IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

LABOUR REVISION NO. 29 OF 2021

(Arising from an Award of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi in Labour Dispute No. CMA/KLM/MOS/ARB/16/2021)

THE REGISTERED TRUSTEES OF CATHOLIC DIOCESE OF MOSHI..... APPLICANT

VERSUS

FRANCIS STEPHEN MAYOMBO..... RESPONDENT

JUDGMENT

06/02/2022 & 29/03/2022

SIMFUKWE, J.

The Registered Trustees of Catholic Diocese of Moshi hereinafter referred to as the Applicant filed this application after being aggrieved with the ruling of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/KLM/MOS/ARB/16/2021** of Moshi dated 25th June, 2021 for being improperly procured, illegal, irrational, irregular and tainted with errors. The application was brought under **section 91 (1)(a), Section 91 (2) (a) (b) (c)** and **Section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (ELRA);** read together with **Rule 24 (1) (2) (a) (b) (c) (d) (e)** and **(f), (3) (a) (b) (c)** and **(d)** and **Rule 28 (1) (c) (d)** and **(e) of the Labour Court Rules, GN No. 106 of 2007**. The Applicant prayed for the following orders:

1. *That, this Honourable Court be pleased to call for the entire records,*

inspect and examine the record of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi in Labour Dispute No. CMA/KLM/MOS/ARB/16/2021, and revise the findings and an Award delivered by Honourable Arbitrator G.P. Migire on 25th June, 2021, for being improperly procured, illegal, irrational, irregular, tainted with erroneous. (sic)

2. *That, this Honourable Court be pleased to quash the said Award.*
3. *That, to make any other relevant and appropriate order(s) in the circumstances of this application, as this Honourable Court shall deem fit and just to grant in the interest of justice.*

The application was supported by an affidavit sworn by Mr. Tumaini Materu learned counsel for the Applicant, which was contested by the counter affidavit sworn by Mr. Richard Patrice Mosha learned counsel for the Respondent.

The factual background of the dispute is to the effect that, the respondent was employed by the applicant on 5th December 2014 as a teacher at Uomboni Secondary School in Moshi District, under a fixed term contract of two years (2). The agreed monthly salary was Tshs. 680,000/= only. On 14th December 2016, the respondent signed another employment contract which ended on 13th December 2018 whereby the agreed monthly salary was Tshs 810,000/= only. On 14th December 2018 the respondent signed another employment contract of two years expected to end on 13th December 2020. However due to an addendum dated 1/5/2020 and the letter dated 18/6/2020, the respondent's employment contract ended on 12th February 2021. That, following the outbreak of Corona virus the school programs were closed on 17th March 2020 and

students were returned home pursuant to the order of the government. On 24th April 2020 the meeting was held between the school management and the school boardt, whereby the meeting resolved several issues including unpaid leave and addendum to the employment contract dated 14th December 2018. On 1st May 2020 the applicant delivered addendum to all staff, the respondent received the said addendum and signed it. That, in the said addendum, parties agreed on unpaid leave during the whole period of the government's order regarding the closure of the school programs. On 18th June 2020 the respondent was given a letter which informed him about opening of school programs on 29th June 2020. The said letter also informed the respondent that the two months will be added to his contract signed on 14th December 2018. On 19th November 2020, the applicant informed the respondent about the end of his employment on 12th February 2021. The said letter was replied by the respondent on 14th December 2020 requesting to be paid gratuity, transportation costs and certificate of service. Then, on 12th February 2021, the applicant paid part of respondent's gratuity and promised to pay him the remaining amount. However, the respondent decided to file a labour dispute before the Commission for Mediation and Arbitration. The said dispute was decided in favour of the respondent whereby he was awarded a total of Tshs. 17,512,125/= being gratuity, bus fare for four persons, transportation of goods costs, subsistence allowance and compensation of twelve months remuneration.

Aggrieved with the Arbitral award, the Applicant preferred to file the instant application for revision against the CMA award on the following grounds: -

i. *That, the Honourable Arbitrator erred in law and fact for holding and finding that, the applicant did not follow fair procedure for termination of the Respondent's employment contract, while the respondent's employment contract terminated by lapse of time, and the applicant followed all procedures including issuance of notice which informed the respondent about the end of his employment contract.*

ii. *That, the Honourable Arbitrator erred in law and fact for finding and holding that the termination of the respondent's employment contract was unfair, for a mere reason that there was an expectation of renewal of the employment contract.*

iii. *That, the Honourable Arbitrator erred in law and fact for failure to finding and holding that there was no expectation of renewal due to economic constraints as well as respondent's correspondences including the letter dated 14th December 2020 and letter dated 11th February 2021. (sic)*

iv. *That, the Honourable Arbitrator erred in law and fact for awarding transportation costs for the respondent and his family members as well as subsistence allowance, while respondent was first recruited at Moshi and he has permanent residence at Himo within Moshi District.*

v. *That the Honourable Arbitrator erred in law and fact for awarding transportation costs to the respondent and his family members as well as subsistence allowance, while the first employment contract revealed that the respondent was employed at Moshi.*

vi. *That, the Honourable Arbitrator erred in law and fact for misapprehend the evidence of DW2 and thereby awarding transportation costs to the respondent and his family members as*

well as subsistence allowance in absence of any relevance evidence. (sic)

vii. *That the Honourable Arbitrator erred in law and fact for finding and holding that the applicant had intention to terminate the respondent's employment contract on a mere reason that, the applicant transferred the respondent to a new working station (Majengo Secondary School) which had economic constraints.*

viii. *That, the Honourable Arbitrator erred in law and fact for finding and holding that Majengo Secondary School is very far from Himo compared with distance between Himo and Uomboni Secondary School, contrary to the evidence in the record.*

ix. *That, the Honourable Arbitrator erred in law and fact for awarding the respondent compensation of twelve months remuneration while the termination was fair.*

x. *That, the Honourable Arbitrator erred in law and fact for failure to evaluate and address properly the evidence given during the hearing.*

xi. *That, the Arbitrator erred in law and fact for awarding the respondent the (sic) Tanzanian Shillings 17,512,125/=, contrary to the evidence on record.*

xii. *That, an award of the CMA was irrational, illegal, improperly procured and tainted with erroneous (sic).*

The application was argued by way of written submissions. Both parties complied to the schedule of which I am very grateful. Mr. Tumaini Materu learned counsel argued the application for the applicant, while Mr. Richard Patrice Mosha opposed the application for the respondent.

Mr. Tumaini Materu started his submissions by narrating the background of the dispute of which I find no need to reproduce here as it has already been covered herein above. The learned counsel adopted the contents of his affidavit together with all annexures to form part of his submissions in support of the application for revision.

Mr. Materu submitted among other things that, the CMA award was improperly procured, illegal, irrational, irregular and tainted with erroneous (sic), the same should be inspected, examined, revised and quashed. He prayed to abandon the ground which appear in paragraph 19 (ix) of the affidavit.

Supporting the 1st ground of revision, Mr. Materu submitted that the respondent's employment contract was fixed term contract of two years, which was automatically terminated by lapse of time. The termination of employment contract by lapse of time is one of the categories of lawful termination under the common law, which is recognized under **Rule 3(1)(a) and Rule 3(2) (a) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No. 42 of 2007.** The learned counsel quoted the above noted Rules for ease reference:

> *"Rule 3(1) (a) For the purposes of these Rules, the termination of employment shall include-*
>
> *(a) A lawful termination under the common law.*
>
> *Rule 3(2) A lawful termination of employment under the common law shall be as follows: -*
>
> *(a) Termination of employment by agreement."*

The learned counsel for the applicant also cited **Rule 4 (2) of GN No.**

42 (supra) which provides that: *Where a contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.*

Mr. Materu submitted further that, the applicant complied with procedures for termination of employment contract; she issued a notice which informed the respondent about the end of his employment contract and non-renewal of his employment contract. The respondent acknowledged receipt of the said notice and replied it via his letter dated 14th December 2020. In addition, Mr. Materu quoted part of the employment contract between the applicant and the respondent which reads as follows:

> *"16. RENEWAL OF CONTRACT*
> *Where either party wishes to renew this contract then such party shall have notice to the other party three months' notice in writing to that effect. The employee who has not given to the employer notice of renewal of contract shall not at all circumstances be allowed to continue to work for the Diocese."*

The learned counsel for the applicant pointed out that, throughout the records, proceedings and an award of the Commission for Mediation and Arbitration, there was nowhere where the respondent tendered the letter requesting renewal of the employment contract. On that basis, the learned counsel was of the view that, the respondent's employment contract was lawfully terminated by lapse of time. Thus, there was no unfair termination.

On the 2nd and 3rd grounds of revision, Mr. Materu submitted that there was no reasonable expectation for renewal of the said employment

contract, because the respondent did not request for renewal of the employment contract three months before the end of his employment as directed under clause 16 of the employment contract (exhibit A1). He contended that the respondent was not entitled to benefits under the auspices of the expectation of renewal of employment contract and reiterated how the applicant complied to the laid down procedures and that impliedly, the respondent consented to terminate his employment contract. That, the applicant's letter/notice (exhibit A8) clearly informed the respondent about the end of his employment contract, and further informed the respondent about non-renewal of his employment contract due to economic constraints facing the school. The respondent knew the economic constraints facing the school due to decrease of big number of students and income emanating from school fees. That's why he did not request for renewal of the employment contract.

In that sense, Mr. Materu was of the opinion that the Arbitrator erred in law and fact for finding and holding that, there was expectation of renewal of the respondent's employment contract under **Rule 3 of GN No. 42 of 2007** (supra). The learned counsel stated further that, **Rule 3 (1)** cited hereinabove has been elaborated by **Rule 4(5) of GN No. 42 of 2007** (supra) which provides that:

> *"Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew."*

The above quotation emphasizes the employee to demonstrate an objective basis for the expectation of renewal such as previous renewal, employer's undertakings to renew.

Starting with previous renewal, Mr. Materu submitted that, the Arbitrator failed to consider the essential fact of the renewal of the employment contract. The said essential fact is the clause or terms of the employment contract regarding the renewal of employment contract. This is because in assessing the renewal of a contract, the Arbitrator ought to look at the terms of contract, particularly the renewal of the contract, in order to consider if the party who expected for renewal of contract had complied with the terms of such contract. Mr. Materu was of the view that, since the employment contract provides for a party who wish to renew a contract, to inform the other party in writing, this implies that the employment contract cannot be renewed where there is no notice to request such renewal of the employment contract and this defeated the expectation of renewal.

Concerning the employer's undertakings to renew, Mr. Materu referred to **Black's Law Dictionary, 9th Edition** where the word **undertakings** has been defined to mean that "*a promise, pledge*, or *angagement*."

From the above definition, the learned counsel stated that nowhere in the records and award of the Commission for Mediation and Arbitration, where the applicant promised or requested for renewal of the employment contract as directed by clause 16 of the employment contract. That, evidence on record revealed that the applicant informed the respondent about non-renewal of the employment contract. It was insisted that, Rule 4 (5) (supra) is couched in mandatory term "shall" which implies that an employee is not entitled to claim for an expectation of renewal if he has failed to demonstrate the existence of previous renewals and employer's undertakings to renew.

The learned counsel for the applicant also quoted **Rule 4 (6) of GN No.**

42 (supra) which provides that:

"The provision of this rule shall not apply where: -

(a) The size of the employer may justify a departure,

(b) The nature of the employment business may require strict adherence to the rules than may normally be the case, or

(c) Not Applicable."

From the above quotation, Mr. Materu said that it is very clear that the size of the employer may justify a departure in the claim of expectation of renewal. That, exhibit A8 clearly state that the Applicant faced with economic constraints, thus it was impossible to renew the Respondent's employment contract which stand as an exception for the claim of expectation of renewal. He added that, the nature of the Applicant's business (school) requires strict adherence to the rules because the number of teachers depends on the number of students. That, since the number of students at Majengo Secondary School drastically decreased, it implied that it was impossible to renew the employment contract. Thus, the Arbitrator erred in law and fact when he awarded the Respondent twelve (12) months remuneration as compensation for unfair termination, based on wrong findings of expectation of renewal of employment.

Submitting on the 4th, 5th and 6th grounds of revision which are in respect of transportation and subsistence allowance; Mr. Materu stated that the Respondent's first employment contract of 2014 which was tendered by the Respondent before the CMA and was admitted as exhibit D3, shows that the first place of recruitment was Uomboni Secondary School found at Marangu within Moshi District. Also, the last employment contract

(exhibit A1) shows that the place of recruitment was Uomboni Secondary School. Thus, exhibit A1 and exhibit D3 are the relevant evidence which proved that the Respondent was first recruited at Uomboni Secondary School. Mr. Materu argued that, it is trite position of the law that contents of documentary evidence can be proved by the document itself not oral evidence. He referred to **section 100 of the Evidence Act, Cap 6 R.E 2019** which provides that:

> *"When the terms of contract, grant, or any other disposition of property, have been reduced to the form of document, and in all cases in which any matter is required by law to be reduced to the form of document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in whlch secondary evidence is admissible under the provision of this Act."*

In addition, the learned counsel for the Applicant submitted that **section 101 of the Evidence Act, Cap 6 R.E 2019** excludes oral evidence from proving the contents of documentary evidence. On that basis, he commented that since the employment contracts provide the place of recruitment to be Uomboni Secondary School, such evidence cannot be contradicted, varied, added or subtracted by oral evidence. He was of the view that, in this case, the Arbitrator did not consider documentary evidence (employment contracts) which provides for place of recruitment, but rather he considered oral evidence, thus violated the provision of the law cited herein above. He insisted that it is trite position of the law that such oral evidence cannot be used to contradict or change or disprove the contents of the employment contracts.

Mr. Materu went on to submit that, DW2 did not testify that the Respondent was employed while at Mwanza. He said the CMA record is silent on where DW1 got such fact of Respondent's place of recruitment, taking into account that DW2 was employed at Uomboni Secondary School in 2019 while the Respondent was employed in the year 2014. DW2 found the Respondent was already employed at Uomboni Secondary School. He stated further that, even if DW2 testified that the Respondent was recruited at Mwanza, such evidence is not reliable because DW2 was not present at the time when the Applicant employed the Respondent. Thus, such evidence on place of recruitment falls under the category of hearsay which is inadmissible for failure to meet essential elements for it to be admissible. That, the Respondent has a permanent place of residence at Himo within Moshi District as clearly stated in the Respondent's letter dated 22nd June 2020 (exhibit A3).

On the 7th and 8th grounds which were combined and are to the effect that the Honourable Arbitrator erred in law and fact for finding and holding that the Applicant had intention to terminate the Respondent's employment contract, on a mere reason that the Applicant transferred the Respondent to a new working station which is very far from Himo compared to Uomboni Secondary School; Mr Materu submitted that it was the Respondent who requested to be transferred to a new working station. The Applicant accepted the Respondent's request and transferred him to Majengo Secondary School which is nearby the Respondent's permanent place of residence at Himo. That, there was nowhere in the proceedings of the CMA where the Respondent complained about his transfer to Majengo Secondary School. However, the Arbitrator came up

with an irrational decision and findings that the Applicant had intention to terminate the Respondent's employment contract by transferring the Respondent to Majengo Secondary School which had economic constraints. Thus, the CMA award was improperly procured and contrary to the evidence on record.

On the 10th ground of revision which is to the effect that the Honourable Arbitrator erred in law and fact for failure to evaluate and address properly the evidence adduced during the hearing, the learned counsel for the Applicant reiterated what he stated on the 2nd and 3rd ground of revision. He said that, they strongly believe that the Arbitrator did not scrutinize and evaluate properly the evidence adduced before him because there was misdirection and non- direction of evidence in his findings. Mr. Materu subscribed to the case of **Salum Mhando V. Republic [1993] TLR 170** in which the Court observed inter alia that:

> *"Where there are misdirection and non-directions on the evidence a court of second appeal is entitled to look at the relevant evidence and make his own findings of fact."*

Mr. Materu averred that, this Court is entitled to look at the evidence and make its own findings of facts since there was misdirection on the evidence by the Arbitrator. The learned counsel also cited the case of **Peters V. Sunday Post Ltd (1958) E.A 424,** in which the Court of Appeal for East Africa set out the principles of which an appellate court can act in appreciating and evaluating the evidence, among other things it was held that:

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to*

support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, has plainly gone wrong, the appellate court will not hesitate so to decide."

On the 11th ground of revision which is to the effect that the Arbitrator erred in law and fact for awarding the Respondent Tshs. 17,512,125/= contrary to the evidence on the record; Mr. Materu submitted that there was no any relevant evidence on record to justify payment of twelve months remuneration as compensation for unfair termination because there was no reasonable expectation for renewal. He submitted further that, there was no any evidence on record to justify payment of transportation costs and subsistence allowance, because the Respondent was recruited at Moshi and his employment contract ended at Moshi. Also, the Respondent resides at Himo in his own house which is found within Moshi district. The learned counsel prayed that the award of the Commission for Mediation and Arbitration be quashed.

On the 12th ground of revision, which is to the effect that, **the CMA award was irrational, illegal, improperly procured and tainted with erroneous** (sic), Mr. Materu argued that an award of the CMA was illegal and improperly procured because the Arbitrator failed to append signature at the end of each witness's evidence (DW1, DW2, PW1, PW2, PW3 and PW4), which is fatal to the proceedings because it jeopardizes the authenticity and correctness of the record. He cited the case of **Joseph Elisha versus Tanzania Postal Bank, Civil Appeal No. 157 of 2019**, Court of Appeal of Tanzania at Iringa (unreported), at page 6 of the typed judgment it was held that:

"Upon perusal of the record of appeal, we have found that the

arbitrator did not sign the evidence of all witnesses from both parties when they testified from page 101 to 120.... It is our view that the requirement is imperative to safeguard the authenticity and correctness of the record."

At page 7 it was held that:

"Going forward, in its various decisions, the Court has pronounced itself that the effect of failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings."

In the light of the foregoing grounds and legal authorities, this court was implored to allow this revision and quash an award and proceedings of the CMA in Labour Dispute No. CMA/KLM/MOS/ARB/16/2021.

Opposing the application, Mr. Richard Patrice Mosha learned counsel for the Respondent prayed to adopt the counter affidavit deposed by himself to form part and parcel of his submission. He submitted among other things that; the Respondent had been employed by the Applicant from 14/7/2014 up to 12/2/2021. That the Respondent was recruited while working at Eden Secondary School at Mwanza. Then, the Headmaster of Uomboni Secondary School called the Respondent while at Mwanza and interviewed him on the phone. After agreeing on the terms of employment the bus fare was sent to the Respondent who was required to report on 12/7/2014, and on 14/7/2014 the Respondent was given an appointment letter (Exhibit B2) and officially commenced his employment as a teacher of the Catholic Diocese of Moshi at Uomboni Secondary School. On 05/12/2014 having successfully completed the probation period, the Respondent and the Applicant signed a two-year employment contract (exhibit B3) which ended on 13/12/2016. Again on 14/12/2016, the

parties herein signed another Employment contract (Exhibit B4) ending on 13/12/2018; and on 14/12/2018 parties signed another employment contract (Exhibit A1) which was ending on 13/12/2020. That, on 01/5/2020 the Respondent was forced by the Applicant to sign an Addendum (Exhibit A2) without any prior discussion(s) between them.

It was submitted further for the Respondent that; the subject matter of the said Addendum was school fees. That, due to Covid 19 the schools were closed by the Government Notice; and that both students and workers would stay at their homes for unknown period of time. It was also unknown whether the students would pay the whole school fees or not. The schools were closed for a period of about two months though the school fees were not affected as the students paid school fees of the whole year. Mr. Mosha stated further that, it is undisputed fact that workers/ teachers were working from home during the two months corona break. That, all witnesses proved that the teachers were sending tasks to students to perform at their homes through smart phones. Teachers marked and corrected the tasks. Moreover, after opening the schools on 29/6/2020 the school time table was changed so that teachers could have extra coaching time to cover the two months period that students stayed at home. Periods began at 07:00am to 05:00pm as proved by exhibit B1 collectively and the testimony of DW2 at page 11 paragraph 2 and 3 of the proceedings of the CMA.

Mr. Mosha also noted that, in all employment contracts (Exhibit B3, A1 and B4) there is no any clause or paragraph which states about ADDENDUM. That, the said addendum was just raised from nowhere and without any justifiable criteria and reasons. The letter of notice of opening

school (exhibit A7) dated 18/6/2020 has nothing to be capable of changing the terms of lawful Employment Contract. (Exhibit B4). Basing on **Rule 4 (2) of GN No. 42/2007**, Mr. Mosha averred that the Employment Contract of the Respondent came to an end on 13/12/2020 and not on 12/2/2021 as there was no any clause that provided otherwise. That, the parties had started another contract from 14/12/2020 which would end on 13/12/2022; and that the same was unfairly terminated.

Countering ground one of revision that the Applicant did not follow the procedure of fair termination, the learned counsel for the Respondent argued that the Honourable Arbitrator was proper and right in holding so. That, all employment contracts were two-year contract beginning in December and ending in December. Thus, the Applicant terminated the Respondent's employment on 12/2/2021 without following proper procedure and without any apparent or justifiable reasons. The mere alleged reason for termination was economic constraints which was never proved by the Applicant. No document was adduced before the Respondent or the CMA by the Applicant to show and prove that Majengo Secondary School had economic constraints as required by the laws. Mr. Mosha referred to **section 38 of the Employment and Labour Relations Act,** (supra) read together with **Rule 23 of GN No. 42/2007** which require the employer to prove the existence of economic constraints, and to retrench employees in accordance with the prescribed procedures. That, in this case, the Applicant did not adhere to these provisions of laws, hence unfair termination due to unfairness of the procedure and reason for termination.

In addition, it was submitted for the respondent that the respondent had

a great deal of expectation of renewing his employment contract. He had renewed the said contract twice, and he was discharging his duties smoothly and successfully. He had never been given any warning or summoned for a disciplinary meeting. To support his argument, Mr. Mosha referred to **section 36 (a) (iii) of the Employment and Labour Relations Act,** (supra) read together with **Rule 4 (4) and (5) of GN No. 42/2007** which provide that:

> *".... Failure to renew a fixed term of contract in circumstances where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination.*
>
> *Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew."*

In that regard, Mr. Mosha was of the view that due to renewals of employment contracts since July 2014 up to December 2020, and or 12th February 2021, there was no way that the Respondent could not expect renewing his employment contract. The Respondent has been positively corresponding with his employer from 2014 to 2021. He had to expect a renewal of employment contract. He has never committed any misconduct or being incapable of discharging his duties. That, the Respondent had never been given any warning, nor summoned to appear before a disciplinary committee. The Respondent has successfully performed his duties throughout the period of employment with the Applicant. Having been transferred to Majengo Secondary School on 10/9/2020, the Respondent could not have imagined to be given termination letter on 19/11/2020. That, the Respondent was assured by

the Applicant that he was to work with them for many more years because the Respondent prayed to be shifted to a school nearby his residence place so as to cut down transport costs and smoothening his performance in the employment. Thus, the Respondent had great expectation to renew his employment contract with the Applicant on the basis of previous renewals and employer's undertakings. The learned counsel cited the case of **Huruma Kimambo vs Security Group (T) Ltd, Labour Revision No. 412/2016,** High Court Labour Division at Dar es Salaam, in which it was held that:

> *"…. the employment of worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based in the operational requirement of the undertaking establishment or……."* ***[Article 4 of ILO Convention on termination of Employment No. 158 of 1982].*** *That, there must be apparent reasons for the termination which should clearly be expressed."*

On the issue of renewal of contract raised on ground two and three of revision, Mr. Mosha reiterated among other things that, the Honourable Arbitrator did not err in law and fact in finding and holding that there was expectation of renewal of employment contract. That, notice issued on 19/11/2020 was not valid since the employment contract was coming to an end on 13/12/2020, and thus there was no three months' notice. It was also stated that accepting receipt of the notice does not amount to consenting/ agreeing to its content.

On the issue of transport and subsistence allowance, the learned counsel for the Respondent was of the view that, the Honourable Arbitrator did not err in law by awarding the same to the Respondent. He contended

that the Applicant recruited the Respondent while the Respondent was teaching at Eden Secondary School at Mwanza. That, the Applicant phoned the Respondent informing him that they had heard that he was good in teaching science subjects; and therefore, they would like him to come to Moshi and work with them. Upon such phone calls and discussions; the Respondent agreed to work with the Applicant. The Applicant sent the bus fare from Mwanza to Moshi (Uomboni Secondary School). After arrival, the Respondent was given appointment letter (exhibit B1). The learned counsel for the Respondent referred to page 15 at paragraphs 3 and 4 of the CMA proceedings where the Respondent clearly stated that he was recruited at Mwanza. It was elaborated that Uomboni Secondary School was a working station /work place and not a place of recruitment. That, clause 1 of the employment contract never stated the place of recruitment. The learned counsel quoted the said clause to the same effect. That, the first contract was signed at Uomboni Secondary School after six months from commencement of work on 14/7/2014. To cement his point, the learned counsel for the Respondent referred to exhibits B5 and B6 (Annual leave forms filled by the Respondent) which show that the respondent spent his leaves at Bariadi in Simiyu which by then was Mwanza. Due to the reason that the Applicant terminated the Respondent without giving him his terminal benefits, Mr. Mosha concluded that the Respondent qualified to be awarded both subsistence and transport allowance.

On the 4th ground of revision, Mr. Mosha was of the opinion that the Honourable Arbitrator did not err in law and fact by finding and holding that the Applicant intended to terminate the Respondent's employment contract by transferring him to Majengo Secondary School which is very

far from Himo (residence of the Respondent) compared to Uomboni Secondary School, while the Respondent prayed to be transferred to a nearby school.

On the 5th ground of revision, it was argued for the Respondent that the Hon. Arbitrator did not err in law and fact in evaluating and addressing the adduced evidence properly. That, the findings and decision of the Arbitrator based on the evidence adduced during the hearing of the dispute. That, every finding is backed up with what was stated in the testimonies of witnesses, or proved by tendered documents.

Moreover, it was argued further for the Respondent that, if the law recognizes the termination of fixed term of contract by lapse of time, the respondent's Employment Contract would definitely end up on 13/12/2020 and not 12/2/2021 as the same was signed on 14/12/2018.

Mr. Mosha commented that the Applicant should know that a provision of the law is not read in isolation of other provisions. He cited the celebrated case of **Thomas Ngawaiya vs The Attorney General and 3 Others, Civil case No. 177/2013,** High Court of Tanzania at Dar es Salaam at page 12, where it was held that:

> *"In interpreting the provisions of law, we should read in their context as a whole and not one section in isolation of others. The principle of looking at the law in its context and as a whole means that the section should not be used in isolation of other sections of the same ACT, or of other ACTS. As the law stands there are other sections which qualify the working of other sections."*

Basing on the above decision, the learned counsel for the Respondent, submitted that, the learned counsel for the Applicant violates the requirements of this principle by isolating **Rule 3(1)(a)** and **Rule 4(1)**

and (2) from **Rule 3(1)(c) of GN No. 42/2007** (supra). He commented that, in this case there is no need of re-evaluating evidence as there was no misdirection and non-direction on the evidence. Regarding the cited case of **Salum Mhando** (supra), Mr. Mosha said that the same was irrelevant to the instant matter.

On the 6th ground of revision, Mr. Mosha argued that, the Hon. Arbitrator did not err in law and fact by awarding the Respondent Tzs 17,512,125/=, as it was based on the adduced evidence. That, the Respondent managed to prove and it was not disputed that he was entitled to be paid gratuity by the Applicant. Even the amount of gratuity was undisputed as it is provided under the employment contract. The learned counsel referred to Exhibits B3 and B4 at page 2 where there is a gratuity clause. That, Exhibit A1 at page 5 paragraph 13 provides for 15% of the gratuity after successfully completion of contract. It was averred further that, after termination of employment of the Respondent, he was entitled to transport/ repatriation and subsistence allowance as the same was never given to the Respondent after termination of his employment on 12/2/2021. It was also argued that, the respondent was entitled to be paid compensation for being terminated unfairly as he was expecting renewal of contract and that the addendum was of no effect as its subject matter (school fees) was not affected. In support of the issue of terminal benefits, Mr. Mosha stated that the same are provided under **sections 41(5), 42(1) and (2), 43(1) and (2), 44(1) and (2) of Employment and Labour Relations Act** (supra).

Concerning ground 7 of revision, it was submitted for the Respondent that the CMA award was rational, legal and properly procured as there was no any error. Every witness took an oath and testified. At the end of every

testimony of each witness and ruling, the Hon. Arbitrator appended his signature. On the cited case of Joseph Elisha (supra), Mr. Mosha was of the view that the same was distinguishable to the instant matter; as the noted irregularities are not observed in the case at hand. He insisted that the proper way to prove the same is by looking at the hand written proceedings of the CMA.

Mr. Mosha finalized his submissions by stating that, in these circumstances this application for revision does not hold water and prayed that the entire application be dismissed, the CMA award and orders be upheld and costs of this application be provided to the Respondent.

In his rejoinder against the reply of the Respondent, Mr. Materu for the applicant reiterated their position and submission in chief.

On the issue that the addendum was not valid, and that the employment contract ended on 13/12/2021 and not 12/2/2021, the learned counsel for the Applicant strongly opposed such submission made by the Respondent's counsel. He said that the addendum (exhibit A2) was valid and it was freely signed by the applicant and the respondent. The allegation that the respondent was forced to sign the said addendum was disputed on the reason that the respondent did not complain before the institution of the case, and he failed to prove the said allegations. In addition, Mr. Materu submitted that the contents of the said addendum were supplemented by a letter (exhibit A7) which was received by the respondent and the respondent was duly informed about termination of his employment contract on 12/2/2021 through exhibit A8. That, the respondent replied exhibit A8 through a letter, exhibit A9 and he did not challenge extension of his contractual period; which clearly revealed that the respondent was aware about the end of his contract on 12/2/2021

and he consented of the same as in his letter the respondent claimed payment of gratuity, transportation costs and certificate of service only.

Mr. Materu reiterated further the law on fixed term contract by lapse of time and averred that, in this matter there was no unfair termination.

Regarding the issue that employment of contract ended on 12/2/2021, Mr. Materu alleged that the same was framed before the CMA as the first issue and it was properly resolved by the Honourable Arbitrator; whereby at page 6 of the typed CMA award, the Arbitrator correctly found that the employment contract between the applicant and the respondent ended on 12/2/2021. Thus, the issue of addendum and the end of employment contract is not an issue at this stage of revision.

The learned counsel for the applicant also opposed the submission made by the respondent's counsel who submitted on termination of employment by default of the employer. That, before the CMA the respondent claimed about reasonable expectation of renewal and not termination by default which Mr. Materu was of the view that it was a mere afterthought. He prayed that the submission made by the respondent's counsel should be ignored.

Furthermore, on the issue that transfer of the respondent to Majengo Secondary School and that his contract was renewed three times, gave him reasonable expectation of renewal; Mr. Materu strongly disputed such argument on the reason that the applicant informed the respondent about the end of his contract on 12/2/2021 through exhibit A8. That, the respondent did not dispute or complain to the Applicant but he consented through exhibit A9. The learned counsel reiterated among other things

that, if the respondent really expected for renewal of employment contract, he would have submitted a letter to the applicant, requesting for renewal three months before the end of his employment contract, pursuant to clause 16 of the employment contract. He insisted that, the employment contract put mandatory requirement to each party of employment contract to write a letter to the other party requesting for renewal of employment contract, if he/she wishes to renew.

Mr. Materu went on to submit that, there was misinterpretation of **section 36** and **38 of the Employment and Labour Relations Act No. 6 of 2004** (supra) on part of the respondent's counsel and the Arbitrator. He averred that, the test as to financial constraint under section 38 herein above do not apply under the circumstances of this case as the respondent's employment contract was terminated by lapse of time and not otherwise. The applicant informed the respondent about the end of his employment contract due to economic constraints through exhibit A8, and since the respondent was aware of the said economic constraints, he opted to claim for payment of gratuity, transportation costs and certificate of service only as indicated in exhibit A9. That, there was no reasonable expectation of the renewal of the employment contract and thus there was no unfair termination.

Concerning the issue of subsistence allowance and transportation costs awarded to the respondent, Mr. Materu contended that the respondent was not entitled for the same on the reason that he was employed at Moshi. That, the employment contracts (exhibit A1 and exhibit D3) were valid and relevant evidence which proved that the respondent was recruited at Moshi. Apart from that, it was also alleged that the respondent has permanent place of residence at Himo within Moshi

District and that even the submission made by the respondent's advocate revealed that the respondent has a permanent place of residence at Himo. In that sense, the learned counsel for the applicant was of settled opinion that the respondent was not entitled to be repatriated to Mwanza and that he is not entitled for subsistence allowance.

On proof of place of recruitment, Mr. Materu said that the employment contracts were proof of the same and not appointment letter. In this matter, it was alleged that employment contracts proved the place of recruitment to be Uomboni Secondary School which is found within Moshi District. Moreover, it was alleged that there was no evidence of payment of transport costs from Mwanza to Moshi in the CMA record.

On the issue of signature at the end of each witness's evidence, Mr. Materu maintained that the Arbitrator did not append his signature at the end of testimony of each witness. That, the signature of the Arbitrator was appended after the order of adjournment to the next hearing date and not at the end of the witness's testimony. He opined that the said irregularity is fatal to the proceedings as it jeopardizes the authenticity and correctness of the record.

Concerning the issue of severance payment, Mr. Materu was of the view that an employee of a fixed term contract is not entitled to severance payment. He supported his argument by referring to **section 42 (3) (c)of Employment and Labour Relations Act (**supra). He submitted further that; the applicant offered payment of gratuity to its employees under a fixed term contract in lieu of severance payment in order to motivate them. Thus, the respondent is not entitled to severance payment.

I have considered the submissions of the learned counsels of both parties

as well as their respective affidavits and the CMA record. There are three issues for determination:

1. *Whether termination of employment contract of the respondent was unfair*
2. *If the 1st issue is answered in the affirmative, whether the CMA award of Tzs 17,512,125/= was justifiable?*
3. *Whether failure to append signature at the end of each witness's testimony was fatal to the proceedings?*

Starting with the 1st issue, **whether termination of employment contract of the respondent was unfair;** this issue was also considered before the CMA whereby the Hon. Arbitrator found that pursuant to **section 37 (2) (b) (ii) of the Employment and Labour Relations Act** (supra), economic constraints, may lead to termination of employment by way of retrenchment. Thus, the applicant should have applied the procedure of retrenchment under **section 38 of the Employment and Labour Relations Act** (supra) read together with **Rule 23 of the Employment and Labour Relations (Code of Good Practice)** (supra). The learned Counsel of the Respondent was of the same opinion that the procedures under **section 38 of the Employment and Labour Relations Act** (supra) were not adhered to. On the other hand, Mr. Materu for the applicant was of the view that pursuant to the Addendum, the respondent was terminated fairly on the basis of what was agreed in the said addendum. I totally agree with the reasoning of the learned Arbitrator as well as the submission of Mr. Mosha for the respondent. Fixed term contract of employment cannot be terminated on economic constraint reason. Economic constraint is the basis for retrenchment subject to laid down procedures. The fact that the

respondent received the notice and replied it, cannot be resolved against the respondent since in termination cases the onus of proof lies on the employer. **Section 15 (5) of Employment and Labour Relation Act** (supra) is relevant. In that sense, the employer had a burden of proving that their notice dated 19/11/2020 was pursuant to the law and their employment contract. It may be noted from the record that, in the Addendum signed on 01/05/2020, parties did not agree on extension of contract to February 2021. Had the same been included in the Addendum, I could agree with the applicant. The two months were just stated in the letter dated 18/6/2020 (exhibit A7), which is contrary to the law and the signed employment contract. In the circumstances, impliedly the preceding contract of employment of the respondent ended on 12/12/2020 as agreed and well stated in the Addendum. Thus, from 13/12/2020 impliedly, the respondent commenced another new contract which was unfairly terminated on 12/2/2021. The 1st issue is therefore resolved in favour of the respondent.

On the second issue ***whether the CMA award of Tshs. 17,152,125/= was justified;*** the learned counsel for the applicant questioned among other things transport allowance and subsistence allowance on allegation that the respondent had permanent residence at Himo. I have perused the CMA record, in the application for employment written by the respondent dated 18th June 2014 the address of the respondent is P.O. Box 8872, Mwanza. In the employment contract dated 14th December 2018, the Postal address of the respondent is P. O. Box 201, Bariadi, physical address is Kilulu Bariadi. In other words, place of domicile of the respondent is not at Uomboni Secondary School as alleged. The respondent applied for a post of a teacher to the Applicant

while at Mwanza. Meaning that, the respondent was recruited from Mwanza and not Uomboni as alleged. As a matter of practice, the contract of employment could not be signed at Mwanza or at Bariadi. Having worked for a long time with the applicant, possibly the respondent built a residential house at Himo (exhibit A3 is relevant). However, that does not infringe the right of the respondent to be repatriated to his place of domicile. Otherwise, those who are entitled to house rent allowance could be denied the same if they own a house near the working station. **Black's Law Dictionary, 8th Edition at page 523,** defines the word 'Domicile' to mean:

> *"1. The place at which a person has been physically present and that the person regards as home.*
>
> ***2.A person's true, fixed, principal and permanent home, to which that person intends to return and remain even though currently resides elsewhere."*** *Emphasis added*

On that basis, transport allowance and subsistence allowance awarded by the CMA to the respondent is justifiable.

The last issue is ***Whether failure to append signature at the end of each witness's testimony was fatal to the proceedings?*** **Section 3 (a) of the Employment and Labour Relations Act** (supra) provides objects of the Act as follows:

> *"(a) to* ***promote*** *economic development through economic efficiency, productivity and social justice."* Emphasis added

Having regard to the objects of the **Employment and Labour Relations Act** which includes the above quoted object, in resolving labour disputes courts should not be tied up with technicalities for the

sake of promoting economic development as provided under **section 3 (a)** (supra). In addition, the Overriding Objective principle as provided under **section of 3A (1) of the Civil Procedure Code, Cap 33, R.E 2019** is to the same effect that courts should promote substantive justice as opposed to procedural justice. In the same manner, I am of considered opinion that failure to append a signature at the end of testimony of each witness is not fatal to the proceedings for the sake of promoting the object under **section 3 (a) of ELRA** (supra). Otherwise, it will prolong litigation of labour disputes unnecessarily, rendering the enactment of the 1st object of **ELRA** futile.

In support of my opinion, I subscribe to a very recent Court of Appeal decision in the case of **North Mara Gold Mine Limited versus Khalid Abdallah Salum, Civil Appeal No. 463 of 2020, CAT at Musoma;** in which the Court at page 7-9, quoted **Rule 19 (1) of the Rules,** which provides that:

> *"19(1) An Arbitrator has the power to determine how the arbitration should be conducted."*

Then, the Court observed that:

> *"We are of the considered opinion that in the light of the style adopted by the Arbitrator of authenticating the witnesses' evidence no miscarriage of justice was caused to the parties. We hold this firm view because, firstly, there is no dispute that the parties in this appeal have not questioned the authenticity of the proceedings with regard to the testimonies of witnesses of both sides.* ***Indeed, this being a record of the proceedings of the trial CMA, it cannot be easily impeached as it is presumed to be authentic of what transpired before it.*** *Besides, in view of the submissions of*

the counsel for the parties before us, ***it has not been contended that the substance of the evidence recorded by the CMA does not reflect what the witnesses testified at the trial****. It is in this regard that in* ***Halfan Sudi v. Abieza Chichili [1998] T.L.R 527*** *at page 529 the Court stated that: -*

> *"We entirely agree with our learned brother* ***MNZAVAS, JA*** *and the authorities relied on which are loud and clear that, "A court record is a serious document. It should not be lightly impeached. There is always presumption that a court record accurately represents what happened."*

..... We therefore find that the ***failure of the Arbitrator to append signature at the end of each witness's testimony did not, in the circumstances of this case, occasion miscarriage of justice to the parties****.....*

More importantly, we think ***the purpose of Rule 19(1) is to make the procedure applicable in arbitration proceedings before the CMA as simple as possible without strictly resorting to the provisions of the CPC to attain substantive justice*** *as we observed in* ***Finca Tanzania Ltd v. Wiidman Masika and 11 Others,*** *Civil Appeal No. 173 of 2016 (unreported)."* Emphasis mine

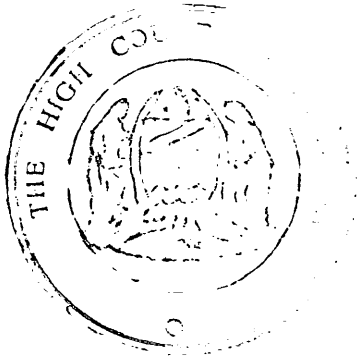
On the strength of the above findings in the case of **Khalid Abdallah Salum** (supra), I am of settled opinion that the cases cited by the learned counsel for the applicant are distinguishable to the present case. Apart from lack of signature at the end of each witnesses' testimony, both parties have not questioned the content of the proceedings of the CMA.

Thus, since the omission has not occasioned failure of justice to any of the parties, I do not see any basis of vitiating the CMA proceedings as prayed by the learned counsel for the applicant.

Having resolved all the raised issues in favour of the respondent, I find this application to have no merit. I therefore uphold the CMA award and findings and dismiss this application forthwith. This being a labour matter, no order as to costs.

It is so ordered.

Dated and delivered at Moshi, this 29th day of March, 2022.



S.H. Simfukwe.

Judge

29/3/2022.