IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 16 OF 2022

BETWEEN

SWISSCONTACT..... APPLICANT

AND

PHILIPO NAMANGA BRUNO & 4 OTHERS..... RESPONDENT

JUDGMENT

Date of last order: 04/10/2022
Date of Judgement: 25/10/2022

M. MNYUKWA, J.

Aggrieved by the Award of the Commission for Arbitration and Mediation (CMA) delivered on 20th December 2021, the applicant filed the present application seeking revision of the Award of the CMA. The application is made under the enabling provisions of section 91(1)(a)(b), 91(2)(b)(c), 94(1)(1)(b)(i) of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein to be referred as the Act) and Rule 24(1), 24 (2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c)(d) and 28(1)(c)(d) of the Labour Court Rules, GN No.106 of 2007 (herein to be referred as the GN

No. 106 of 2007). The applicant prayed before this Court for the following Orders:

1. *That this Honourable Court be pleased to call for, examine the record and proceedings of Commission for Mediation and Arbitration on Labour Dispute No. CMA/MZ/ILEM/137/2021 with a view to satisfying itself as to its legality, propriety, correctness and regularity of the award delivered on 20th December 2021.*
2. *That upon examining the said record of proceedings, the Honourable Court be pleased to set aside the award of the Commission (Hon. Igogo) dated 20th December 2021 on the following grounds namely: -*
   a) *The Arbitrator erred in law by concluding that the employment contract subject of the dispute was a fixed term contract rather than a stated term contract considering that a fixed term contract would not have a termination clause.*
   b) *Having found as a fact that the employment contract had a termination clause that stated "Either party may terminate the Agreement by giving the other one month's written notice. This employment agreement will automatically elapse at the end of December 2021 unless otherwise agreed by both the Employer and the Employee and in such case a new contract will be entered into" the Hon. Arbitrator erred by making a ruling that issuing of a notice under clause 7 of the employment contract amounted to breach of contract by the applicant.*

c) *The Hon. Arbitrator having found as a fact through* ***Exhibit D1*** *being proof of the estimated timeline for completion of the project that is 30th June 2021, the Hon. Arbitrator erred by assuming without proof that the applicant (Employer/Swisscontact) had other means and/or source of income to give its employees contracts up to end of the year.*

d) *The Hon. Arbitrator having found as a fact through* ***Exhibit D1*** *being proof of the estimated timeline for completion of project that is 30th June 2021, the Hon. Arbitrator erred by demanding proof of communication between the Donor and Swisscontact that funds would no longer be forth coming*

e) *The Hon. Arbitrator erred by applying Rule 8(2)(a)(b) to the Stated term contract.*

f) *Having confirmed that the claim is based on breach of contract, the arbitrator erred in entertaining determination of the issue of failure to follow due procedure which only applies to disputes based on unfair termination.*

g) *The Hon. Arbitrator erred by holding that the complainants are entitled to six months salaries for the remaining period of the expired term of the stated term employment contract notwithstanding the mutual termination of employment clause of the employment contract in dispute and;*

h) *The Hon. Arbitrator erred by awarding transport allowance at rates sought by the complainants without any proof of expenditure or quotation, notwithstanding proof by applicant that it had already paid the same to the Respondent herein.*

3. Any other relief(s) and/or Order(s) as this Honourable Court may deem fit and just to grant.

The present application is supported by the affidavit sworn in by Hope Paul, an advocate on behalf of the applicant. The respondent challenged the application through the counter affidavit of Joseph Madukwa, the counsel of the respondents.

When eventually, the Revision was coming for hearing, considering the prayer and consent of the parties and by the leave of the court, the hearing was done by way of written submissions.

In order to appreciate the context in which the labour dispute arose and later this Revision, I find it apposite to briefly explain the material facts of the matter as gleaned from the available court record. It goes thus: the respondents were employed in yearly contract basis whereby on 4th January 2021, they entered under a one-year contract with the applicant into different cadres according to their professional. The contract was ending on 31st December 2021, as exhibited by Exhibit A1, A3, A5, A7 and A9. That, in the middle of the contract, sometimes on 30th March 2021, the applicant issued the notice of non-renewal of employment contract which serve as termination notice to all respondents herein with effect from 1st May 2021, terminating the

employment contract of the respondents on the reason of the closure of the project by the donor i.e MasterCard Foundation as exhibited by Exhibit A2, A4, A6, A8 and A10. That, sometimes in May, they were paid their terminal benefits. The respondents aggrieved by the action of the applicant to terminate their employment contract and filed a labour dispute at the CMA.

In determining the dispute brought before it, the CMA framed four issues for consideration and determination to which;

1. *Whether the applicant breached the respondents' contract of employment.*
2. *Whether there were sufficient reasons for termination of the respondents' contract of employment.*
3. *Whether the procedures of terminating employment contract were followed.*
4. *To what reliefs are the parties entitled to.*

After hearing both parties to the dispute, the CMA ruled out that, there was breach of contract on the part of the applicant towards the respondents, there was no reason for breach of the contract and the procedures for termination of contract were not followed. The CMA allowed the application and ordered the applicant to pay the

respondents the total amount of Tshs. 70,518,163/= to be awarded to five respondents in the manner allocated to each of them in the Award.

Dissatisfied with the Award of the CMA, the applicant lodged the present Revision and advanced his grounds as reproduced above in this Application.

In arguing the Revision, the applicant counsel prayed to adopt the affidavit sworn in by Hope Paul to form part of his submissions. He argued that, according to the Law of Contract Act, Cap 345 R.E 2019, as it is provided for under section 2(h) an agreement enforceable by law is contract and that, the contents of the contract are its terms in which parties to contract are bound by it. And that, the Hon. Arbitrator in her Award confirmed that, the employment contract may be terminated by giving right to any party to the contract to issue 30 days' notice.

He went on that, breach of contract occurred when there is violation of the contractual obligation by failure to perform one's own promise, by repudiating it or by interfering with another party's performance. He added that, in line with that definition, applicant acted in conformity with the provision of the employment contract by issuing one month notice. He concluded that, in that circumstances the issue of breach of contract can not arise.

The counsel for applicant further refers to Exhibit D1 which shows that, the applicant is a Non- Governmental Organization which does not generate funds and run its activities through funds from the donor. That, the applicant's witness, DW1 testified before the CMA that, the applicant had entered into contract with the MasterCard foundation for purpose of funding the project whose estimated completion date was categorically stated to be 30th June, 2021. He added that, since Exhibit D1 shows the completion of the project by the donor, it was wrong for the Hon. Arbitrator to conclude that the applicant had other means or source of income to give its employees contract up to the end of the year.

The applicant's counsel further submitted that, in her decision, the Hon. Arbitrator applied Rule 8(2) (a) & (b) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 which is applicable to employment contract of a fixed term contract, before expiration of the contract and period before the employee materially breached the contract or rather where there is no such breach by getting the employee to agree to early termination. He went on that, unlike fixed term contract, employment agreement that include nominated expire date, may be expressed as specified period or task

which provides to the parties the right to terminate the contract early usually with notice are termed as stated term, maximum-term or outer limit employment contract.

He clarified more by stating that, the respondents' employment contracts embody a termination clause which makes them stated term, maximum-term or outer limit employment contract and not the fixed term contract. He therefore retires on this point by submitting that, the Hon. Arbitrator erred to conclude that the type of the contract between the applicant and the respondents is a fixed term contract rather than a stated term contract.

The counsel for applicant also submitted on the issue of the entitlement of compensation of six months' salaries awarded by the CMA for the remaining period of contract to be wrongly awarded.

The counsel further attacks the CMA Form No 1 and the decision of the Hon. Arbitrator to entertain the dispute which was not placed before her. He stated that, the Hon. Arbitrator entertained the issue of failure to follow proper procedure to terminate respondents' contract. He claimed that, in the CMA Form No. 1, the respondents' claimed for both breach of contract and unfair termination which renders the pleadings to be defective. To support his argument, he refers to the case of **James**

Renatus v Cat Mining Company Labour Revision No. 1 of 2021 and the case of **Bosco Stephen v Ng'amba School,** Revision No. 38 of 2020.

He further submitted that, the Hon. Arbitrator erred by awarding the respondents, transport costs and allowance beyond what the applicant offered, without substantial proof of extra expenses over and above what was offered by the applicant. He retires by submitting that, the Hon. Arbitrator erred in awarding the respondents over and above what stated under the law considering the fact that, they were paid severance pay at the courtesy of the employer in which they did not deserve. He finally prays the court to grant the relief sought in chamber summons.

In rebuttal, the counsel for respondents prays to adopt his counter affidavit of to form part of his written submissions. He also prayed the court to upheld the Award of the CMA which ordered the applicant to pay the respondents Tshs. 70,518,163/= as the salaries for the remaining part of the contract, transport costs and subsistence allowance.

The counsel for respondents started submitting by attacking the interpretation of the type of the respondents' employment contract as

specified by the counsel for the applicant, as stated term contract to be unknown in our law. He refers to section 14(1)(a) (b) and (c) of the Act that provides for only three types of contracts which are contract for unspecified period of time, contract for specified period of time for professional and managerial cadre and contract for specific task. He went on that, the evidence adduced shows that, the type of contract entered between the applicant and the respondents is a fixed term contract for 12 months as evidenced in exhibit A1, A3, A5, A7 and A9. He added that, section 41 of the Act, does not bar a fixed term contract from having termination clause as it may apply to all types of contracts including fixed term contract.

He further submitted that, even if in the employment contract there is termination clause, the same must comply with Employment and Labour Relations Laws and Regulations as it is provided for in the case of **St. Joseph Lolping Secondary School v Alvera Kashushura,** Civil Appeal No. 377, CAT at Bukoba where it was held that, the employer must comply with the provisions of Laws and Regulations for fair termination of employment before issuing notice. He retires by stating that, the existence of termination clause in the employment

contract is not the reason to breach the contract rather, the termination must comply with the provision of the law.

The counsel for respondents further stated that, exhibit D1 which is referred by the applicant is not the employment contract and therefore cannot govern the relationship between the applicant and the respondents. He further stated that, the applicant knew all along that the project would end on 30th June 2021, and that was not the sufficient reason for breach of contract.

On the assertion that, the donor and Swisscontact had a communication about ending the project, the counsel for respondents averred that, there was no proof whatsoever that, the Donor communicated with the respondents as to the end of the project. He insisted that, it is a trite position of the law that, the Arbitrator before reaching to a fair decision, he must consider the evidence adduced by both parties and proof presented before him.

The counsel for respondents further insisted that, in Tanzania we don't have the stated term contract as it is unknown in our laws. He went on that, in any type of contract, following the proper procedure is pre-requisite requirement before terminating a contract or breaching a contract as per Rule 8(2)(a)(b) and Rule 9 of Code of Good Practice

which dictates that, proper procedure must be followed as it was stated in the case of **St. Joseph Lolping Secondary School v Alvera Kashushura,** (supra).

Concerning the Award of the CMA. The counsel for respondents averred that, the arbitrator was right to award the remaining salaries and he was ought to have awarded the 8 months salaries instead of 6 months salaries. He added that, in our case at hand there was no mutual termination of employment contract as alleged rather, the presence of termination notice of non-renewal of employment contract.

On the issue of transport allowance, the counsel for respondents stated that, transport rates are under the public domain and therefore can be easily accessible by the CMA. He went on that, the applicant did not cross examine the respondents' testimony on place of recruitment and on procedural unfairness and therefore CMA was justified to find that, the procedure for breach of contract and the payment of transport allowance were not followed. He refers to the Court of Appeal decision in the case of **Jacob Mayan v The Republic,** Criminal Appeal No. 558 of 2016 that, failure to cross examine on a certain matter, is equal to an acceptance.

Regarding the CMA Form No 1 to include the dispute of breach of contract and unfair termination he responded that, the respondents admitted the respondents to have claimed for breach of contract and unfair termination in CMA Form No 1. He clarified that, the nature of the dispute which was indicated, is the breach of contract and not any other claim. He went on that, even if the respondents claimed for unfair termination yet the CMA did not determine on unfair termination. He added that, both parties to the dispute testified on breach of contract.

He retires his submission that, since there was no valid reason and the procedure were not followed that's why the Arbitrator gave an Award in favour of the respondents. He cemented his argument by referring to the case of **Good Samaritan v Joseph Robert Munthu,** Revision No 165/2011, HC Labour Division at Dar es Salaam that, when an employer terminates a fixed term contract, the loss of salary by an employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer wrongful action. He thus prayed for Revision application to be dismissed.

Rejoining, the counsel for applicant mainly reiterates what he had submitted in chief and he insisted that, in the CMA Form No 1 the respondents ticked both, the breach of contract and unfair termination

of contract as the nature of the dispute and also filled part B of the form on the unfair termination and this makes their prayers unmaintainable. He said that, Part B of the CMA Form No 1 is an addition form for termination of employment dispute only and not otherwise. He therefore stated that, the claim was founded under defective charge.

He went on to distinguish the case of St. **Joseph Lolping Secondary School v Alvera Kashushura,** (supra) contending that the same refers to the dispute of unfair termination while in our case at hand the dispute is on the breach of contract.

After considering the rival submissions from both counsels, I find that what is disputed are the types of the employment contract entered between the applicant and the respondents and whether there was breach of the contract between the two, and to what reliefs are the parties' entitled to.

At this juncture before I determine the legal issues presented by the applicant through the Notice of Application, I find it useful to explain on the issue of the CMA Form No 1, as one of the legal issues raised and submitted by the applicant when arguing the Application for Revision. I am mindful with the well-established principle that, parties are bound by their pleadings which also extends to the legal issues raised by the

applicant in the Application for Revision, in which the applicant's written submission must be in consonance with the legal issues raised in the Application for Revision. However, since the issue of CMA Form No. 1 is the legal issue and the other party got an opportunity to address it, for the interest of justice, I find justifiable reason to determine it.

It is the applicant's complain that, the respondents' CMA Form No 1 are defective as they contained two disputes which is breach of contract and unfair termination as the respondents filled in Part B of the CMA Form which is specifically for unfair termination. And that, the Hon. Arbitrator determined the matter which is not before him. In rebuttal, though the respondents' counsel challenged the raising of this issue in submission, he responded to it. In his response, he stated that, the respondents claim was the breach of contract and even if they have claimed for unfair termination, the same was not heard and determined by the CMA as both parties to the dispute testified on the breach of contract and the decision based on breach of contract and not unfair termination.

So, the issue for immediate determination is whether the CMA Form No. 1, which is the form used to initiate claim in the CMA was defective to the extent that, it is incurable in the circumstances of our

case at hand. I say so because, each case is determined in its own fact and circumstance and whether the pleadings is curable or not, it depends on whether the other party is prejudiced in anyhow taking into consideration that, this is Labour Court which is the court of equity as it is provided for under Rule 3(1) of the Labour Court Rules, GN No. 106 of 2007.

Upon going through the CMA Form No. 1, it is true that, the respondents claimed that the nature of the dispute was a breach of contract. They also went further by filling Part B of the Form which dealt with unfair termination. By looking on it, its true that one may say that respondents claimed for both the breach of contract and unfair termination. However, in our case at hand, the arbitrator focused only on breach of the contract. This bears testimony in the records of the CMA as reflected on page 7 of the proceedings where both parties of the dispute appeared before the Arbitrator in the coram dated 20/9/2021 and the framed issues based on the breach of contract. The issues that were framed are:

1. *Endapo walalamikaji walivunjiwa mkataba na mlalamikiwa.*

2. *Endapo kulikuwa na sababu za msingi za kuvunja mkataba.*
3. *Endapo taratibu za kuvunjiwa mkataba zilifuatwa.*
4. *Stahiki kwa kila upande.*

As per the records, the above issues guided the parties on adducing their evidence before the CMA as even the nature of the evidence testified by the applicant and respondents solely based on breach of contract and not on unfair termination.

Again, if the dispute was that of unfair termination, the applicant, employer (the then respondent at CMA) is ought to testify first to prove before the CMA on the issue of unfair termination as to whether there were a valid reason and the procedure for termination was followed, as it is provided for under Rule 23 of the Labour Institutions (Mediation and Arbitration) Rules, GN No, 67 of 2007.

Furthermore, in our case at hand, it was the respondents who firstly started to adduce evidence before the CMA to prove that there was breach of contract. As if that is not enough, fortunately even the Award itself focused in the breach of contract as it is evidenced on page 12 of the Award where CMA ruled out that, there was breach of contract by the applicant. On page 13 of the Award, it shows that, the applicant

failed to prove that there was reason for breach of contract, and on page 14 of the Award, the arbitrator held that, the procedures in the breach of contract were not followed.

For the aforesaid testimony in the court record, it is quite clear that, the nature of the dispute that was heard and determined before the CMA was breach of contract and not unfair termination.

Admittedly, it's true that the CMA Form No. 1 was not properly filled in, but this did not prejudice the applicant and for the circumstances of our case at hand, I find the defect to be curable.

The applicant's counsel cited two cases of this court; **James Renatus** (supra) and **Bosco Stephan** (supra) to show that if the CMA Form No. 1 is defective, the matter deserved to be struck out and nullified the proceedings and the Award of the CMA as it was done in the case of **Bosco Stephan** (supra). While I am agreeing with the legal position of striking out the Application, but the circumstances of the above cases differ with our case at hand as in our case at hand I find the defective to be curable as it did not prejudice the applicant anyhow.

The case of **James Renatus** is distinguishable with our case at hand because in that case the issue of defective of CMA Form No. 1 was raised at CMA as a preliminary objection and the same was disposed at the CMA before hearing of the dispute on merit. At the Revision, one of issues before this court was, whether it was proper for the arbitrator to conclude that, the applicant's application contains defective pleadings. In our case at hand, this issue was not raised in the CMA and it was raised in this court when the matter was already heard on merit at the CMA and still the legal issue that was determined was the breach of contract.

The case of **Bosco Stephan** (supra) is also distinguishable with our case at hand. In this case CMA determined the issue of unfair termination as one of the issues that was framed, was whether the termination was fair, and the proceedings reflected that, it was the employer who started to adduce evidence at the CMA which shows that he determined the dispute of unfair termination which was not before him. In our case at hand as I have discussed above, the framed issues were on breach of contract, it is the employees (respondents) who started to adduce evidence as they alleged that there was breach of contract.

For the aforesaid analysis, I find this legal issue of defective CMA Form No. 1 to have lack merit and it is an afterthought and the same is hereby dismissed.

Now turning back to the main contention of this dispute which to my view centered on the type of the employment contract entered between the parties and whether the breach of the same was proper in the eyes of the law.

Before I embark to determine the above issues, I want to put it clear that, parties are in agreement that there was contract for employment between them. Upon going through the said contract which were admitted as Exhibit A1, A3, A5, A7, and A9, one of its clauses is titled **OPERATION OF THE LAW** in which it states that:

> *"Subject to these terms, this Agreement is tenable within the Republic of Tanzania and governed by Tanzania Law".*

From that clause, it is quite clear that parties to the contract agreed to be bound by the laws governing labour matters in Tanzania and not otherwise.

It is contended by the applicant's counsel that, parties in this agreement entered into the so-called stated term contract which is a common law contract and one of its peculiar features is for it to have

termination clause which distinguish it with the fixed term contract and therefore, it can be terminated by giving a notice as it was stated in the termination clause, for it to be regarded as a proper termination in the eyes of the law.

The above averment was strongly disputed by the respondents' counsel who submitted that, the contract entered between the applicant and the respondents is a fixed term contract and that the same is governed by our labour laws and when terminated, there should be reason and the procedures need to be followed.

From the finding of the CMA, the type of contract entered between the parties is a specific term contract, the findings which I also join hands. It is a specific term contract because it has a start date and an end date and it is not sin for it have a termination clause which guides parties on what should be done in case there is need for termination. In this type of contract parties are bound by the specified period and the terms of the contract should be honored and in case of termination, the labour laws apply. This type of contract is recognized in our labour laws as it is provided for under the Act, where under section 14(1) it provides that:

"A contract with an employee shall be of the following types

(a) a contract for an unspecified period of time

(b) a contract for a specified period of time for professional and managerial cadre

(c) a contract for a specific task."

Apart from the type of contract entered by the applicant and the respondents to be recognized in our labour laws, in case of the termination before the end date, the labour laws apply as well. Fortunately, in our case at hand, the application of our labour laws to regulate the contract of employment between the applicant and the respondents was stated under clause 11 of the Contract of Employment as I quote above.

After forming an opinion that, the type of the employment between the applicant and the respondents is a fixed term contract, the issue for consideration and determination is whether there was breach of contract by the applicant.

Admittedly, in Exhibit A1, A3, A5, A7 and A9 there was a termination clause as it is provided for under Clause 7 which reads as here under:

"TERMINATION

Either party may terminate this Agreement by giving the other one month's notice. This employment Agreement will automatically elapse at the end of December 2021 unless otherwise agreed by both the employer and the employee and in such case, a new contract will be entered into."

The above clause means either party to the contract may terminate contract by giving one month notice and that, if no termination notice is given, the contract will automatically elapse at the end of December 2021. That means, the contract for employment is automatically expected to elapse on December 2021. However, before the elapse, the applicant as evidenced on Exhibit A2, A4, A6, A8 and A10 issued the Notice which was titled as a "Notice of Non-Renewal" on 30th March 2021 with effect from 1st May 2021. The applicant alleged that, the reason for the termination of employment contract was closure of the project by the donor i.e MasterCard Foundation. In the so-called termination letter, the respondents were required to handover the applicant's office on or before 30th April 2021.

It is my observation that, the applicant's notice of non-renewal of contract cannot be equated with the notice of termination as the notice of non-renewal aimed to inform the employee that the employer will not

renew the contract after it elapses. Unlike the purpose of the notice of non-renewal, as the name itself sound, the notice that was given to the respondents was treated as notice of termination of the employment contract which was issued within the contractual period as the contract was expected to end automatically on December 2021.

Nevertheless, looking at the contents of the said notice, the intention of the applicant was to issue a notice of termination by giving a one-month notice. This was also understood by the respondents who were required to hand over the office on or before 30th April 2021, which was just a working period of 4 months out of 12 months agreed in the employment contract. To that end, parties are in agreement that the notice that was issued was for termination of employment contract.

The question is now whether, such notice was in line with the labour laws so as to say that, the termination of employment contract was justified. It is on record that, the respondents did not expect their contracts to be terminated before the elapse of the period of contract and they went further even to expect the renewal of the contract. For that reason, it was expected for their termination to comply with the requirement of section 37 of the Act. And, termination of employment

contract contrary to the requirement of section 37 is illegal as the section itself provides that:

> *"37(1) It shall be unlawfully 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 or*
>
> *(ii) based on operational requirement of the employer*
>
> *(c) that the employment was terminated in accordance with a fair procedure.*

It is the requirement of the law that in any type of contract the termination of the contract should base on a fair reason and procedure. As it was stated in the case of **St. Joseph Kolping Secondary School vs Alvera Kashushura** (supra) that:

> *"We do not agree with him that, under our laws a fixed term of contract of service can be prematurely terminated without assigning reasons. This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable*

to those contracts whose terms are shorter than 6 months. .... In addition, creation of a specific duration of contract gives the employee legitimate expectation that everything remains constant, he or she will be in the service throughout the contractual period. The expectation is defeated, if the same can be terminated at any time without reason."

Reverting to our case at hand, the reason for termination was allegedly to be stated in the notice issued to the respondents dated 30th March 2021, which was the closure of the project by the donor. The reason suggests that, termination was based on operational procedure.

The applicant through his witness, DW1 as reflected on page 29 of the CMA proceedings stated that, the contract was breached because the donor could not have fund to finance the project and even themselves, their expectation was for the contract to elapse on December 2021. The applicant tendered Exhibit D1 to prove that, the contract was ending 30th June 2021. Upon examining Exhibit D1 it was stated under page 13 that, the estimated completion date of the service is 30th June 2021 and there was no any evidence which back up DW1 evidence apart from that estimation date. There was no any other evidence which shows that, in fact the contract was ending on 30th June 2021 taking into consideration that Exhibit D1 was entered prior to the

entering of the employment contract between the applicant and the respondents. For that reason, I find the reason for breach of contract was not justified in other words, the reason for breach was not proved before the CMA and since the contract was ending December 2021, there was breach of the employment contract.

Again, it is very clear that, the procedure for termination of employment contract was not followed as the only thing that was done to the applicant was issuing of notice. That is to say, the laid down procedure as it is provided for under section 37(2)(c) of the Act were not followed. The evidence on record reveals that, the termination of employment contract was unfair in terms of the procedure. For the foregoing reasons, I find the applicant's reasoning that, the type of the contract is a stated term contract to which does not have procedure to follow, lacks merit and I dismiss the applicant's grounds that, the CMA erred to hold that, the termination was unfair in terms of reason and procedure.

Having hold that there was breach of the contract, I am now persuaded by the case of **Joakim Mwanikwa v Golden Tulip Hotel,** Revision Application No. 268 of 2013 (unreported) where it was held that:

"When employer terminates fixed term contract, the loss of the salaries by the employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer action was loss of salary for the remaining period of the employment contract."

As the respondent were terminated on May 2021 and their contract was ending on December 2021, they are entitled to compensation of seven (7) months being the salary of the remaining period of contract as it was rightly stated by the respondent's counsel and not six (6) months as awarded by the CMA.

The last issue for consideration is originated from the relief, and the main concern of the applicant is the payment of repatriation costs. As per the records, the applicant complained that the respondents were awarded the transport costs without any proof to exhibit the amount that was awarded. The Act under section 43(1) requires the employer to pay the employee transport allowance upon termination of the employment contract. The section requires the employer either to;

(a) transport the employee and his personal effects to the place of recruitment or

(b) pay for the transportation of the employee to the place of recruitment or

(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period if any, between the date of the termination of contract and the date of transporting the employee and his family to the place of recruitment.

It is not disputed that, the respondents were paid repatriation costs from their duty station to the place of recruitment. The applicant submitted that the Hon. Arbitrator erred to award them transportation costs while they have failed to prove that, they spent more than what was paid. On their part they submitted that, as the repatriation costs was just estimated by the employer(applicant) and it was proper for the Hon. Arbitrator to award them by additional amount as a transportation costs.

After considering the submissions from both sides, I don't think if this issue need to detain me much. It is the trite position of the law that in civil cases, the one who alleged have to prove his allegation. As the respondents alleged before the CMA that they were paid less than what they deserve, it was their duty to prove by cogent evidence that in fact they were paid less than what they deserve. Failure to adduce any

evidence to prove to the contrary, render their evidence to be a mere word which lacks support thereto.

For that reason, I find the Hon. Arbitrator erred to have awarded the respondents additional amount as transportation costs while they were already paid as they did not give any proof to substantiate their claim that, they were not deserving to be paid additional amount. For that reason, in the result, this ground of repatriation costs is allowed and it is revised.

In the final analysis, I hereby partly allow the Revision Application to the extent explained therein. Since this is a labour matter, I make no order as to costs. It is so ordered.

Right of appeal explained.

M. MNYUKWA

JUDGE

25/10/2022

Court: Judgement delivered in the presence of the counsel of the applicant and the respondents' counsel

M. MNYUKWA

JUDGE

25/10/2022