IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

CONSOLIDATED LABOUR REVISIONS NO.70/71 OF 2022

(Arising from the Labour Dispute No. CMA/MZ/NYAM/254/2020/112/2021 in the Commission for Mediation and Arbitration for Mwanza)

ALFRED FAUSTINE MALUGU.....APPLICANT

VERSUS

COUNCIL ST. AUGUSTINE UNIVERSITY OF TANZANIA.....RESPONDENT

RULING

07/11/2023 & 18/03/2024

KAMANA, J:

Alfred Faustine Malugu, hereinafter referred to as the applicant, seeks to revise the Commission for Mediation and Arbitration (CMA) decision for Mwanza dated 27th September, 2022. Likewise, the Council St. Augustine University of Tanzania, hereinafter referred to as the respondent, seeks the revision of the same decision. The two applications, by order of this Court, were consolidated.

Briefly, the applicant was employed by the respondent on a three-year fixed-term contract as an Assistant Lecturer since 1st January, 2012. The last contract which was to last on 1st January, 2021 was terminated by the respondent on 18th November, 2019. Before that termination, the

applicant was charged with three disciplinary offences. Those were disrespectful conduct, changing marks/grades for unethical motives and sexual harassment. After disciplinary procedures, the applicant's contract with the respondent was terminated after he was found guilty of changing marks/grades for unethical motives. Aggrieved by such a decision, the applicant referred the dispute to the CMA citing unfair termination as a ground.

In resolving the dispute, the CMA framed three issues. One, whether there was a valid reason for terminating the applicant's employment. Two, whether the procedures pertaining to the termination of the applicant's employment were adhered to. Three, the reliefs entitled to the parties.

On whether there was a valid reason for terminating the applicant, the CMA was satisfied that the applicant committed the offence of changing marks/grades for unethical motives. However, concerning whether the procedures were fair, the CMA held the view that the procedures were not adhered to. Regarding the reliefs, the applicant was awarded a compensation of twelve months salary which was Tshs. 24,120,000/-.

On his part, the applicant was not satisfied with the findings of the CMA. In that case, he invited this Court under sections 91(l)(a) & 2(b), 2(c) and 94(l)(b)(i) of the Employment and Labour Relation Act, Cap 366 R.E 2019 (ELRA) and Rule 24(1), 24(1), 24(2)(a),(b),(c),(d),(e),(f) and 24(3)(a),(b),(c),(d) and 28(l)(c),(d),(e) of the Labour Court Rules, 2007 (GN No. 106 of 2007) challenging the correctness, rationality, propriety and legality of the issued award. The applicant's prayers were that:

(a) This Court be pleased to call for the records of the Labour Dispute No. CMA/MZ/NYAM/354/112/2021 and inspect and examine such records and proceedings to satisfy itself as to the correctness, rationality, propriety and legality of the award on the fairness of the reason for termination and remedies of leave, notice and severance pay;

(b) This Court be pleased to revise the whole of the proceedings and set aside the subsequent award of the Labour Dispute No. CMA/MZ/NYAM/354/112/2021 delivered by Arbitrator Doris A. Wandiba on 27th September, 2022 on the fairness of the reason for

termination and the remedies of leave, notice and severance pay and for miscalculating the remuneration.

In the affidavit supporting the application, the applicant raised the following grounds:

(a) The Arbitrator erred in law and fact by holding that there was a fair reason for the termination of the applicant's employment while evidence on record shows that no rule or standard was contravened.

(b) The Arbitrator erred in law by holding that the applicant was not entitled to leave, notice and severance pay while she had already held that the termination was unfair in terms of procedure.

(c) The Arbitrator erred in law and fact for miscalculating the remuneration according to the contract of employment.

From those grounds, the applicant raised the following legal issues:

(a) Whether there was a fair reason for terminating the applicant;

(b) Whether the applicant is entitled to leave, severance pay and notice;

(c) Whether the Arbitrator miscalculated the remuneration that the applicant was entitled to.

On her part, the respondent, apart from opposing the application as devoid of merits, filed an application seeking the following orders:

(a) This Court be pleased to exercise its revisionary jurisdiction, call for and examine the records of the proceedings before the CMA in Labour Dispute No. CMA/MZ/NYAM/354/2020/112/2021 to satisfy itself as to the correctness, legality and/or propriety of the award made by Arbitrator (Hon. Doris A. Wandiba) dated 27/09/2022.

(b) If the Court finds incorrectness, illegality and impropriety, set aside the award and orders made therein.

(c) Any other reliefs as this Court may deem fit and just to grant under the circumstances.

The respondent's application was founded on the following grounds:

(a) That the Arbitrator erred in law in holding that the respondent did not follow the fair procedures for termination while the applicant had a fixed-term contract whereby the said procedures are inapplicable;

(b) That the arbitrator wrongly entertained the claim of unfair termination while the applicant had a fixed-term contract and consequently shifted the burden of proof to the respondent;

(c) That the Arbitrator erred in law by awarding remedies of unfair termination as the said remedies cannot be awarded to the person with the fixed-term contract of employment.

Fortified by those grounds, the respondent raised the following legal issues:

(a) Whether the employee under a fixed-term employment contract can claim for unfair termination and be entitled to reliefs thereunder;

(b) Whether the Arbitrator failed to apply the law correctly;

(c) Whether the termination of an employee under a fixed-term contract is required to follow the procedures as of a permanent employment contract.

(d) Whether the award dated 27th September, 2022 was illegally and improperly procured in the eyes of the law.

Likewise, the application was countered by a notice of opposition by an applicant as baseless.

The instant application was disposed of by way of written submission. The applicant's submissions were prepared by Mr. Reagan Charles, learned Counsel for the applicant. The respondent's submissions were drawn by Mr. Innocent Kisigiro, learned Counsel for the respondent.

To determine the controversy, I think it is necessary to first determine the first issue raised by the respondent as to whether the employee under a fixed-term employment contract can claim unfair termination and be entitled to relief thereunder.

In this regard, it was the exposition of Mr. Kisigiro that from the nature of the relationship that existed between the parties (fixed-term contract), the issue of unfair termination did not arise. The learned Counsel based his arguments on the position taken in the cases of

Mtambua Shamte and 64 Others v. Care Sanitation and Suppliers, Revision No. 154 of 2010 (HC) (Unreported); **Jordan University College v. Flavia Joseph**, Revision No. 23 of 2019 (HC) (Unreported); **Asanterabi Mkonyi v. TANESCO**, Civil Appeal No.53 of 2019 (CAT) (Unreported) and **Morogoro International School v. Hongo Manyama**, Civil Appeal No. 378 of 2021 (CAT) (Unreported).

Mr. Kisigiro went on to argue that in the absence of the dispute of breach of contract before the CMA, then the CMA was not seized with the jurisdiction to entertain the same. He cited the case of **Jordan University College** (Supra) to bolster his argument.

Responding, Mr. Charles prefaced by contending that an employee with a fixed-term contract can claim for unfair termination. He distinguished the case of **Jordan University College** (Supra) as irrelevant to the circumstances of this case as the cited case was about contractual rights whilst the present one is about disciplinary issues. He further contended that the case of **Asanterabi Mkonyi** (Supra) supports his contention that an employee under a fixed-term contract can claim for unfair termination. He further invited this Court to consider the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019 (CAT) (Unreported).

Rejoining, Mr. Kisigiro maintained his position in submission in chief. He contended further that the cases he cited are relevant as they put it clearly that the principles of unfair termination and the reliefs thereto do not apply to a fixed-term contract. The learned counsel argued that the cases of **Asanterabi Mkonyi** (Supra) and **Morogoro International School** (Supra) are more recent than the case of **Felician Rutwaza** hence under the doctrine of recent decision they prevail.

In determining the issue, it is imperative to consider the provision of section 37(1) of the EALRA. The said section states that any unfair termination of the employment is unlawful. The section reads:

> *`37.- (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.'*

My reading of section 37(1) does not convince me that the section excludes fixed-term contracts in the sense that the said contracts can be terminated without due regard to conditions that ensure fair termination of the employment. Section 37(2) stipulates vividly the conditions for fair termination. Those conditions must be valid and in relation to the employee's conduct, capacity, compatibility or employer's operational

needs. Further, the law requires that in terminating the employment, the employer must adhere to fair procedures.

One may argue that under section 36 of the EALRA, unfair termination so far as the fixed-term contract is concerned is only when there is the expectation of renewal of the contract. The section reads:

*'**36.** For purposes of this Sub-Part-*

(a) "termination of employment" includes-

(i) a lawful termination of employment under the common law;

(ii) a termination by an employee because the employer made continued employment intolerable for the employee;

(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;

(iv) a failure to allow an employee to resume work after taking maternity leave

granted under this Act or any agreed maternity leave; and

(v) a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them;' (Emphasis added).

I have a different opinion. In interpretational perspective, it is self-evident that when the word "includes" is used, the legislature intends not to restrict the interpretation to the listed items. What is intended is to have an enumerative but unexhaustive interpretation. That being the case, subparagraphs (i) to (v) of section 36(a) are not exhaustive so far as termination of employment is concerned. In other words, termination of the fixed-term agreement by an employer is caught within the web of section 36(a) provided that the employer fails to prove the existence of fair termination and procedure in the light of section 37(1) and (2). The only exception is provided in section 35 of the ELRA whereby it is stated categorically that principles of unfair termination have nothing to do with an employment lasting below the period of six months.

Further, I had the opportunity to go through rule 8(2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN. No.42 of 2007). According to the rule, an employer may terminate a fixed-term contract if there is a material breach of the contract by an employee. Given that, it is my view that such breach must be communicated to the employee who has the right to be heard. Further, the said breach must be proved against the employee as to its fairness in terms of reasons and procedures.

I thoroughly went through the cases cited by the respondent including the case of **Asanterabi Mkonyi** (Supra) which stressed that principles of unfair termination do not apply to fixed-term contracts. However, I hold the view that in pronouncing that principle, the Court of Appeal did not give a green light to arbitrary termination of fixed-term contracts. In this regard, I am fortified by the position taken by the Court of Appeal in the case of **St. Joseph Koiping Secondary School v. Alvera Kashushura**, Civil Appeal 377 of 2021 (Unreported). In the cited case, the Court of Appeal was invited to consider whether, under a fixed-term contract, fair reasons for termination and procedure are relevant or otherwise. The Court of Appeal had this to state:

'We also do not agree with him that, under our laws, a fixed term contract of service can be prematurely terminated without assigning reasons. This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. (See section 35 of the ELRA). In addition, creation of a specific duration of contract gives the employee legitimate expectation that if everything remains constant, he or she will be in the service throughout the contractual period. The expectation is defeated, if the same can be terminated at any time without reason.'

At this juncture, it suffices to state that termination of the fixed-term contract by an employer is susceptible to scrutinization provided under section 37(1) and (2) of the EALRA.

Having decided that, the next question that requires my determination is whether there was a fair reason for termination.

Expounding on the issue, Mr. Charles, learned Counsel for the applicant contended that the respondent failed to prove the offence of

changing examination results in favour of one of his students as alleged against the applicant. The learned counsel argued that the applicant did not admit to committing the alleged offences.

On the other hand, Mr. Kisigiro, learned Counsel for the respondent, argued that during the disciplinary hearing, the applicant admitted to having changed the examination results contrary to the Academic, Administrative and Support Staff Regulations, 2015.

I gave a thorough thought to the decision of the CMA. In her decision, the Arbitrator held that the termination of the applicant by the respondent was fair. She based his reasoning on the fact that the applicant was recorded in the minutes of the disciplinary hearing to admit the offence of changing the examination results.

Indeed, I find no reason to differ from the findings of the CMA. According to Exhibit SU2H (Minutes of the Staff Disciplinary Committee), the applicant was recorded to state that he changed the examination results. He was also recorded to state that he changed the examination results after being threatened by the student that if he did not change the results, she would raise a scandal to tarnish his image.

During the CMA proceedings, the applicant advanced the argument that the system that processes examination results was defective and

had the habit of changing examination results. He tendered different slips to prove changes in examination results.

It is my considered opinion that the defectiveness of the system does not in any way outweigh the applicant's admission that he changed the examination results in question. Further, in my opinion, the defence that he changed the examination results due to threats exerted on him is unmeritorious.

Likewise, the arguments of Mr. Charles which I do not think relevant to reproduce here are baseless simply on the reason that the applicant admitted to having committed the alleged offence of changing examination results. They are just afterthoughts brought to save the boat from capsizing. It remains that a person of his calibre who is entrusted with imparting knowledge to students who would become experts in their field of expertise when succumbing to student threats to the extent of changing examination results, his dismissal is inevitable and warranted.

Having held that, the next question that invites my determination is whether the termination of an employee under a fixed-term contract is required to follow the procedures of a permanent employment contract.

Submitting on this, Mr. Kisigiro, learned Counsel for the respondent contended that it was incorrect on the part of the CMA to apply procedural rules enshrined in the EALRA to the termination of a fixed-term contract. However, he stressed that in terminating the applicant, fair procedures were adhered to as the applicant was formally charged, summoned and heard before being terminated upon his admission.

The applicant did not respond to the raised issue on the reason that the same was not part of the application filed by the respondent. I find the reason baseless as the respondent's affidavit states the raised issue.

In her decision, the Arbitrator found that the procedures for fair termination were not adhered to. She based her position on the fact that according to Rule 4(2) of GN No. 42 of 2007, the chairman of the disciplinary committee is required to be impartial and not previously engaged in the issues giving rise to the hearing. Guided by that provision, the Arbitrator held that the Chairman who led the Committee was a person who was involved in the matter that led to the hearing as he was the one who received the complaints from the Head of the Department. Further, the Chairman was responsible for requesting the examination results in question and was the one who initiated the

investigation. In her opinion, the Arbitrator found that not only there was a violation of the said provision but also an infringement of the natural law.

The Arbitrator further observed, among other things, that the proceedings (Exh.SU2H) are silent as to whether the applicant was informed of his basic rights including the right to object to membership of any member of the Committee.

In this aspect, I have no reason to differ from the CMA in holding that the rules of fair procedures were not followed to the letter. As I have stated hereinabove, termination of the fixed-term contract is not exceptional so far as the procedures for fair termination are concerned. In that case, it was inappropriate for a person who received the complaint and initiated the investigation to be the Chairman of the Disciplinary Committee. One of the cornerstones in the decision-making process is impartiality. By initiating the investigation and sitting as the Chairman, the Chairman of the Disciplinary Committee was exercising the functions of investigation, prosecution and adjudication. That kind of behaviour is abhorred in the dispensation of justice.

Having taken that position, I am now delving into the issue as to whether the Arbitrator failed to apply the law correctly.

In his submission, Mr. Kisigiro, learned counsel for the respondent, contended that the CMA wrongly invited the principle of reasonable expectation of renewal of the contract of employment. He asserted that the law vividly provides that the issue of reasonable expectation of renewal of the contract arises where the employer fails to renew a fixed-term contract on the same or similar terms if there was a reasonable expectation of renewal. Based on that, he argued that an employee who is terminated when the contract is operational on grounds of the breach of the employment contract can not assert expectation of renewal of the contract. Responding, Mr. Charles, learned counsel for the applicant, contended that the said issue was not decided.

As rightly pointed out by Mr. Charles, the CMA did not decide on the issue. Given that, this Court has nothing to revise so far as the issue is concerned.

The next issue for my determination is whether the applicant is entitled to leave, severance pay and notice.

Submitting on this issue, Mr. Charles, learned Counsel for the applicant contended that since the termination of his client was substantively and procedurally unfair, he is entitled to be paid severance, leave and notice pay as per the provisions of the EALRA. To strengthen

his arguments so far as leave and notice pay are concerned, the learned Counsel invited this Court to consider the case of **Felician Rutwaza** (Supra).

Countering the argument, Mr. Kisigiro argued that the nature of the dispute that led to this application was a breach of contract and not unfair termination as alleged by the applicant. Given that, held the view that the applicant is not entitled to severance, leave and notice pay as what he complained in the CMA was in a real sense a breach of contract and not unfair termination.

Deciding not to grant severance, leave and notice pay, the CMA relied on the reason that the applicant was terminated fairly in terms of reasons. While I agree with its conclusion, I slightly differ with the reasoning of the CMA.

Trite law in our jurisdiction is that when a fixed-term contract is terminated unfairly whether in substantive or in procedure, the terminated employee is entitled to the salaries for the remaining period of the terminated fixed contract. That being the position and taking into consideration that the applicant was employed under a fixed-term contract, he is not entitled to severance, leave and notice pay.

Another issue is whether the award dated 27th September, 2022 was illegally and improperly procured in the eyes of the law.

On this, Mr. Kisigiro contended that in the CMA-F1, the applicant prayed only for reinstatement without any other alternative prayer. Given that, he opined that the applicant was not entitled to compensation for the following reasons. One, the respondent did not pray for alternative relief to reinstatement. Two, it is untenable in law to grant the relief that is not prayed for in the pleadings and during the hearing. Three, by granting the relief different from the one arising from unfair termination, the CMA formulated a new cause of action which was never heard before it, and in that case, the burden of proof was placed on the applicant instead of the respondent.

Responding, Mr. Charles contended that the CMA was right in awarding the compensation as the contractual term had expired for about one year and a half. In that case, he argued that the CMA considered the fact that reinstatement would cause the respondent to part with fifteen months' salary instead of the twelve months' salary awarded as compensation.

In deciding to award twelve months' salary, the CMA relied on the provision of section 40(1)(c) of EALRA. According to the provision, an

employee who is unfairly terminated may be compensated for not less than twelve months' salary.

At this point, it should be noted that section 40(1) provides for remedies for unfair termination. The remedies are the reinstatement of the employee without loss of income during the termination period; reengagement on the terms decided by the arbitrator or this Court; or compensation to the tune of not less than twelve months salary.

However, for the CMA or this Court to order reinstatement or re-engagement of an employee who has been terminated, principally that employee must have been substantively terminated unfairly. Further, in the circumstances where there is a loss of trust between the employer and the employee, regardless of whether the termination was unfair, the CMA or this Court is precluded from ordering reinstatement of re-engagement.

In this matter, the applicant sought reinstatement as a relief for what he alleged to be unfair termination in terms of reasons and procedures. Upon hearing the parties, the CMA found that the applicant was fairly terminated in terms of reasons but unfairly in terms of procedure. In such circumstances, the CMA couldn't reinstate the applicant except to resort to other remedies though not pleaded.

Concerning the argument that the CMA erred in granting the relief that was not pleaded, the law is that the CMA or this Court is vested with powers to grant reliefs regardless of whether they were pleaded or not provided they are statutory. Among the statutory reliefs is the compensation under section 40(1)(c) of the ELRA.

However, in the circumstances of this case where the termination was in respect of the fixed-term contract, the CMA was required to order compensation for the salaries for the remaining period of the fixed-term agreement. Given that, I hold that the applicant is entitled to a salary of fifteen months which is Tshs.31,125,000/- which is equivalent to Tshs.2,075,000/- per month as per the agreement. In that case, it is my holding that Tshs.2,010,000/- that was taken by the CMA to be the applicant's salary per month was miscalculated. For the avoidance of doubt, the ordered sum is subject to statutory and non-statutory deductions as agreed by the parties.

On those findings, the award of the CMA is hereby revised to the extent explained. The right to appeal is explained. Order accordingly.

DATED at **MWANZA** this 18th day of March, 2024.

KS KAMANA

JUDGE