IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION APPLICATION No. 84 OF 2020

(C/F Labour Dispute No. CMA/ARS/ARS/48/2019)

BETWEEN

ST. THERESA OF THE CHILD JESUS

SECONDARY SCHOOL..... APPLICANT

AND

EDWIN GEORGE KAFUMU..... 1ST RESPONDENT

ELISA D. NKYA .....2ND RESPONDENT

SOMON NJOGOLO.....3RD RESPONDENT

ADEN ADOLF ..... 4TH RESPONDENT

DEUS M. LUZIGA.....5TH RESPONDENT

JUDGMENT

28th July & 10th August 2022.

TIGANGA, J.

This is an application for revision emanating from Labour Dispute No. CMA/ARS/ARS/48/2019 filed and arbitrated before the Commission for Mediation and Arbitration for Arusha, herein after referred to as the CMA. In this application, the applicant moved this court by way of notice of application, chamber summons and an affidavit sworn by one Paul Sebastian Malisa who introduced himself as the manager of the applicant. The application was filed under section 91(1)(a), 91(2), (c) and 94(1), (b), (i) of the Employment and Labour Relations Act, [cap 366 R: E 2019],

rules 24(1), (2)(a), (b), (c), (e), (f) and Rule 28(1), (c), (d) and (e) of the Labour Court Rules GN No.106 of 2007

The applicant had several prayers as shown in his chamber summons supported with an affidavit;

1. That, this Honourable Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration in Employment and Labour Case No. CMA/ARS/ARS/48/2019.
2. That, the Honourable Court be pleased to revise and set aside the CMA Arbitration award made on the 07th September, 2020 by Honourable Lomayani Stephano, Arbitrator on the following grounds;
    a) That, the Arbitrator erred in law and in fact in holding that there were no valid reasons for terminating the respondents' employments'.
    b) That, the Arbitrator erred in law and in fact in holding that the applicant did not follow proper procedure on termination of the respondent's employments.
    c) That, the arbitrator failed to analyse the evidence adduced during the hearing by the applicant and hence arrived at the wrong conclusion.
    d) That, remedies awarded by the Arbitrator are unreasonable, illogical, irrational and unlawful.

To understand the gist of this application, the background of this matter is important, and it goes that, the respondents filed a complaint before the CMA for unfair termination of their respective employments' contracts. They became successful and among other things, they were awarded payments of their last leaves, certificate of service as well as the payments in lieu of the notice for termination.

The applicant was aggrieved by the awards issued by the CMA to the respondents, hence this application for revision. In this revision, the applicant was represented by Mr. John F. Materu, learned Advocate, while the respondents enjoyed the service of Mr. Bashir Ibrahim Mallya, also learned Advocate. With leave of the court, parties argued this application by way of written submissions. Both counsel filed their respective submission as scheduled by this court.

In support of the application, the counsel for the applicant submitted that, the learned Arbitrator refused the grounds for termination of the respondents' employment contracts namely frustration as per exhibit D6 and use of clause 11(a) of the respondents' employment contracts as it allows giving the respondents a one-month notice or paying a one-month salary in lieu of the notice. According to him, the Arbitrator did not consider the fact that, the termination of respondents' contracts was due

to frustration following the Government instructions to the applicant to remove unprofessional teachers from employment.

He further submitted that, as per the employment contracts between the applicant and the respondents, it is clearly provided under clause 11(a) of their employment contracts that an employer may decide to terminate an employee's employment contract at any time by giving the teacher a one-month notice or payment of a one-month salary in lieu of that notice. He further submitted that, there is nowhere in the said contracts that, an employer should give reasons when terminating an employee. In his vie, since the condition of the employment contract under clause 11(a) was met, therefore he termination was lawful.

He further submitted that, the payments ordered by the Honourable Arbitrator to be paid by the applicant to the respondents were unlawful since the termination was lawful under 11(a) of their employment contracts. He in the end, prayed for the setting aside of an award given by the CMA.

In reply submission the learned Counsel for the respondents strongly opposed the applicant's arguments, he submitted that, it is clearly shown on records that, the respondents entered in a two years' employment contract each having being found by their employer to have

qualified to teach. He further submitted that, page 6 and 7 of the awards of the CMA supports the fact that the respondents were unfairly terminated by the applicant.

In his opinion, the applicant was supposed to justify the budget cut which resulted into the respondents' retrenchment. Failure to substantiate as to how the employer economy was in a situation which necessitated the respondents' termination is as good as lacking a valid reason for the termination of respondents' employment contracts.

It is his further submissions that, the applicant had to consult the respondents before their termination. He further submitted that, with regards to the Government instruction that, unprofessional teachers be removed, those employed ones were supposed to finish their contracts or the employer was to do so in consultation with the employee and meet consensus by having a termination agreement. He further stated that, the respondents were given letters to inform them that they were no longer applicant's employees. In his view, that is where the procedure was flouted because the law requires a notice not a letter as the applicant did.

While submitting his submission on that issue, he submitted that, terminating the respondents on basis of operational requirement (retrenchment) had to comply with section 38(1) of the Employment and

Labour Relations Act, read together with section 23(2), (a) of Employment and Labour Relation (Code of Good Practice) Rules GN No. 42 of 2007. Failure to comply with the above laws implies that the termination was unfair. In his further argument, he said the termination of employment contracts also was done during the leave while the law is very clear under section 41 of the Employment and Labour Relation Act, (supra) that, the notice of termination shall not be given during any period of leave. He concluded his reply submissions by asking the Court to dismiss the application for revision and uphold an award delivered by the CMA.

In rejoinder submissions, there was nothing apart from the reiterations of the applicant's submissions in chief, therefore for purpose of brevity, I will not reproduce the rejoinder herein. That, marked the end of the submissions by both parties.

Now, gathering from the application, the counter affidavit as well as the submissions by the counsel, the issue for determination before this court is whether the termination of the respondents employment contracts observed the law?

This Court while labouring to determine this matter, will be guided by the principle governing the employment contract. In my view there are three main areas of concentration, the **first** being an evaluation as to

whether there were valid reasons by the Employer to terminate the respondents' employment contracts. **Second** is scrutinizing as to whether the required procedures for termination were observed and **lastly** is whether respondents were entitled to the reliefs awarded to them before the CMA.

With regards to the valid reasons, this Court is guided by **section 37(1) of the Employment and Labour Relations Act**, [cap 366 R: E 2019], on what amounts to a valid reason which provides that;

> *37. (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by* an employer is unfair if the employer *fails to prove;*
>
> ***(a) that the reason for the termination is valid***
>
> *(b) that the reason is a fair reason*
>
> *(i) related to the employee's conduct, capacity or compatibility*
>
> ***(ii) based on the operational requirements of the employer, and***
>
> ***(c) that the employment was terminated in accordance with a fair procedure. (The bolded is my emphasize)***

As per the law, what amounts to a valid reason, fair reason and a fair procedure for termination is as provided above. In this case, the applicant terminated the respondents on two reasons, one, being the Government instruction to remove unprofessional teachers from the school two, being the dropping of the school's income. It goes without saying that the moment the applicant employed the respondents had enough knowledge that they were qualified persons for the purpose of teaching at her school.

It is very unfortunate that the applicant tells this court that following the Government instruction that unprofessional teachers be removed from the schools then he decided to terminate respondents' employment contracts as they were not teachers by profession. It is my considered view that this is not a valid reason since the applicant ought to have known before employing them, he employed the respondents because he had enough time to pass through their academic qualifications and realized that they were teachers by profession.

A reasonable man could not expect under such circumstance to employ teachers and realize later that the employees were not teachers by profession following a government instruction, hence this does not

suffice a valid reason for respondents' termination of their employment contracts.

With regards to the second reason for termination which based on operational requirements of the employer, I wish to reproduce paragraph 4 of the CMA's award which was actually an abstract quoted form exhibit P8 in which is a letter informing one Aden Adolf that his employment contract has been terminated containing reason adduced for termination;

> *"Baada ya kutathmini hali halisi ya idadi ya Wanafunzi tunalazimika kutoruhusu kurudia mkataba wako na kwa awamu nyingine hii ni kutokana na upungufu mkubwa wa Wanafunzi na kuwa na mikondo michache na vipindi pia"*

At page 9 paragraph 2 of the award, the CMA quoted another part of exhibit P8 as follows;

> *"Baada ya kutathmini hali halisi ya Wanafunzi bodi ya shule imeamua katika kikao chake cha tarehe 03/12/2018 kutoruhusu kurudia kwa mikataba kwa wale waliomaliza muda wao."*

Basing on the above quoted paragraphs of the CMA award, it is clear that the applicant relied on the operational requirement to terminate the respondents' employment contracts. It goes without saying that the applicant has not substantiated the valid reasons on the basis of

operational requirements which necessitated the termination of the respondents' employment contracts. There is nowhere on record, the applicant has satisfied this court on how his office's operational environments have been hard in such a way that the only solution was to terminate the respondents. In short, there is no justifications for the alleged operational requirement and the same fails to stand as a valid reason for termination of the respondents.

Having gone through the reasons, I now turn to crosscheck as to whether the procedures for termination were observed. It is upon records of the CMA that; the Respondents were terminated while they were on leave. Under section **41(4)(a), (b) of the Employment and Labour Relations Act**, [cap 366 R: E 2019], it is provided that;

(4) Notice of termination shall not be given

(a) During any period of leave taken under this Act

(b) To run, concurrently with any such period of leave.

The respondents were terminated while they were on leave, the provision above restricts the termination of employment contracts during the period of leave. The records show at page 10 paragraph 2 of the CMA's award that the respondents employment contracts were terminated

in December 2018, even the witness of the applicants admitted that fact during cross examination. I therefore find the termination to have infringed the above-mentioned procedure.

The other procedure is that, termination of employment contracts on bases of operational requirements requires a prior notice of intention to retrench, disclosing all relevant information followed by consultation of an employee by the employer and set out the termination arrangements. This principle is true under the provision of **Section 38(1) of the Employment and labour Relations Act**, [Cap 366 R.E 2019] 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;*
>
> > *(c)* ***consult prior to retrenchment or redundancy on****; (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 (****The bolded is my emphasize****)*

From the phraseology of the law, this kind of termination is a participatory one. However, in this case, the termination of the respondents was done on the bases of operational requirements but there was no prior consultation between an Employer and the Employee as required by the law.

In fact, these are not the only procedural irregularities embedded in the process of terminating the respondents. There are some other procedural infringements, which include failure of the applicant to issue notice to the respondents instead he gave them letters to inform them their termination, instead of informing them prior their termination. It is a procedural requirement which forms a corner stone of not only the rule of natural justice but which is now the constitutional right provided under Article 13(6)(a) of the Constitution of the United Republic of Tanzania that when the right of any person is being determined, that person must as a matter of right be given opportunity to be heard.

Therefore, failure to notify the respondents before termination was nothing but a breach of their Constitutional right which is an incurable defect. See. **Mbeya-Rukwa Auto parts and Transport Limited vs Jestina George Mwakyoma** [2003] TLR 251 as cited with approval in

the case of **Hashi Energy Tanzania Limited vs Hamisi Maganga,** Civil Application No. 200/16 of 2020 CAT-DSM un reported.

Even if we believe for the sake of argument that, the applicant was acting on the government directives in terminating the respondents contract of employments, which facts have not been proved, I believe the government did not direct the applicant in implementing to its directive to flout he procedure. Having said so, it can be justifiably concluded that, the termination of the respondent's contracts of employment were substantively and procedurally unfair which facts renders all the grounds of this revision untenable.

With regards to the reliefs granted in the award issued in the favour of the respondents by the CMA, I subscribe to the findings of the CMA, since the respondents entered into a fixed term contracts with the applicant the only compensations they are entitled to, should be calculated on the basis of the remaining periods of their contracts. On that, I am persuaded by the decision of this court sitting at Mwanza in the case of **Big Daddy's Wholesalers Ltd vs Nazmeen Ally Masoud and 1 Another,** Labour Revision No.17 of 2021 **where** at page 13, the Court referred to the case of **Good Samaritan vs Joseph Robert Savari**

Munthu, Labour Revision No. 165 of 2011, reported in HC labour digest No. 09 of 2013, in which it was held that;

> *"When an employer terminates a fixed term contract, the loss of the salary by the employee of the remaining period of unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action. Therefore, in this case, a probable consequence of the applicant's action was loss of salary for the remaining period of the employment contract which was 21 months."*

With regards to the reliefs awarded to the respondents, it is my considered view that, the award is considerate and is in line with the principle in the two cases I have just cited. Since there was a remaining period for the unexpired fixed term contracts, the respondents were legally entitled to the compensations which is commensurate to the remaining period of time in their contracts. That said, this application for revision is hereby dismissed for lack of merit, the award of the CMA passed in favour of all the respondents is hereby upheld.

Order accordingly.

DATED at **ARUSHA,** on this 10th day of August 2022.

J.C. TIGANGA

JUDGE