

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION NO. 204 OF 2019**

**BETWEEN**

**CFAO MOTORS TANZANIA LTD.....APPLICANT**

**VERSUS**

**ATTU J.MYNA.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 01/10/2020*

*Date of Judgment: 30/11/2020*

**Z.G. Muruke, J.**

This application is made under section 91 (1) (a) 2 (b) 94 (1) (b) (i) (c) of the Employment and Labour Relations Act, No. 6 of 2004 and Rule 24 (1) (2) (a) (b) (c) (d) (e) (f) (3) (a) (b) (c) (d) and Rule 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN. No. 106 of 2007 (the Rules). The applicant calls upon this court to revise the award passed by the Commission for Mediation and Arbitration (herein the CMA) on 21<sup>st</sup> December, 2017 in Labour Dispute No. CMA/DSM/ILA/R.560/16/651 by Hon. I.E. Mwakisopile (Arbitrator). The application was supported by the affidavit of Mr. George Herbert Chaka the applicant's Human Resource Manager. In challenging the same, the respondent filed her counter affidavit.

With consent parties argued the application by way of written submission of which both parties complied to the schedule. The applicant was represented by Mr. Arnold Arnold Luoga, Advocate while Advocate Advera Nsiima was for the respondent.

Briefly, it is on record that on 15<sup>th</sup> February, 2016 the respondent was employed by the applicant as Marketing Manager, in a fixed term of two years ending 14<sup>th</sup> February, 2016. The contract started with probation of three months. After working on her probation period while she was yet to be confirmed, on 20<sup>th</sup> June, 2016 her dream of working with the applicant had seized after she was retrenched on operational basis. Aggrieved with the termination she referred the matter to the CMA claiming for breach of contract. CMA decided on her favour by stating that she was unfairly terminated. The applicant was dissatisfied with the award hence filed the present application.

Arguing in support of the application the applicant's counsel on the 1<sup>st</sup> ground submitted that, On 6<sup>th</sup> October, 2016 at the arbitration stage the parties agreed on two (2) issues for termination, to wit;

- i. Whether there was a breach of complainant's employment contract.
- ii. What relief are the parties entitled to?

However the arbitrator in determining the matter did not address the first issue but opted to determine the fairness of termination the issue which was not agreed by the parties, and without considering that the respondent was employed under a two years fixed term contract. He referred the case of **Mtambua Shamte & 64 Others v Care**

**sanitarium and Supplies**, Rev. No.154/2010 which decided that the principles of unfair termination do not apply into a specified tasks or a fixed term contracts which come to an end on a specified time or on completion of a task. He also cited the case of **Serenity of the Lake Ltd v Dorcus Martin Nyanda**, Civil Appeal No.33/2018

On the 2<sup>nd</sup> ground Mr. Luoga submitted that the arbitrators findings in regard to relief at page 10 of the award, is improper and irrational as it does not reflect the respondent's cause of action. In the circumstances of this case the respondent would have been entitled to damages/ for breach of contract and not unfair termination.

Concerning the 3<sup>rd</sup> issue, it was submitted for the applicant that, the arbitrator erred in law in granting relief of 5,000,000/= as nominal damage for the unproved claims of unfair termination. He referred the case of **CRJE Construction Co. Ltd v Maneno Ndaliye & another**, Rev. No.205/2015, and the case of **Abdul karim Haji v Raymond Nchimbi Alois & 1 another**(2006) TLR 420. He thus prayed for the grant of the application.

In reply, Ms. Advera submitted that the arbitrator properly analyzed the facts, evidence and applicable laws to arrive to the fair decision. It is true that they formed two issues as stated by the applicant and the same were determined by the arbitrator properly. The applicant's counsel misconstrued the reality that whenever any mode of terminating employment have been done improperly, be it breach of a contract it results to unfair termination. That the applicant breached the terms of

their contract hence the termination was contrary to Rule 8(2) of Employment and Labour Relations (Code of Good Practice) GN 42/2007 (herein GN.42/2007).

She further submitted that, the respondent was employed in professional managerial cadre and she had not breached her contract but the applicant prematurely terminated her contract under the pretext of operational ground, referring the case of **A- One Products and Bottlers Ltd v Frolah Paulo and 32 Others** , Rev. No.356/2013. Learned counsel further stated that the applicant in his 1<sup>st</sup> ground has not raised any reason to necessitate revision of the CMA award as required under Rule 28 (1) of the Rules and Section 91(2) of Cap 366 RE 2019 hence it should be dismissed.

As regards to the 2<sup>nd</sup> ground , Counsel for the respondent submitted that, the applicant had failed to prove that, retrenchment was a valid reason for the untimely breach of the respondent's employment contract and the retrenchment was conducted according to the required procedure. Failure to prove the same amounts to unfair termination. Therefore in granting the relief the arbitrator exercised the power vested in him as stated in the case of **Christina Christopher v Board of Progressive Islamic Education Foundation**, Rev. No.16/2013.

On the 3<sup>rd</sup> ground it was submitted for the respondent that, the arbitrator having found that the termination was not fair in both substantive and procedurally aspect, properly exercised the power vested in him under Rule 32(5) of GN.67/2007 which allows him to award



appropriate compensation basing on the circumstances of the case. Therefore the award of 85, 000,000/= as salary for remaining 20 months and 5,000,000/= as nominal damages, was somehow proper taking into consideration the circumstances of the case. She cited the case of **Aboubakar Haji Yakubu v Air Tanzania Co. Ltd** Rev. No.162/2011.

Ms. Advera additionally argued that the applicant filed the present application just to delay justice since, the respondent has filed execution No.62/2018 which has been stayed since 5<sup>th</sup> February,2018. She founded the application with no merit and prayed for dismissal of the same.

Having considered the parties submission, records and the relevant laws, this court finds the following issues for determination;

- i. Whether the arbitrator properly analyzed the issues agreed for determination.
- ii. What are the reliefs entitled to the parties.

Before addressing the issues I must make clear that from records it is undisputed that the respondent was employed in a fixed term contract of two years, which started with a probation of three months. The probation period ended on 15<sup>th</sup> May,2016,and she continued to work without being confirmed up to 20<sup>th</sup> June,2016 when she was retrenched on ground of operational requirement.

On the 1<sup>st</sup> issue, the applicant alleged that the arbitrator abandoned the issue of whether there was a breach of contract between the parties, and determined the issue of unfair termination which was raised suo moto. This was undisputed by the respondent's counsel but she claimed that, the

same was inevitable since there was breach of contract done by the applicant as a result the respondent was unfairly terminated. It is undeniable fact that the issue of unfair termination was not among the issues agreed by the parties to be determined on arbitration stage. On that regard the arbitrator wrongly determined the same and it was contrary to the law as it was decided by this court in the case of **GAIA ECO SOLUTIONS (T) LTD v FADHILI M. ULAYA** Rev. NO 443 OF 2018.

Again in determining the said issue of unfair termination, the arbitrator based on Section 37 of Cap 366 RE 2019 and found that the termination was unfairly and awarded the respondent compensation basing on Section 40(3) of Cap 366 RE 2019. This court is of the considered view that, the arbitrator wrongly determined this matter basing on the said provision. The law is very clear that, the provision of Part III E of Cap 366 RE 2019 do not apply to employees who are under probation or on a special task as it was held in the case of **Commercial Bank of Africa (T) LTD Vs. Nicodemus Musa** Igogo, Rev.NO.40/2012, where it was held that :-

- I. A probationary employee, remains with that status until confirmed with the proper authority.
- II. Fair termination Procedure are not applicable to the employees on probation"

This position was insisted by the of Court of Appeal in the case of **David Nzaligo V National Microfinance Bank PLC, Civil Appeal No. 61 of 2016 CAT**, Korosso, J.A , She stated that :-

"At the time the appellant was still in probation, we are of the view that, a probationer in such a situation, cannot enjoy the right and benefit enjoyed by a confirmed employee. Since the respondent was still a probationer at the time he resigned, and he cannot benefit from remedies under Part III E of the ELRA."

Therefore basing on that position the respondent being a probationary employee is not covered under the provision of Section 37 (2), hence she cannot benefit the benefit of unfair termination as issued by the arbitrator. On such basis this court finds the arbitrator acted in with material irregularity in determining the dispute between the parties.

On the other hand, I have cautiously gone through the records and noted that there is no dispute on the reason for retrenchment. What is disputed is untimely termination of the contract of employment. The respondent claimed that she was not informed of the retrenchment, not consulted and she was unrepresented she was just handled a letter of termination hence the applicant breached their contract.

I have gone through the records and observed that while conducting the said retrenchment exercise, the applicant notified TUICO and Alliance Non Union Employees as per Exhibit C2 Collectively. They both participated in the whole process as the representative of the employees as it can be evidenced on Exhibit C3 and C4 being the minutes of consultative meeting. On that regard the respondent being the non-member of TUICO was duly represented by Lauraen Donald from Alliance Non Union Members hence there was no unfair labour practice.

Concerning the relief of the parties, on basis of the above discussion, the respondent being the probationary employee cannot enjoy the benefit of unfair termination as granted by the arbitrator by awarding her 20 months' salary. The respondent cannot benefit from the work she has not done. Therefore I hereby quash the whole arbitrator's decisions and set aside the award. I order the applicant to pay the respondent her statutory benefits if any.



Z. G. Muruke

**JUDGE**

30/11/2020



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**Date: 30/11/2020**

Coram: Hon. S.R. Ding'ohi, DR.

Applicant:

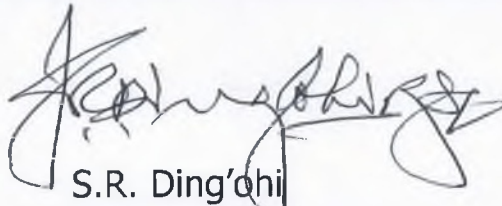
For Applicant: } Absent

Respondent:

For Respondent: } Mr. Advera Nsima Kamuzora, Personal Representative

CC: Halima

**Court:** Judgment delivered this 30<sup>th</sup> day of November, 2020.



S.R. Ding'ohi  
**DEPUTY REGISTRAR**

30/11/2020