IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT MOROGORO

REVISION NO. 23 OF 2019

JORDAN UNIVERSITY COLLEGE.......................APPLICANT

VERSUS

FLAVIA JOSEPH..RESPONDENT

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JUDGMENT

Date of last Order: 02/12/2020
Date of Judgment: 08/12/2020

Z.G.Muruke, J.

Flavia Joseph, was first employed by applicant on one year contract ending on 31st August, 2013, as assistant Human Resource Officer, subject for renew. Applicant last contract was for three years from 1st September, 2015 to 31st August, 2018 signed on 7th January, 2016. On 30th June, 2016 applicant was addressed with a letter titled termination of Employment agreement. For reason to be adduced later the letter, is reproduced below.

> In reference to caption above, I have to communicate to you the deliberations and decision of Juco Governing Board held on June, 17, 201 following the directives of the owner to terminate your service at JUCO in the office of the Human Resource in accordance with clause 10 of the Jordan University College Employment Agreement which states.

10: TERMINATION OF SERVICE

Either party may terminate this employment contract by giving the other party a three months' notice in writing or one month's salary in lieu of notice.

Accordingly, the employer has chosen to give you one month's salary in lieu of notice and your service comes to an end on 5th July, 2016. However, your are required to hand over anything that was under your duty to the Acting Human Resource officer in the presence of the DPFA and the corporate counsel before leaving.

All your rights relating to the Employment Agreement entered with Jordan University College up to its termination shall be honoured. The employer wishes to express his gratitude for the services you offered to Juco up to now.

With best wishes:-

Signed	Signed ....
Rev. Fr Africanus Lokilo SDS	Rev Dr. Kimariyo Ignas OFM Cap
Chairperson, Governing Board	Secretary,Governing
JUCO	Board -JUCO

Respondent was dissatisfied, with the letter, however, she delayed to file the dispute at CMA. After successfully application for condonation, then file dispute reference number RF/CMA/MOR/135/2016, claiming for compensation for unfair termination and payment of terminal dues to wit unremitted NSSF contribution. After CMA fully hearing, claim for NSSF contribution was refused, however, applicant was ordered to pay respondent for remained period of her contract 26 months, to the tune of 41,836,574,Tshs, and certificate of service. The Award dissatisfied

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applicant, successfully filed present revision, after several application being struck out for incompetence, raising following issues for determination:

4.1 Whether the arbitrator was correct to treat the respondent as to have been unfairly terminated.

4.2 Whether the arbitrator was correct to award reliefs more than what was claimed under form No. 1.

4.3 Whether the respondent was entitled to compensation of 26 months salary i.e 41,830,574.

On the date set for hearing, Professor Binamungu represented applicant, while respondent was being represented by learned counsel Alpha Sikalumba.

In support of the revision, it was submitted by applicant counsel on issue number one, on whether arbitrator was correct to treat respondent to have been unfairly terminated as follows, reading award at page one and two shows clear that, matter before CMA was for unfair termination. Respondent was seeking for compensation for such termination. Respondent was working under specific term of contract as reflected in page two of the award, started 1st September, 2015 to end 30th August, 2018. So contract being specific it was in ordinate for her to file case for unfair termination. Being specific contract, the remedy for her was to file dispute on breach of contract if any. Decision of this court Rev. No. 305/2019, **Abell Kikoti and 5 others Vs. Tropical Contractors Ltd** at page 7, shed light on the point.

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Basing on the authority, cited it goes without saying that the finding by the arbitrator was totally misconviened because unfair termination for employer working under specific time, does not apply. Parties are bound by their own pleadings as said in the case of **James Fenke Gwagilo Vs. Attorney General (2004) TLR** Pg. 161, in which court held that parties are bound by their own pleadings. Claim in CMA form number one, was for unfair termination. It did not provide anything in the alternative, which would give any lee way for arbitrator to decide. That being the case, court should look at respondent case, should not have been considered the way arbitrator considered her. On this very ground, applicant pray that this court find that decision by arbitrator that was unfit to be treated in the presence of section 37 of Employment and Labour Relations Act, Act No. 6/2004.

Issue number two relates to award, whether arbitrator was right to award more than what was claimed in CMA form number one. Respondent at CMA prayed for three relief.

(i) Unfair termination without reasons.

(ii) Compensation for unfair termination.

(iii) NSSF contributions which had not yet remitted to NSSF office.

Reading page 9 of the award there are computation. Salary X 26 months resulting to 41,836,574 Tshs, these figures were not specifically mentioned by respondent on trial. That being the case, the reliefs that arbitrator awarded were not prayed for. Assuming that the computation was based on Section 40 of Employment and Labour Relations Act, same

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would have been 12 months salary unless there are special reason advanced by arbitrator. So, awarding more, reason must exist and explained. Again, because there was misconception on filing unfair termination case, instead of breach of contract. More so, arbitrator should not have awarded, because the case was not for breach of contract. Court of Appeal in **Fatma Salum Vs. Khalifa Said** Civil Appeal No. 28/2002,(unreported) held that is it is now settled law that only way to raise issues before the court for consideration and determination is through pleadings and as far we are aware of, this is the only way.

In the case at hand, arbitrator awarded relief which were not prayed for. In actual fact, there were u-turn at CMA. The case was for unfair termination, but there was U-turn at the stage of composing award, arbitrator awarded respondents relief on breach of contract, i.e salaries for remaining period of employment 26 months. Respondent was not entitled to the 26 months' salary as awarded by arbitrator, because the case was not for breach of contract, but rather was for unfair termination. Respondent at CMA did not pray for compensation based on breach of contract. Therefore, arbitrator had no jurisdiction to award what was not prayed for, in form number one. She went beyond the power she had under the law. In view of this, applicant counsel prayed for Revision be allowed, and set aside the award with costs.

On the other hand, respondent counsel submitted that, Arbitrator was correct in treating respondent for unfair termination, her work was not for specific contract. The issue is whether respondent was unfairly terminated and not breach of contract. Applicant counsel, ought to

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address whether arbitrator was correct to treat respondent unfairly terminated and not breach of contract. So, issue before CMA was on unfair termination. Respondent situation falls on unfair termination in terms of section 37 of Employment and Labour Relation Act. Rule 8(2)(a) of Employment and Labour Relation Act, (Code of Good practice) GN 42/2007, provides that fixed term contract can on only be terminated by the Employee if employer materially breaches the contract. Arbitrator was correct in treating respondent being unfairly terminated, because her situation fairly under unfair termination not breach of contract.

Arbitrator did not award more than what was claimed. She awarded according to CMA Form No. 1 at CMA, it was requested for compensation for unfair termination and payments of terminal dues (NSSF). Section 40(1)(c) which provides for remedy of unfair termination, read that.

> "If an arbitrator or labour court find termination is unfair the arbitrator or court may order the employer to pay compensation to employee of not less than 12 months remunerations."

In the case at hand, arbitrator ordered 26 months, is not less than 12 months as the law says. In the revision number 113/2019 **Azama Rajabu Mbilanga Vs. Shield Security Services Ltd** at page 8 *"Since the applicant was under a fixed term contract she was entitled to be paid the remaining salary of the said months."*

Thus arbitrator did not award more than what was explained in form number one, it was proper to award 26 months' salary because it is that period which remained before expiration of the contract.

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In rejoinder applicant counsel insisted that, counsel for responder has submitted that it was correct for the arbitrator to rule that responder was unfairly termination. More so, respondent counsel has not attempte to say anything on the authority, I have cited on my submission on fixe term contract in which this court made it very clear that principles of unfai termination do not apply to fixed term contract. Respondent counsel ha correctly said that respondent was under fixed term contract of thre years. So, by conceding that, respondent was working under fixed tern contract, to which the principle of unfair termination does not apply, thu arbitrator should not have treated respondent as unfairly terminate employee having received contract of employment exhibit MKJ-1 Arbitrator made an error.

On ground number two:- counsel has argued that arbitrator ha justified to award 26 months' salary to the respondent, and that th reasons are there at page 8 of the award, there are no specific reason adduced. The case being referred on, is on breach of contract as a resul compensation was granted, which does support the facts of the case a hand. It is on that area that arbitrator made an error. Arbitrator awarde what was beyond her powers. Revision applicant counsel prayed for b revision to be allowed and CMA award be quashed.

Having heard both parties submissions, the central issue is whethe arbitrator was correct to treat respondent to have been unfairl terminated. From the evidence on records, and submission by bot counsels there is no dispute that, respondent had three years contract wit

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applicant, and that, she was terminated following applicant letter dated 30th June, 2016, addressed to herself. Looking at exhibit MKJI tendered by respondent, contract of employment for three years between the parties herein , a clause on termination is at paragraph 10, that reads.

> Either part may terminate this employment contract by giving the other party a three month's notice in writing or one months salary in lieu of notice.

Respondent then applicant, at CMA and this court argued that there are no mutual agreement between herself and applicant to terminate the contract. To this court, that is a misconception, Exhibit MKJ-1 contract of employment paragraph 10 clearly display that, either party may terminate this employment contract by giving the other party a three month's notice in writing or one month's salary in lieu of notice.

The above is what parties agreed while signing employment contract on 7th January, 2016, covering a period of 3 years. According to Law of contract Act section 2(h) Cap 345 RE (2019) an agreement enforceable by law is a contract. In a way, contract is agreement which the law enforces. The contents of a contract are its terms, which define the rights, obligations and rules by which the parties are to be bound in the contract. Thus, a contractual term is any provisions forming part of a contract. Each term gives rise to a contractual obligations, breach of which can give rise to litigations. What applicant and respondent agreed in exhibit MKJ-1 contract of employment is one of terms that either party can enforce. Clouse 10 of exhibit MKJ-1 was an express term agreed between applicant and respondent.

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There is no unfair termination in a fixed term contract as correctly submitted by applicant counsel professor Binamungu, this court hold so.

Honourable Rweimamu, J laid down the above principles in the case of **Msambwe Shamte and 64 Others Vs. Care Sanitation and Supplies**, Revision number 154/2010 at that page 8.

> Principles of unfair termination under the Act, do not apply to specific task or fixed term contract which came to an end on the specified time or completion of specific task, under the letter, such principles apply under conditions specified under section 36(a)(iii) read together with Rule 4(4) of the code.

It is worth noting that at CMA, respondent claimed for unfair termination, after evidence, arbitrator awarded respondent salary for the remained part of the contract. These are not remedies of unfair termination, rather are for breach of contract. As correctly submitted by applicant counsel, arbitrator made a U-turn, I hold so. Commission cannot frame new cause of action in the cause of award. Principle that parties are bound by own pleadings should be adhered to. Same was insisted by Court of Appeal decision in the case of **Fatma Idha Salum Vs. Khalifa Khamisi Said** Civil Appeal No. 28 of 2002, at Zanzibar (unreported) where Nsekela, J held at page 7 that:

> With all due respect to both District Court and the Regional Court, these issues were not pleaded and should not have been considered. It is now settled law that the only way to raise issues before the court for consideration and determination is through pleadings an as for as we are aware of, this is the only way.

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Principle of being bound by pleadings, was insisted in the Court of Appeal decision, in the case of **James Funke Ngwagilo Vs. Attorney General 2004 TLR 161**, it was held that.

> *"in order for an issue to be decided it ought to be brought on record and appear from the conduct of the suit to have been left to the court for decision."*

By terminating respondent, applicant just exercised express term of contract. Respondent cannot refute what they agree in their legal binding agreement exhibit MKJ-1 tendered by herself as witness of her own case. There is nothing wrong done by applicant having exercised contractual rights. Thus, there is nothing like unfair termination, in the presence of express term previous agreed upon by parties. Thus, issue number one has been answered in the negative, that arbitrator was not correct to treat the respondent to have been unfairly terminated.

Respondent counsel Alpha Sikalumba has tried seriously defend the award issued, but sincerely, records speaks loudly, that issue at CMA was for unfair termination, while award issued is on breach of contract by awarding, respondent salary for remained period of contract. Assuming without accepting that, applicant filed a case of breach of contract yet, there was no any breach. Clause 10 of exhibit MKJ-1 being express term that parties agreed, while signing employment contract, respondent cannot claim for breach of contract. To this court, applicant exercised her contractual rights which respondent agreed when she signed employment contract, on 7th January, 2016. Thus, it is od to think of breach of contract while there is express term to that effect.

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Having answered first issue in the negative, second and third issue, are both covered in the first issue. In totality, Revision application allowed, award of 26 months' salary for remained period is quashed and set aside. Revision allowed to the extent shown. Ordered accordingly.

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08/12/2020

Judgment delivered in the presence of Professor Binamungu for the applicant, also holding brief of Mr. Alex Sikalumba for the respondent.

Z.G.Muruke

JUDGE

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