

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT ARUSHA**

REVISION NO.77 OF 2021

***(Originating from Commission for Mediation and Arbitration (CMA) in
Labour Dispute No. CMA/ARS/ARS/257/20/128/2020)***

BILILA LODGE INVESTMENT LTD T/A APPLICANT

VERSUS

ZAKAYO AGAEL MOLLEL RESPONDENT

JUDGMENT

21/07/2022 & 29/09/2022

KAMUZORA, J.

The Applicants in this application being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1), (a) and (b), 91(2) (c), 91(4) (a)(b) and section 94(1) (b) (i) of the Employment and Labour Relations Act Cap 366 and Rule 24(1) 24(2) (a) (b) (c) (d) (e) (f) and 24(3) (a) (b) (c) (d) and Rule 28(1) (a) (c) (d) & (e) of the Labour Court Rules GN. No. 106 of 2007. The Applicant prays for this Court to be pleased to call and examine the records of the proceedings and award of the CMA in

Employment dispute No. CMA/ARS/ARB/128/20 and revise the proceedings, order and award on the following grounds: -

- 1) That, the arbitrator erred in law and in fact by failure to decide on all issues as framed especially on breach of contract.*
- 2) That, the arbitrator erred in law and in fact by awarding unjustified reliefs to the Respondent.*
- 3) That, the arbitrator erred in law and in fact by holding that the reasons for termination of employment contract while on probation period was unfair and invalid.*
- 4) That, the arbitrator erred in law and in fact by failure to properly assess and evaluate the evidence tendered before it, leading to wrong findings.*
- 5) That, the Arbitrator award has occasioned miscarriage of justice to the Applicant.*

As a matter of legal representation, the Applicant enjoyed the service of Advocate Evod Mushi while the Respondent was ably represented by Advocate Lilian Justo. Both Advocates agreed to conduct the hearing by way of written submission and they both filed their submissions as scheduled save that, the Applicant decided not to file rejoinder submission.

Submitting in support of the first ground in the application, the Applicant stated that, the arbitrator erred for not determining the first issue which is whether there was a breach of employment contract. The

appellant argued that, the CMA only determined the issue issues on whether there were valid reasons for termination and whether the procedures were followed and the reliefs to the parties but omitted to determine the first issue on whether there was a breach of employment contract. In the Applicant's view, such omission vitiates the proceedings.

The Applicant also submitted that, the Respondent was terminated while on probation period of three months thus, he could not challenge the fairness of termination as per section 35 of the Employment and Labour Relations Act Cap 366 R.E 2019 under which, an employee under six months cannot challenge fairness of the termination.

The Applicant further explained that, the contract alleged to have been breached was a contract for unspecified period of time (permanent contract). That, as per the law, breach of contract can only be claimed on a contract of specified time but for a permanent contract, a person can only challenge termination on ground that there were no reasons for termination and the procedures were not followed.

The Applicant argued that, the Respondent at the CMA combined two distinct cause of action which are breach of contract and termination of employment a fact which is an error. In support of this, the Applicant cited the case of **James Renatus Vs. CATA Mining**

Company Limited, Revision No 38 of 2017 HC Labour Division at Musoma.

On the second ground the Applicant submitted that, the Respondent was awarded 12 months compensation as to an employee who was terminated unfairly but, since the Respondent worked only for 2 months and was a probationary employee then, the award was unfair as the claim of unfair termination could not stand as per section 35 of the ELRA Cap 366 R.E 2019. He insisted that, the relief awarded has no justification and there was no breach of contract.

The Applicant argued for the third ground that, as there is no dispute that the Respondent was on probation period when he was terminated, he could not challenge the termination as per section 35 of ELRA. It is the submission by the Applicant that, the act of the Respondent to fill part B of CMA F1 on termination of employment while he was terminated while on probation period was legally wrong and the decision of the CMA to that effect was also wrong.

The Applicant further submitted that, there was no proper analysis of evidence by the arbitrator as it was evident that the Respondent had only worked for 2 months and 11 days and the Respondent was still on probation but the arbitrator proceeded to make a determination of unfair

termination contrary to the law regardless the fact that the Applicant followed proper procedure and had a valid reason for the termination. And for the last ground, it is the submission by the Applicant that the learned arbitrator disregarded the law specifically section 35 of ELRA CAP 366 a fact which caused miscarriage of justice to the Applicant.

In his reply submission to the first ground the Respondent submitted that, it is not true that the arbitrator did not determine the first issue. Pointing at page 3 and 4 of the award he stated that, the arbitrator discussed the first issue and stated that the contract was a permanent contract. He was of the view that, a permanent contract can be breached just like any other contract as far as parties did not honour the agreement.

In his reply submission to the remaining grounds, the Respondent argued that, it is true that under section 35 ELRA one cannot claim for terminal benefits for unfair termination but there are circumstances which the same can be invoked. Reference was made to the case of **Edi Secondary School Vs. Ezekiel Damas Sinyangwe**, Revision No. 10 of 2013, **Good Samaritan Vs. Joseph Robert Savari Munthu**, Revision No 165 of 2011. He argued that, it was the duty of the Applicant to prescribe the terms and condition of probation something

that was not done hence the alleged poor performance was not proved. He maintained that, the Respondent was unfairly terminated hence entitled to the reliefs granted.

The Respondent added that, another circumstance which may allow one to be granted reliefs despite section 35 of ELRA is when there are reasonable expectations of renewal of a contract. He referred the case of **Good Smaritan Vs. Joseph Robert Savari Munthu**, Revision No. 165 of 2011. He insisted that, as the Respondent was working under a permanent contract which involve employment on regular or continuing basis, such contract could only end after a breach of contract by either of the parties. He was of the view that, the Respondent had reasonable expectation of continuation of his work hence the Applicants termination was unfair.

Regarding the claim that the Respondent was under a probation he stated that, the Respondent was supposed to serve for 90 days short of which amounted to a breach of contract. Regarding the submission that the CMA was wrong to frame two issues of unfair termination and breach of contract, the Respondent argued that, there is no law which prevents the framing and determination of both issues and the same does not vitiate or prejudice the proceedings. Referring the case of

Good Samaritan (supra), the Respondent added that, the court in that case accepted both issues and determined them in favour of the Respondent. The Respondent added further that, the CMA has mandate to determine both labour disputes and breach of contract by virtue of section 88 (1) (b)(ii) of ELRA. Regarding the claim of valuation of evidence. He insisted that, there was valuation of evidence as seen under page 5 and 6 of the award and the arbitrator explained that the Applicant failed to prove that there was fair termination. Based on the above submission, it is the Respondents prayer that the application be dismissed with costs.

I have gone through the records of the CMA and considered the present application, affidavit in support of the application and the submissions from the parties. It is clear from the records that the Respondent was terminated within 2 months and 11 days of his commencing work with the Applicant. From the records, specifically CMA Form 1 the nature of dispute raised by the Respondent was for breach of contract. The reliefs sought were; compensation for breach of contract, one month salary in lieu of notice, payment of salary for the month of May, leave and transport allowances, certificate of service and general damage. The Respondent also filled in Part B which is an

additional form for termination of employment disputes only. Now the question is whether the Respondent's claim was based on breach of contract or termination of employment.

Based on CMA Form 1 the nature of dispute was breach of contract and the reliefs sought as listed above shows that the Respondent's claim is based on breach of contract. Even in his submission, the Respondent pointed out that the issue on breach of contract was properly raised and dealt with by the CMA referring page 3 and 4 of the award and insisted that even the contract of employment can also be breached. It was the contention by the Applicant that, since the Respondent's contract was for unspecified period, he could not file a dispute for breach of contract.

I agree with the Applicant that, breach of contract arise where the contract of employment is for a specified period of time. Going through the CMA award from page 3 to 6 I discovered that, the Arbitrator real discussed the issue on the breach of contract. Now the question is whether this matter fall under breach of contract. There is no dispute that the Respondent was employed for unspecified term. Thus, his termination could not be challenged based on breach of contract rather under unfair termination.

The records reveal that, while the Respondent did not claim for unfair termination, he filled in Part B which an additional form for termination of employment disputes only. I do not agree with the Applicant's assertion that the Respondent raised two distinct disputes under CMA Form 1. I say so because, it is clear from the said form that, under Part A where the employee is supposed to fill the nature of dispute, only breach of contract was opted and termination of employment was not opted. The fact that Part B was filled could not help to serve the purpose of showing that there was a claim for unfair termination. I say so because that part become relevant only where the in Part A, the employee had opted to raise dispute on termination of employment.

Apart from that, even the nature of most of the reliefs sought which are; compensation for breach of contract, one month salary in lieu of notice, payment of salary for the month of May, leave and transport allowances, certificate of service and general damage are those awardable under breach of contract as opposed to reliefs under unfair termination the reliefs which include re-instatement, re-engagement and compensation for 12 months' salary.



I therefore agree with the Applicant's counsel that, the arbitrator went further in determining the matter as if the claim was for unfair termination without first addressing the issue on breach of contract that was raised to be determined. Looking into the CMA award at page 3 the arbitrator acknowledged that the issue was on the breach of contract. He also acknowledged that the Respondent's employment was not a fixed term contract rather contract of unspecified period. By that determination, the arbitrator was in agreement that the dispute by the Respondent could not base on the breach of contract rather unfair termination that is why he continued discussing whether the Respondent's situation could be regarded as unfair termination.

In my view, having determined that the dispute did not fall in breach of contract, it was not proper for the arbitrator to proceed on determining the fairness of the reasons and procedures for termination based on unfair termination. I therefore agree with the Applicant that, the main issue referring the dispute that was presented before the CMA was not dealt with hence the CMA award was based on improper claims. I therefore find merit in this ground and allow the same.

The first ground being decided in affirmative, it goes to the propriety of the award, I therefore find no reason to deliberate on other

grounds. The application is therefore allowed and the arbitrator's award is hereby set aside. In considering that this is a labour dispute, no order for costs is granted.

DATED at **ARUSHA** this 29th day of September 2022.

 
D.C. KAMUZORA
JUDGE

