IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT IRINGA

LABOUR REVISION NO. 19 OF 2022

(Originating from Labour Dispute No. CMA/IR/ARB/10/2022 in the Iringa Commission for Mediation and Arbitration delivered on 31 October, 2022)

BETWEEN

SUN ACADEMY PRIMARY AND SECONDARY SCHOOL.....APPLICANT

AND

YERICKO NGUSI.....RESPONDENT

JUDGMENT

Date of the Last Order: **24.05.2023**
Date of the Judgment: **02.06.2023**

A.E. Mwipopo, J.

Yericko Ngusi, the respondent, was employed in 2020 for one year fixed contract by Sun Academy Primary and Secondary School, the applicant. The employment contract was renewed on 01.07.2021 and was expected to end on 30.06.2022. On 04.03.2022 respondent suspended the appellant pending investigation on disciplinary offence for instigating strikes in the place of work. On 19.03.02022, the respondent prepared a notice to attend a disciplinary hearing to be held on 21.03.2022 at 9:00 am. The appellant was notified to appear before the disciplinary committee on 21.03.2022. In the

notice, the disciplinary charge was annexed. The disciplinary meeting was conducted on 21.03.2022, and the disciplinary committee found the respondent guilty of the disciplinary offence and recommended disciplinary measures to be taken against him. The respondent was aggrieved with the disciplinary committee's decision and appealed to the appeal committee. The appeal committee dismissed the appeal and recommended to the employer that disciplinary actions be taken against the respondent by terminating his employment contract. The applicant dismissed the respondent from employment on 11.04.2022.

The respondent was aggrieved by the respondent's decision and referred the dispute to the Commission for Mediation and Arbitration (CMA). The Commission heard both parties and, in its arbitral award, found that the employer had no reason to terminate the respondent's employment and the procedure for terminating the employment was not adhered. It ordered the employer (applicant) to pay the respondent three months' salary compensation, one month's salary as termination notice, and two months' salary arrears. The applicant was not satisfied with the CMA award and filed the present application for revision. The revision is filed by Notice of Application, Chamber Summons supported by the affidavit of the applicant's Legal Counsel, namely Emmanuel Kalikenya Chengula. The respondent filed a counter affidavit in opposition to the revision.

The applicant has ten grounds for revision, as found in paragraph 8 of the affidavit. The said grounds for revision are as follows:-

1. *That, the Arbitrator erred in law and facts by entertaining the dispute, which contained a claim which was time barred. Yet proceeded to declare the claims by the respondent meriously.*
2. *That, the Arbitrator erred in law and facts by failing to abide by a principle of functus officio after being assigned a case and revoking the ruling of the fellow Arbitrator who denied to recuse herself.*
3. *That, the Director of the Commission for Mediation and Arbitration caused an error in law and facts by intervening/ interrupting the powers of the Arbitrator who was assigned to hear and determine the dispute without providing any legal reasons of reassigning another Arbitrator viz Arbitrator who didn't recuse herself from the case.*
4. *That, the applicant has never been given the right to be heard once the respondent lodged a second complaint through a letter dated 28.07.2022 that the trial Arbitrator should recuse herself from hearing the matter even if she had issued a ruling on 25.07.2022 of non-recusal.*
5. *That, the Arbitrator erred in law by failing to sign on the recorded testimony of the witness who appeared before the Arbitrator, rendering the proceedings of the trial Arbitrator defective.*
6. *That, the Arbitrator erred in law and facts by finding that there was unfair termination while the course of action was just a breach of contract without critically analysing the evidence adduced by the applicant pursuant to exhibits tendered to prove the adhered procedures based on the executed contract.*
7. *That, the honourable Arbitrator erred in law and facts for failure to analyse the facts, exhibits and evidence on record tendered by the*

applicant and concluded that the respondent was not given 48 hours until he entered into disciplinary committee and therefore arrived at an erroneous conclusion and gave an unjustifiable award.

8. *That, the Arbitrator erred in law and facts by declaring that the respondent was unfairly terminated. Yet, he was given a fair disciplinary hearing by the disciplinary committee and appellate committee.*
9. *The Arbitrator erred in law by failing to analyse and take into consideration the legal argument that the applicant's counsel put forward in the closing submissions.*
10. *The Arbitrator erred in law by awarding payment of severance pay, whereas the termination was fair on the ground of misconduct due to absconding and influencing riots/demonstration done by the respondent.*

The applicant was represented at the hearing by advocate Emmanuel Chengula, whereas the respondent was present in person without representation. The Court invited parties to make their submission.

It was the applicant's submission on the 1st ground of revision that the CMA admitted on page 16 of the judgment that the dispute was referred to the Commission out of time. But instead of striking it out, the Arbitrator determined the matter on the ground that the respondent had a good case. It is wrong for the Commission to proceed with determining the dispute referred out of time, and it was supposed to dismiss it. In the case of **Muse Zongori Kesere vs. Richard Kisika Mugendi and 3 Others**, Civil Application No. 244 /01 of 2019, Court of Appeal of Tanzania at Dar Es

Salaam, (unreported), it was held on page 5 that Court could not entertain the matter which is time barred. In his plaint (CMA Form No. 1), the respondent claimed salary arrears for the years 2021 and 2022, and the CMA awarded the said salary arrears.

He said that the CMA decided on the unfairness of the contract while the issue was the breach of contract in the fixed-term contract. The procedure of terminating fixed term contracts does not apply to procedures for unfair termination. This was stated in the case of **Hamidu Abdallah Mbekae and 11 Others vs. Be Forward Tanzania Co. Ltd**, Civil Appeal No. 380 of 2019, Court of Appeal of Tanzania at Dar Es Salam, (unreported). The same was stated in the case of **Morogoro International School vs. Hogo Menyanya**, Civil Appeal No. 278 OF 2021, Court of Appeal of Tanzania at Morogoro, (unreported).

On the 2nd issue for revision, the applicant submitted that the Director of the Commission and Arbitration intervened in the power of the Arbitrator assigned to determine the case. The respondent requested the Arbitrator to recuse herself, and the Arbitrator, in her ruling, rejected the prayer to recuse. However, the Director of the CMA reassigned the case to another Arbitrator who took over the case without informing the applicant of the reasons for taking over. The position of the law, as stated in **Jitesh Jayantilal Ladwa and Another vs. Dhirajlal Walji Ladwa and 2 Others**, Civil Appeal No.

435 of 2020, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), is that when another Magistrate took the case from the previous magistrate the reason taking over must be communicated to the parties. This was not done.

The change of Arbitrator was done after the predecessor Arbitrator had rejected to recuse herself from the case. Taking over the case by another Arbitrator makes the successor Arbitrator functus official as there is a ruling of the predecessor Arbitrator rejecting to recuse herself. The remedy after the first Arbitrator rejected her ruling to recuse herself was to wait until the determination of the case was made and file a revision in this Court if the party was not satisfied with the decision. The act of the successor Arbitrator taking over the case from the predecessor arbitrator is procedural irregularity. The Court of Appeal stated this in the case of The **International Airlines of the United Arab Emirates vs. Nassor Nassor**, Civil Appeal No. 379 of 2019, Court Appeal of Tanzania at Dar Es Salaam (unreported).

On the remaining grounds of appeal, the applicant said that the trial Arbitrator said nothing about the evidence adduced during the disciplinary hearing. But the Arbitrator concluded that the procedure and reasons for termination were not fair without showing the said unfairness. The Arbitrator erred in finding that the termination of the respondent's employment was unfair substantially and procedurally. All procedures for termination were

adhered to by the applicant, and the reason for termination was fair as the respondent was organising and leading a strike in his place of work.

In his reply, the respondent said that the submission by the applicant had no legs to stand. On the issue that the application was filed out of time, the respondent said he was given a letter of termination on 11.04.2022, and he referred to the CMA for the dispute for breach of contract on 09.05.2022. In the dispute, the respondent was claiming salary arrears when he was in employment, and there was an agreement that the employer would pay for the said salary arrears, but he did not do so. The applicant also claimed other entitlement concerning with termination of the employment contract. The dispute was referred to the CMA within time. The claim for salary arrears, found to be out of time, was not granted and did not form part of the CMA award.

On the issue that the CMA erred in determining the fairness of termination in the dispute over a breach of contract, the applicant said that since the cause of action was a breach of contract. As the applicant did not have a reason for termination of the employment contract and the procedure was unfair, the CMA rightly held that the termination was not fair. Even the applicant, in his closing submission, said that the termination of employment was fair, meaning that he knew that the breach of contract was in respect of

fairness of termination of employment. There were unfair reasons and unfair procedures for terminating the employment contract.

Regarding the submission that the reasons for termination were fair, the respondent said there was no strike whatsoever at the place of employment when the applicant employed him. There is no evidence on record which prove that there was a strike at the place of work. There is no evidence that he was leading the strike. Exhibit D2 was not the respondent's letter. It was a forged document.

Regarding the award of payment of 2 months' salary arrears, the respondent said that the CMA ordered payment of 2 months' salary arrears as it was among his claims. The applicant relied on exhibit D7 to prove that the respondent was paid, but exhibit D7, a list of employees' salaries, is not proof of payment of salaries. Payment of salary is proved by pay in slip. On the evidence that the respondent sent a message inciting trikes to the school employees by Whatsapp group, it was found that the said Whatsapp number belongs to another teacher and not the respondent.

On the issue that it was wrong for the dispute to be assigned to another Arbitrator after the predecessor arbitrator decided not to recuse, the respondent said he sent his complaint to the administration of the CMA following the way Arbitrator was conducting the proceedings. Several clients were complaining about the Arbitrator and her conduct. The CMA informed

us that they are working on the complaints, and if they are genuine, they will act on them. The CMA administration decided to remove the Arbitrator from the case and assign it to another arbitrator, meaning they found the complaint genuine.

It was the respondent's submission on the issue of fairness of the termination that the CMA found that the reasons and procedure for the termination respondent's employment were not fair. The complainant, Head Master, was also the chairman of the disciplinary committee, and the secretary in the disciplinary committee was the chairman of the appeal committee. This means that Headmaster was the complainant and judge in his case. Even in appeal, the secretary of the disciplinary committee was chairman of the appeal committee. Respondent said that he was informed about the disciplinary hearing on the hearing date and was forced to provide his statement. The disciplinary committee decided to terminate his contract. The respondent appealed, and the appeal committee determined the matter without giving him a chance to appear. The Headmaster had a conflict with the respondent after they had different positions concerning supervising the national examination. This caused the Headmaster to have a grudge and set the respondent up. The CMA decision was valid and was made according to the evidence adhered to before it.

In his rejoinder, the counsel for the applicant said that the CMA erred in awarding payment of salary arrears as the same was done out of time. Further, there is evidence that the same was paid to the respondent. As the respondent was in a fixed term contract, he was supposed to be paid for the remaining period and not the period before his contract. The counsel reiterates his submission in chief.

Having heard submissions from both sides, there is no dispute that the applicant employed the respondent for one year fixed term contract in 2020. The contract was renewed on 01.07.2021 and was expected to end on 30.06.2022. On 11.04.2022, the applicant terminated the respondent's employment for misconduct. The applicant said he is challenging the CMA award as the procedure was not adhered to as the trial Arbitrator was changed during trial after she rejected the prayer for recusal in her ruling; the decision of the CMA that the termination of the respondent was not fair; and the Commission's award of 2 months' salary arrears which was filed out of the prescribed period. Thus, in determining this revision, there are three main issues to be comsidered. The first issue is whether there was a procedural irregularity in the change of trial Arbitrator in the CMA proceedings; the second issue is whether the applicant terminated the respondent's fixed term employment fairly; and the last issue is whether the

award of 2 months' salaries arrears issued by the CMA was proper as the claim for the salary arrears filed was out of time.

In the issue of procedural irregularity, the applicant submitted that the Director of the Commission and Arbitration intervened in the power of the Arbitrator assigned to determine the case by reassigning the case to another Arbitrator who took over the case without informing the applicant of the reasons for taking over. The change of Arbitrator was done after the predecessor Arbitrator had rejected to recuse herself from the case. The taking over of the case made the successor Arbitrator functus official as there was a ruling of the predecessor Arbitrator rejecting to recuse herself. In his reply, the respondent said that the change of trial Arbitrator was administrative action taken by the Commission following complaints made.

There are circumstances where a case changes hands from one magistrate, judge, or presiding officer to another for various reasons. In civil cases, this matter is governed by Order XVIII, Rule 10(1) of the Civil Procedure Code Act, Cap. 33 R.E. 2022, which provides that:-

> *"Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and*

may proceed with the suit from the stage at which his predecessor left it."

It is a settled principle that the magistrate or judge who takes over a partly heard case must state the reasons for taking over the case from his predecessor. The rationale is to guarantee that the credibility of witnesses is assessed by the magistrate or judge who records the evidence and to protect the judiciary's integrity. In **Ms. Georges Centre Limited vs. A.G. and Another**, Civil Appeal No. 29 of 2016, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why they have to take up a case that is partly heard by another. There are several reasons why a trial started by one judicial officer must be completed by the same Judicial Officer unless it is not practicable to do so. For one thing... the one who sees and hears the witness is in the best position to access the witness's credibility. The credibility of witnesses, which has to be assessed, is very crucial in the determination of any case before a court of law. Furthermore, the integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised. "

In the case of **Abdi Masoud Iboma and 3 others vs. Republic,** Criminal Appeal No. 116 of 2015, Court of Appeal of Tanzania at Dodoma, (unreported), it was held that:-

"The provision requires that reasons be laid bare to show why the predecessor magistrate could not complete the trial. In the absence of any such reasons, the successor magistrate lacked authority and jurisdiction to proceed with the trial, and consequently, all such proceedings before him were a nullity."

From the above cited cases, where there is a change of a Magistrate, Judge or Presiding Officer in the case, the successor Magistrate, Judge or Presiding Officer must give reasons for taking over. Failure to give reasons after taking over makes the predecessor Magistrate, Judge or Presiding Officer lack jurisdiction to proceed with the trial, and the proceedings before him are null and void.

The record shows that two Arbitrators handled the present case. Hon. Mwakyusa L.L., Arbitrator, was the first to preside over the matter. But before the arbitration hearing commenced, the matter was reassigned to Hon. Matalis, R., Arbitrator. On 07.09.2022, Hon. Matalis, R., informed both parties that he was assigned to preside over the matter. There was no objection from any of the parties regarding the taking over of the matter by another Arbitrator. The successor Arbitrator stated the reason for taking over the matter from the predecessor Arbitrator is the Director of the CMA reassigned it.

It is the Commission for Mediation and Arbitration which is vested with the function of mediating and determining disputes referred for arbitration

under section 14 (1) (a), (b) (i), (ii) and (iii) of the Labour Institutions Act. Under section 15 (1) (a) and (b) of the Labour Institutions Act, the Commission discharges this function by appointing and assigning disputed referred for mediation and arbitration to the mediators and arbitrators. According to section 19 (5) of the Labour Institutions Act, the Commission is responsible for the control and discipline of mediators and arbitrators, provided that the control or discipline does not interfere with the independence of the mediators and arbitrators in any dispute. The functions of the Commission are delegated to mediators and arbitrators by the Director of the CMA, after consultation with the Commission, in accordance with section 18 (5) of the Labour Institutions Act. As the Commission is responsible for the control and discipline of the mediators and arbitrators, the same is interpreted that the mandate of the Commission to control and discipline mediators and arbitrators is done through the Director of the CMA.

The applicant submitted that it was wrong to reassign the dispute to another arbitrator after the predecessor assessor had delivered a ruling rejecting to recuse herself. This ground has no merits. Assignment of the dispute to the arbitrator is an administrative procedure. A change of arbitrator is made at any time and stage depending on the circumstances of the case. In the absence of evidence proving that re-assignment of the dispute to another arbitrator amount to interference with the independence of

arbitrator, it could not be said that the change of arbitrator in this case was irregular. Thus, this ground lacks some merits.

Moving to the 2nd issue on the fairness of terminating the respondent's fixed term employment contract, the law provides in section 37 (1) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019, that it shall be unlawful for an employer to terminate the employment of an employee unfairly. The same Act in section 37 (2) provides for the employer's duty to prove that the termination was fair in dispute for termination of employment. The section reads as follows:-

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

The above section requires employers to terminate employees for valid and fair reasons and fair procedures. Failure of the employer to prove the fairness of the termination means that the termination was not fair. The law

provides further in section 37 (4) of Cap. 366, that in deciding whether a termination by an employer is fair, an employer, Arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99 of Cap. 366. The Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, provides in rule 4 (1) and (2) that the employer and the employee shall agree to terminate the contract in accordance with the agreement and where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires unless the contract provided otherwise.

Rule 8 (1) (a), (b), (c) and (d) of G.N. No. 42 of 2007 provides how the employer may terminate the employment contract. The termination of the employment of the employee by the employer may be by compliance with the terms of the contract relating to termination, payment of termination benefits, providing an acceptable reason for termination and following fair procedures for termination. The G.N. No 42 of 2007 provides further in rule 8 (2) (a) and (b) for compliance with the provisions of the contract relating to termination on a fixed term. The rules state that for a fixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract or where there is no breach to terminate the contract lawfully by getting the employee to agree to early termination. The employer may terminate the contract by giving notice of

termination; or without notice if the employee has materially breached the contract. The said rule reads as follows:-

"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 the contract: and

(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 depend on whether the contract is for a fixed term or indefinite in duration. This means that-

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

(b) where there is no breach to terminate the contract lawfully by getting the employee to agree to early termination;

(c) where the contract is for an indefinite duration, the employer must have a fair reason to terminate and follow a fair procedure.

(d) the employer may terminate the contract

(i) by giving notice of termination; or

(ii) without notice, if the employee has materially breached the contract."

The above cited rules provide two lawful ways in which the employer may terminate a fixed term contract of the employee before the expiry of the contract period. Firstly, if the employee materially breaches the contract, the employer may terminate the contract without notice. Secondly, where there is no breach, the employer has to terminate the contract lawfully by getting the employee to agree to early termination. Where the employee agrees to early termination, the employer terminates the employment contract by giving notice of termination.

In the present case, the applicant terminated the respondent's employment on disciplinary grounds for the reason that the respondent committed a disciplinary offence by instigating strikes in the place of work. The employer investigated the matter, a disciplinary hearing was conducted, the respondent was found guilty of the disciplinary offence, and the respondent was terminated from employment. The trial Commission found in its decision that the termination was not fair as the reason and procedure for termination were unfair. The Commission found that there is no proof of the presence of riots or strikes in the place of work. The procedures for termination were not fair as the respondent was served with a notice to attend a disciplinary hearing on the day of the disciplinary hearing. The Headmaster of secondary school was the chairperson of the disciplinary committee. The secretary of the

disciplinary committee was chairman of the appellate committee, contrary to the unfair hearing principles.

The evidence in the record displays that the respondent was suspended from work pending investigation for the disciplinary offence by the Headmaster of Sun Secondary School, namely Bakari E. Mkiwa, on behalf of the management from 04.03.2022. After investigation, the respondent was served with a notice to attend a disciplinary hearing on 21.03.2022 and a disciplinary charge. The said notice was served to the respondent on the hearing date. The respondent was charged with a disciplinary offence of unlawful strikes contrary to rule 14 (1) of the G.N. No. 42 of 2007. The particulars of the offence state that the respondent together with other employees, being employees of the applicant, conducted strikes on 01.03.2022 by not obeying instructions of writing an explanation letter, not receiving letters from the Headteacher, not entered in the class and performing their duties contrary to the laws. The chairman of the disciplinary committee was Bakari E. Mkiwa, the committee secretary was Juan Ntiwamenya, and the committee members were Petro Nzala, Elishama Chengula, Salome Abdallah and Christopher Mgeni. Msenga Mbembela was the complainant who prosecuted the case to the disciplinary committee on behalf of the employer.

The disciplinary committee heard the case and found respondent guilty of the offence. The committee recommended the respondent to be terminated

from employment. The respondent was informed of the committee's decision and appealed to the appellate committee. The appellate committee, comprised of its chairperson, Ayubu Kingshashu, and its secretary Msenga Mbembela delivered its ruling on 08.04.2022 and dismissed the appeal for want of merits. The appellate committee went on to find the respondent guilty of abscondment, which he was not among the disciplinary offence the respondent was charged with. The appellate committee recommended that the employer terminate the respondent's employment. On 11.04.2022, the Director, Nguvu Edward Chengula, terminated the respondent's employment because he was found guilty by disciplinary and appellate committees of unlawful strikes and absenteeism.

The evidence in the record shows no dispute that the respondent was employed as a chemistry and biology teacher. The said subjects are taught in secondary school, meaning he was a secondary school teacher. The evidence from the disciplinary committee and the Commission shows that the strikes occurred in primary school. The investigation report shows that the strikes happened in the Sun Primary School. The testimony of DW1 (Director) testified that the respondent was terminated for conducting unlawful strikes and absenteeism. He said that the respondent was instigating strikes in the staff Whatsapp group. However, DW1 provided no exhibit to prove that the respondent was initiating strikes in the staff Whatsapp group. DW2

(Headmaster of Secondary School) testified that the respondent sent messages instigating strikes to the teachers' Whatsapp group. The respondent sent the message using the number 0679041596, but DW2 said that the number was new as the respondent was using phone numbers 0692066777 and 0620413175. This evidence shows that DW2 was not sure if the message was sent by the respondent as there is no proof that the number sending the message is owned or was in possession of the respondent. DW2 said during cross-examination that there were no strikes in the secondary school. The strike was in the primary school. As the respondent is a secondary school teacher, it could not be said that he participated in the strike in the primary school. From this evidence, the reason for termination was not valid.

Regarding the procedure for termination, the evidence in the record shows that the procedure for termination was not fair. The respondent was not served with the investigation report before he appeared to the disciplinary committee as it is the foundation of the allegation against him. He was served with notice of hearing on the hearing date, and the person who was suspended him during the investigation was the chairman of the disciplinary committee. After he was informed of the disciplinary committee decision, the respondent appealed to the appellate committee. The secretary of the appellate committee was the person who prosecuted the case on behalf of the employer at the disciplinary committee. Also, the appellate committee found the respondent

guilty of the disciplinary offence of absenteeism which he was not charged with and recommended for termination of the respondent's employment. The Director (DW1) terminated the respondent's employment after finding him guilty of conducting unlawful strikes and absenteeism. All of this prejudiced the right of the respondent in the fair trial.

The counsel for the appellant submitted that it was wrong for the CMA to find that the termination was not fair as the principles of unfair termination do not apply in dispute of the fixed term employment contract. The position is indeed settled that the principles of unfair termination do not apply to a dispute of termination of a fixed term employment contract. The position was stated in the case of **Morogoro International School vs. Hongo Manyanya**, (supra). However, it was the applicant who terminated the respondent's employment on disciplinary grounds after following all disciplinary procedures. The said procedures followed by the applicant was for fairness of termination of employment. Further, as I stated earlier herein, the employer may terminate the employee's employment by compliance with the terms of the employment contract relating to termination as per rule 8 (1) (a) and (2) (a) (b) of G.N. No. 42 of 2007. For a fixed term employment contract, the employer may terminate the contract before the expiry of the contract period if the employee materially breaches the contract or if the employee agree to earlier termination.

The respondent employment contract (exhibit D1) provides in section 14 (1) and (3) that the employer may terminate the teacher for justifiable reasons. By stating that the termination of the teacher is for a justifiable cause, it means the termination is for a fair reason. The evidence in the record has failed to prove that the applicant has fair reason to terminate the respondent's employment. Thus, the termination of the respondent's employment was not lawful. It was against the law and the terms of the employment contract.

On the issue of whether the award of 2 months' salary arrears issued by the CMA was proper, the applicant submitted that it was wrong for the Commission to award two months' salary arrears to the respondent as the claims were filed out of time. It was further added that the evidence in the record proved that the salaries for November, 2021, December, 2021, January, 2022 and February, 2022 were paid to the respondent. On his side, the respondent said he was not paid his two months' salary before he was terminated and the list of names (Exhibit D7) is not proof of salary payment.

The record shows that the respondent received a termination letter on 13.04.2022, and on 09.05.2022, he referred the dispute to the CMA. CMA Form No. 1 and the nature of the dispute is a breach of contract. The respondent was seeking in the CMA Form No. 1 the payment of 3 months' salaries for the remaining time of the fixed term contract, notice payment, salary arrears from January, 2022, leave pay, and certificate of service. In its decision, the CMA

awarded three months' salaries remaining in the respondent fixed term contract, one month's salary as notice, one month's salary as leave pay, and two months' salary arrears. The reason the CMA awarded the two months' salary arrears to the respondent is that those two months' claims were within time as rule 10 (2) of the Labour Institutions (Mediation and arbitration) Rules, G.N. No. 64 of 2007 provides for disputes other than those for termination of employment has to be referred within 60 days. The applicant averred that the whole dispute was supposed to be dismissed because of the claims for salary arrears in the outcome of the dispute.

The applicant's prayer for dismissal of the whole dispute has no basis. The respondent filed CMA Form No. 1 within 30 days of terminating his employment. The nature of the dispute was a breach of contract, and the respondent claimed, among other payments, the payment of salary arrears from January, 2022 to April, 2022, when he was terminated. As the dispute was filed in the Commission on May, 2022, the respondent has a claim of rights for his salary arrears for March and April, 2022, which falls within 60 days of referring the dispute to the Commission under rule 10 (2) of G.N. No. 64 of 2007. There is no evidence in record proving that the applicant paid respondent's salaries for March and April, 2022. Thus, the CMA correctly awarded the respondent two months' salary arrears.

Therefore, the revision lacks merits, and I dismiss it accordingly. As this is a labour matter, no order is given as to the costs of the suit.

A. E. Mwipopo

JUDGE

02/06/2023