**THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 124 OF 2021**

**BETWEEN**

**HOPE KIVULE SECONDARY SCHOOL..... APPLICANT**

**VERSUS**

**MATIKU ALFRED & 2 OTHERS..... RESPONDENT**

**JUDGMENT**

Last order 02/11/2021
Date of Judgement 03/12/2021

**B.E.K. Mganga, J**

The applicant was an employer of the respondents. Their relation went bad as a result on 2019 applicant terminated employment of the respondents. Aggrieved by termination, respondents filed Labour dispute No. CMA/DSM/ILA/43/19 at CMA. On 19th February 2021, Hon. Ndonde, Severin, arbitrator, issued an award in favour of the respondents. On 1st April 2021 applicant filed this revision application with a view of seeking the Court to revise the said award. The application was supported by an affidavit of Neophyte Mongi, applicant's Officer. Respondents filed a joint counter affidavit to oppose the application by the applicant.

When the application was called for hearing, Mr. Augustino Kusalika, Advocate, appeared for the applicant, while Mr. Melody Ernest represented the respondents.

Arguing the application for and on behalf of the applicant, Mr. Kusalika advocate, submitted that the arbitrator erred in law as the applicant is not a legal person hence cannot be sued by the respondent. He submitted that respondents were supposed to refer the dispute against Neophyte Mongi t/a Hope Kivule Secondary School. When Mr. Kusalika, counsel for the applicant was asked by the court as whether that issue was raised at CMA, he readily conceded that it was not, and that arbitrator could not have decided on it. Counsel conceded further that evidence does not show that respondents were employed by the said Neophyte Mongi. Counsel submitted further that, the arbitrator failed to appreciate that respondents refused to sign the contract prepared by the applicant as result, they opted to sign the contract prepared by the headmaster. Counsel submitted further that, headmaster had no mandate to issue contract. He went on that; the applicant is the employer, but Headmaster was just an agent of the applicant. He conceded that no steps were taken against the headmaster and that the Headmaster was not called by the applicant as

witness. Counsel concluded that there was no unfair termination and prayed the application be granted.

Mr. Melody submitted that they were employed by the applicant and not Neophyte Mongi. He submitted that, Neophyte Mongi is the Director of the applicant and that Neophyte Mongi did not issue any contracts to the respondents, but they were issued with letters of appointment by the headmaster on behalf of the applicant. Brief as he was, he prayed that the application be dismissed.

I have carefully examined the CMA record and find that appointment letters of the respondents (Exh.P1 and P3) shows that respondents were employed by the applicant and not the said Neophyte Mongi. Therefore, in no way they could filed a dispute at CMA against Neophyte Mongi who was not their employer. In my view, the argument by counsel for the applicant that applicant is not a legal person not liable to be sued cannot hold water. More so, that issue was not raised at CMA hence cannot be allowed to be raised at the revision stage. That ground is bound to fail, and I hereby dismiss it. It is unfair to criticize the arbitrator while the issue was not brought before him.

It was submitted on behalf of the applicant that respondents refused to sign contracts that were issued by Neophyte Mongi, instead,

they signed the contracts that were issued by the headmaster. It was further submitted on behalf of the applicant that there was no unfair termination. I have examined exhibits P1 and P3 and find that the same were signed by the headmaster and stamped a rubber stamp of the applicant. Letters of appointment were issued by the headmaster and not by Neophyte Mongi. In her evidence, Neophyte Mongi (DW1) confirmed that all matters relating to recruitment of employees were done by a team led by the headmaster. In her evidence, DW1 is recorded saying:-

"*Kuhusu kuajiri kuna panel anayoiongoza mwalimu mkuu.*"

With that piece of evidence, it is my considered view that, there was no justification of terminating employment of the respondents allegedly, that they refused to sign contracts issued by the said Neophyte Mongi (DW1) instead, they signed the contracts issued by the headmaster.

It was further testified by DW1 that respondents were terminated before confirmation. In her evidence under cross examination, DW1 is recorded stating:-

*"Baada ya kuona kuwa muda wa probation haujaisha sikuingia nao tena mkataba mpya. Probation ilikuwa ya six months. Baada ya kuisha probation sikutaka kuendelea nao".*

I have read appointment letters of the respondents and find that respondents were on probation for three (3) months from the date of employment and that after probation, they will either sign a one year or two years employment contract. The letters of appointment of Matiku Alfred and Mapinduzi Ngalunda reads:-

*Your appointment will take effect from 14/7/2017. Your probation period will be three (3) months. However this period can be extended if the school management sees it necessary. On confirmation you will either be provided with one or two years employment contract. Your appointment is subject to termination without notice in the event of insubordination, misconduct or inefficiency...on termination of contract, either part will pay one month net salary as a notice or three months written notice in advance"*

The Letter of appointment of Melody Ernest have similar terms but his appointment date is 16th January 2017. Respondents' employment contracts were terminated on 10th January 2019 having worked for about eighteen (18) months. On the other hand Melody, was terminated after he has worked for twenty five (25) months. In other words, if we exclude three months of probation, Mapinduzi and Matiku had 9 months remaining on their employment contract whether it was for one year or

two years but Melody had two months remaining on his employment contact. I am of that view because no evidence was brought by the parties suggesting that there was extension of probation period as provided for, under Rule 10(5) of the Employment and Labour Relations (Code of Good Practices) G.N. No. 42 of 2007. The said Rule reads:-

> *"An employer may, after consultation with the employee, extend the probationary period for further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment."*

As there was no extension of probation period as required by the above Rule, the applicant was wrong to testify that respondents were terminated just after completion of their probation period.

Applicant seems to have a notion that once an employee is on probation or had just completed probation period can be terminated as the employer deems fit and without procedure. This notion is wrong because even Rule 10(7) and (8) of the Employment and Labour Relations (Code of Good Practices) G.N. No. 42 of 2007 is clear on the procedure to be followed on termination of an employee who is on probation. The said Rule reads as follows;

> *"10 (7) where at any stage during the probation the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall*

*notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.*

*(8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-*

*(a) the employee has been informed of the employer's concerns;*

*(b) the employee has been given an opportunity to respond to those concerns;*

*(c) the employee has been given a reasonable time to improve performance or correct behavior and has failed to do so".*

The employer is required to adhere to that Rule when contemplating to terminate an employee who is on probation period. As pointed herein above, there is no evidence that probation periods of the respondents were extended. I further find that these subrules were not complied with.

As pointed above, there were no valid reasons for termination of employment contracts of the respondents hence termination was unfair. Since respondents had fixed term contracts, they are entitled to compensation for the unexpired term as loss of salary because that is the direct foreseeable and reasonable consequence of the employer's wrongful action as it was held in the case of **Good Samaritan Vs. Joseph Robert Savari Munthu**, Rev. No. 165/2011 HC Labour Division DSM (unreported). The unexpired period for Melody is 2

months. Melody Ernest is therefore entitled to be paid TZS 800,000 because his salary was TZS 400,000 per month. Matiku Alfred and Mapinduzi Ngalunda, had 9 months each remaining to the contract of employment. They are therefore entitled to be paid TZS 3,600,000 each. The applicant is therefore ordered to pay TZS 8,000,000/= in total to all respondents.

Applications is granted to that extent only.


B.E.K. Mganga
**JUDGE**
03/12/2021