's why the claim was dismissed so that the applicant could file a proper claim at CMA.

For the foregone reasons, the findings of the CMA is upheld. Accordingly, the application is hereby dismissed. No order as to costs.

Ordered Accordingly.

DATED at **ARUSHA** this 17th day of August 2022.




N.R. MWASEBA

JUDGE

17.08.2022