

**IN THE HIGH COURT OF TANZANIA
(LABOUR COURT DIVISION)
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA
LABOUR REVISION NO. 19 OF 2020**

MASISTA WA PENDO LA HURUMA

WA MT. VINCENT WA PAULO WA INNSBRUK.....APPLICANT

VERSUS

UTUKUFU GWIMILERESPONDENT

(From Award of the Commission for Mediation and Arbitration- Singida)

(Stanslaus, H. Arbitrator)

Dated 22nd day of May, 2020

In

CMA/SGD/MNY/02/2020/04/2020

JUDGMENT

21st March&16th May,2022

MDEMU, J.:

This labour application has been filed by way of notice of application and chamber summons in terms of the provisions of section 91(1) (a) (b); (2) (a)(b) (c) of the Employment and Labour Relations Act, No. 6 of 2004, and Rules 24(1); (2) (a) (b) (c) (d) (e) (f); (3) (a) (b) (c) (d) and Rule 28(1) (a), (b), (c), (d), and (e) of the Labour Court Rules, G.N No. 106 of 2007.

The Applicant in his chamber summons prays to this Court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/SGD/MNY/02/2020/04/2020 delivered on 22nd May, 2020. The application is supported by an affidavit of Ms. Zahara Mussa Chima, affirmed on 06th of May, 2020.

Briefly, the Respondent was employed as a secondary school teacher by the Applicant's school namely Margareta Naseau Secondary school on contractual basis for three years from 08th day of April, 2018. On 27th January, 2020 she was terminated on reasons of misconduct. Aggrieved, the Respondent referred the matter to the Commission for Mediation and Arbitration (the CMA) claiming compensation for 12 months' salary that is Tshs. 9,600,000/= as a result of unfair termination and other entitlements as provided under "Mwongozo wa Mwajiri; Viinua Mgongo, Motisha na Marupurupu", the document she was given after signing the contract. After hearing, the CMA found the termination unfair and procedures were not followed. Hence, ordered that the Respondent be paid thirteen months' salary being the loss of salary for the remained period of contract. Aggrieved by such decision the Applicant filed this application.

The application was heard by way of written submissions as ordered by the court on 22nd of February, 2022. The Applicant was represented by

Ms. Zahara Mussa Chima, Advocate who filed her written submissions on 7th of March, 2022 and the Respondent was represented by Mr. Festo Fute, Advocate who filed the said written submissions on 21st of March, 2022. There was no written rejoinder by the Applicant.

She argued that, remedies for termination of employment are well stated in section 40 of the Employment and Labour Relations Act, Cap. 366 R.E 2019 which are re-engagement, re-instatement and compensation for not less than twelve months' remunerations. She said that, compensation in this section is effected where the employer has been ordered to re-engage or reinstate the employee from the date of unfair termination to date of final payment which is distinct from compensation of the employee on breach of contract. This latter requires compensation to the employee for the remained period of employment. She cited the case of **Bosco Stephen vs. Ngámba Secondary school, Labour Revision No. 38 of 2017** (unreported).

It was her further submissions that, since the award is incorrect, this Court should exercise its revision power to nullify the whole proceedings and award of the CMA and order the same be tried *denovo*. Without prejudice to the above, it was her submissions that termination was procedural and substantively fair due to the fact that, procedures for termination were adhered to and reasons were given. She argued, the

Applicant complied with Section 41(5) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 by paying the Respondent one-month salary of Tshs. 800,000/= in lieu of one-month notice and the Respondent acknowledged payment as per exhibit D3.

It was her further submissions that, parties were guided by the contract signed on 08th April, 2018 which had an option for termination of employment at any time particularly item 10.0. Since parties signed, it means they acknowledged and consented to the terms of contract on procedures which were adhered to before termination of employment.

On the issue of substantive reasons for termination which is on ground 5(b) and (d), she said that, there was evidence that Respondent's behavior in her work place was intolerable leading to poor performance. The Respondent also violated several terms of contract such as item 3.3.2. She added that, Respondent's work performance was measured through several ways as per exhibit D7 which showed how she failed to perform her tasks and several demands was made to her and acknowledge to change but she didn't. She said that, since in law no one should benefit from his/ her own wrong, the Respondent also should not benefit from what has been stated.

In reply, Mr. Festo Fute submitted that, the said legal issue is a mere allegation which is not worthy in nullifying the CMA's proceedings and

award. He said that, this labour dispute is premised on reasons of termination of employment, that is, misconduct. It was his submissions that, since the Respondent was terminated on reasons of misconduct, the Arbitrator had to unveil the reasons enclosed within the said misconduct in accordance to the provisions of Section 37(2) of the Employment and Labour Relations Act, Rules 12 and 13 of GN No. 42 of 2007 on the fairness of reasons and procedures. He added that the employer may only terminate employee's contract prematurely if the employee materially breaches the contract.

He argued further that, in the proceedings, poor performance was testified by the Applicant as a cause for termination of employment contrary to the cited misconduct as per exhibit D2. He said therefore that, the Respondent's employment was terminated without reasons. In this he cited the case of **Ultimate Security (T) ltd vs. Abubakari Abdallah Mkupasui, Revision No. 337 of 2019** (unreported) on the proceedings based on fairness of termination of employment of a fixed term contract.

He distinguished the case of **Bosco Stephene vs. Ngamba Secondary School, Labour Revision No. 38 of 2017** (unreported) because, in the instant case, the Respondent challenges fairness of reasons and procedures because termination was premised on misconduct.

It was his submissions further that, the Arbitrator was right in awarding 13 months' salary for breach of employment contract because loss of salary by employee of unexpired term was a direct foreseeable and reasonable consequence. He bolstered this argument by citing the case of **Ultimate Security (T) Ltd vs Abubakari Abdallah Mkupasi** (supra) and the case of **Tanzania Saruji Cooperation vs. Africa Marble Company Ltd. (2004) TLR. 155**

Replying grounds 5(a) and (c), he argued that, the Applicant didn't adhere to fair procedures in terminating the Respondent's employment. He said that, the Applicant complied with Section 41(5) of Cap. 366 and item 10.0 of the contract of employment which allows either party to terminate on notice. However, the Applicant failed to submit on adherence to procedures as provided by labour laws before terminating one's employment on reasons of misconduct.

He said further that, the Applicant before terminating the Respondent's employment on ground of misconduct should have notified the employee of the allegations, give her right to be heard and defend before the decision was made. He cited the case of **Access Bank Tanzania Ltd vs Amos Lukuba, Labour Revision No. 50 of 2018** (unreported).

On ground 5(b) and (d), he argued that there was no substantial reason for terminating the Respondent's employment. He added that, in exhibit D2, reasons for termination was misconduct. However, the Respondent's employment was terminated on poor performance and not misconduct. Nevertheless, he argued that, the provisions of Rules 17 and 18 of GN No. 42/2007 were not adhered by the Applicant. With this contradiction, he submitted that, the Respondent was terminated without any fair reasons.

It was his further argument that, the Respondent had three years fixed term contract with the Applicant running from 08th April, 2018 to 08th April, 2021. It was prematurely terminated on 27th January, 2020 (exhibit) D2 by the Applicant since the Respondent was employed on a fixed term contract. Rule 8(2) (a) and (b) of GN. No. 42/2007 entrenches modalities of terminating employment on a fixed term contract which have to be complied.

He concluded his submissions by stating that, this dispute was not worthy applying for revision in all respects. Entertaining applications of this sort would be subjecting the Respondent to unbearable torture. He then prayed this Court to uphold the award of the CMA and dismiss it with costs.

After considering parties' submissions, the CMA's records as well as applicable laws, I find the issues to be determined is whether there was breach of contract of employment by the Respondent as to entitle termination of the Respondent's contract of employment.

It is undisputed that, there was a fixed term of employment between the Applicant and Respondent which was to end on 08th April, 2020. According to the record, the Respondent was terminated on 27th January, 2020 as evidenced by letter of termination (exhibit D2). This being a fixed term contract of employment, in terms of Rule 8(2) of GN No. 42 of 2007 and as observed by the CMA in the award from pages 12 through 14, termination may only be effect upon breach of employment contract or where the employee agrees to early termination.

The law as stressed in the case of **Mtambua Shamte & 64 Others vs. Sanitation and Suppliers, Labour Revision No. 154/2010** (unreported) and Rule 8(2) of GN. No. 42 of 2007 is clear that: -

- 8(1) An employer may terminate the employment of an employee if he;*
- (a) complies with the provisions of the contract relating to termination;*
 - (b) complies with the provisions of sections 41 to 44 of the Act concerning notice, severance pay, transport to the place of recruitment and payment;*

- (c) follows a fair procedure before terminating a contract;
- (d) has a fair reason to do so as defined in section 37(2) of the Act.

(2) compliance with the provisions of the contract relating to termination shall depends on whether the contract is for fixed term or indefinite in duration. This means that –

(a) where an employer has employed an employee on affixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract (emphasis is mine)

Since there is nowhere in the record indicating that the Respondent willful consented towards termination, it remains obvious that, termination was due to breach of contract of employment. The immediate issue therefore is whether the Respondent materially breached the contract and if the answer is in affirmative, whether in terminating her employment, procedures were followed. According to the record, reasons adduced by the Applicant which led to termination of contract of employment is poor performance and not misconduct as per the termination letter. Let the record speak by itself at pages 5,6 and 7 of the proceedings: -

"Tuliamua kumuachisha kwasababu ya namna ya utendaji wake wa kazi tuliona kuna **uzorotaji katika utendaji**. Tunasema hivyo kwasababu ya matendo ya kutotekeleza wajibu wake katika ufundishaji. **Sisi kama walimu tunapofundisha tunatakiwa kuandaa lesson plan, lakini kwa mlalamikaji hili halikuwa likifanyika ipasavyo**. Sisi kama taasisi tulikuwa na vikao vya mara kwa mara kuboresha na tuliifikiana baada ya kugundua walimu wanatunga mitihani kwa kile walichofundisha tuu. Hivyo, tuliiazimia kwamba kila mwalimu atatunga mitihani miwili ambayo itakabidhiwa kwenye ofisi ya taaluma na ofisi ya taaluma na ofisi ya taaluma itachagua mtihani.

....muitikio wa mlalamikaji juu ya vikao vyote viwili mimi mwenyewe niliongea nae kwa mdomo na hata kwenye vikao tulikumbushana, lakini mwenendo wake haukuwa mzuri. Kuhusu muitikio wa vikao hakutelekeza mikakati tuliyoweka Desemba ili tuiifanyie kazi 2019, ilipokaribia wakati wa maandalizi ya mitihani, tulikaa kikao kukumbushana kabla ya kuanza mitihani. **Upande wa mlalamikaji hakutunga mitihani miwili badala yake alitunga mtihani mmoja tuu.**

Baada ya kutotunga, tulimuandikia barua kumtaka ajeleze sababu za kutotekeleza maazimio ya vikao. Maelezo yake yalikuwa kwamba alikuwa akikimbizana kumaliza mada, ratiba zilikuwa nyingi ziliingiliana na alijibu kwa barua yake kukiri kosa.

Upande wa kuandaa lesson plan kwa mlalamikaji jambo hili kwa mlalamikaji halikuwa vizuri na tumekuwa tukikumbushana na mwitikio haukuwa mzuri Pamoja na kukumbushana kwasababu bado kulikuwa na uzorotaji wa kuandaa licha ya kuwa ilikuwa obligation ya kila mwalimu".

Again, even the termination letter(D2) do not contain offences other than issues of failure to prepare lesson plan, which, as said, is not a disciplinary action unless contained in a disciplinary code. The above quoted evidence was discredited by the CMA. In the award dated 22nd of May, 2020 at page 15, the Arbitrator observed that:

Naelewa kwamba dhana nzima ya ufundishaji ipo kwenye kuandaa pamoja na kufundisha. Kwa msingi huo, ni uelewa wangu kuwa kama mlalamikaji alifundisha pasipokuwa na andalio lililoandaliwa kwa ufasaha, kosa lake ni kushindwa

kufanya kazi kwa ufanisi (poor performance) kosa ambalo ni tofauti na utovu wa nidhamu.

Equally, conduct of the Respondent do not fall squarely within the meaning of Rule 12(3) of GN. No. 42 of 2007 providing acts/conducts which may justify termination on reasons of misconduct. They include:

(3)The acts which may justify termination are-

- (a) gross dishonesty;*
- (b) willful damage to property;*
- (c) willful endangering the safety of others;*
- (d) gross negligence;*
- (e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with the employer;*
- (f) gross insubordination.*

Looking at exhibit P1, "Mwongozo wa Mwajiri", in part two, the Applicant may terminate the contract but have to follow procedures and give reasons for termination. According to the evidence adduced, the Respondent impliedly breached item 10.1.4 since she didn't perform well her duties. Rule 17 and 18 of GN. No. 42 of 2007 provide that poor work performance is a ground for termination and is a question of fact to be determined on the balance of probabilities. However, there are

procedures to be complied by the employer before terminating a non performing employee namely:

- (i) *The employer must investigate the reasons of unsatisfactory performance.*
- (ii) *The employer must give appropriate guidance, the employee to be given time to improve, when the employee continues to perform unsatisfactorily, the employer must issue a warning letter.*
- (iii) *Before the employer makes a final decision to terminate the employee, must call the meeting with the employee who must be allowed to attend with his fellow employee or trade union representative, at that meeting the employer must outline the reasons for termination and allow the employee to make a representation before finalizing a decision.*
- (iv) *The employer must consider any representation made and if he does not accept them must explain why.*
- (v) *The outcome of the meeting must be communicated to the employee in writing with brief reasons. All these procedures are to be documented/found in records.*

As noted in the record, all the above enumerated procedures were not followed. And since rules require documentation of such procedures oral evidence by the Applicant that the Respondent was given several warnings may not serve the purpose. There is nowhere in this record one may locate that the employer investigated poor performance of the Respondent, or that the Respondent was guided to improve performance, or that the Applicant convened a special meeting for poor performance and outline terminating the Respondent on poor performance and considered any representation.

Was the award of any legal justification? Since there was a fixed term contract of employment between parties (exhibit D1) and the contract was to end on 08th day of April, 2021 termination effected on 27th day of January, 2020 left 13 months to the expiry of the contract. Therefore, the Arbitrator was right in awarding 13 months' salary for the breach. In the case of **Good Samaritan vs. Joseph Robert Savari Munthu, Labour Revision No. 165/2019** (unreported) on this fact the Court held that: -

"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action."

That said and done, I am convinced that the Respondent's termination was both substantially and procedurally wanting. The application is therefore baseless and is accordingly dismissed in its entirety. The Applicant to pay the Respondent employee as ordered by the CMA. No order as to costs.

It's so ordered.



Gerson J. Mdemu
JUDGE
16/05/2022

DATED at DODOMA this 16th day of May, 2022



Gerson J. Mdemu
JUDGE
16/05 /2022