

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**  
**REVISION NO. 73 OF 2020**

**BREMEN TRANSPORT LIMITED..... APPLICANT**

**VERSUS**

**SHABAN SALUM OMARY.....RESPONDENT**

(From the decision Commission for Mediation & Arbitration of DSM at Temeke)

(Batenga, M: Arbitrator)

dated 20<sup>th</sup> January 2019

in

Labour Dispute No. CMA/DSM/TEM/204/19/112/19

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**JUDGEMENT**

09<sup>th</sup> November & 20<sup>th</sup> December 2021

**Rwizile, J**

The applicant, **BREMAN TRANSPORT LIMITED** has filed the present application against the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/TEM/ 204/19/112/19/ 112/19. She is praying for orders of the Court in the following terms: -

1. That, this Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration in Dispute No. CMA/DSM/TEM/204/19, dated 20<sup>th</sup> day of January 2020, before Hon. Batenga Arbitrator.

2. That this Honourable Court be pleased to declare that termination of the respondent was substantially fair and the respondent is not entitled to any compensation.
3. Any other relief that this Honourable Court may deem fit, just and equitable to grant.

The application is supported by the affidavit of **Innocent Ramadhani Nuru** applicant's operations Manager, advancing the following legal issues;

- i. That the Hon. Arbitrator disregard or ignore all the credible evidence tendered by the applicant.
- ii. That the Hon. Arbitrator failed or erred on analyzing the evidence tendered.
- iii. The arbitrator erred in fact by stating that the complainant was working with respondent/applicant herein since 2015 while in reality 2016 the applicant company neither existed nor incorporated.
- iv. That the Hon. Arbitrator erred in law and fact for holding that the respondent is entitled with compensation for breach of contract without even considering that the respondent was given a chance to work in other departments, the fact which he never denied before Hon. Mediator and the fact that he

was given other work chance which he also denied for the same.

- v. The learned arbitrator had deliberately manipulated the arbitration proceedings to arrive at the decision she wanted.
- vi. That trial arbitrator failed to assign the reasons for delaying in issuing the award.

Opposing the application, the counter affidavit of the respondent was filed.

The background of the dispute in brief is that; the applicant was employed by the respondent as car service tyre operator on 1.3.2019. His relationship with the applicant did not last longer. On 01.4.2019 while he was under probation period, closure of some of the applicant's operations that were a result of shortage of work occurred. Based on their misunderstanding the applicant referred the matter to the CMA. CMA decided the matter in his favour. Dissatisfied with the CMA's decision, the applicant filed the present application.

Both parties to the application were represented. Mr. Martin Frank of Hassam Co. Advocates, appeared for the applicant, whereas the respondent was represented by Mr. Masuna Gabriel Kunju of Mass Attorneys. The matter was disposed of by way of written submissions.



In his written submission Mr. Frank submitted that the arbitrator had acted illegally on his failure to consider the matter in controversy before CMA as the complainant filed the dispute was of breach of contract, but he filled part B of the CMAF1. In his view this part was supposed to be filled by employee who claims for unfair termination.

On that reason, he was of the view that the respondent's pleadings are defective. He sought support in the case of **Bosco Stephen vs Ng'amba Secondary School**, Revision No. 38 of 2017, High Court of Tanzania, at Dar es salaam, (unreported).

The counsel argued that the respondent was entitled to sue for breach of contract and not unfair termination because he was under probation period as per employment contract. Bolstering his position, he cited the case of **Agness B. Buhere vs UTT Microfinance Plc**, Labour Division No. 459 of 2015, High Court of Tanzania, at Dar es salaam, (unreported). Regarding time of issuing CMA award the Counsel submitted that it is mandatory for the arbitrator to adhere to time limit in delivering the award after completion of a hearing. However, the same was not observed in this application as the same was delivered out of thirty days contrary to Section 88 of the Employment and Labour Relations Act, [Cap 366 R.E 2019].

It was further submitted that the arbitrator failed to analyse evidence tendered by both parties. He argued, the respondent was offered to work in other departments but denied. This fact had never been challenged by the opposing side. In the basis he presumed the same to be correct.

Challenging the application in respect of illegality Mr. Kunju told the Court that this is new issue. However, he argued that the applicant is trying to delay the rights of the respondent. He said, there was no dispute that the matter filed at CMA was relating to breach of contract and issues for the same were framed by the parties. But not on termination of employment. On reason for delaying to deliver an award, the counsel prayed to have this point be ignored on the ground that the arbitrator gave reason for such delay as stated at page 8 of the CMA award. He went on saying that the delay has been supported by reason. He was of the view that the delay did not cause any injustice or prejudice to the rights of the parties.

Regarding manipulation of evidence, Mr. Kunju submitted that the evidence was properly evaluated due to the fact that respondent's testimony was supported with three exhibits that is termination letter (S-2, documents from NSSF(S-2) and employment contract(S-1) which show that employment contract started on 01.03.2019 and it was supposed to end on 31.01.2020. However, the same was terminated on 01.04.2019.



He further argued that the applicant's mere word that respondent was offered to do other work should not be considered by this court. He added that, same needs proof and the applicant owes such duty as per section 110 of TEA, [Cap 6 RE. 2019]. In rejoinder applicant reiterated his submission in chief.

Having carefully considered the submissions by the parties, and the affidavit supporting the application, this court finds two issues for determination which are; - *whether the respondent's employment contract was lawfully terminated and if yes what reliefs are parties entitled to?*

In disputing as to whether respondent's employment contract was lawfully terminated, the applicant asserted that after closure of some departments, the applicant was offered an alternative work but refused to take it. On the other side, the respondent argued that his contract was breached as was terminated without any legal justification.

In settling the disputed fact which has been initiated by rivals' submissions, this Court finds it worth to direct its mind to the evidence adduced or tendered at CMA. The evidence available including employment contract which shows that respondent was employed on 01.03.2019 as per exhibit S-1(employment contract) and terminated on 01.04.2019 as evidenced by exhibit S-2(termination letter). This, means

the respondent had worked for one month. Apart from that, the party's employment contract under clause 5 provides explicitly that the respondent would be under probation period of not less than six months. Since the respondent was still under probation period, this court finds it worth to take pleasure in the provisions of Rule 10(1) of the G.N No. 42 of 2007 which provides that; -

*"All employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines"*

From the above provision the respondent is not covered by sections 37 or 38 of the Employment and Relations Act because he was on probationer. I therefore agree with the applicant's counsel that the respondent could not claim for unfair termination. It means therefore, the arbitrator had no justification to deal with fairness of termination as if the respondent had passed the period of probation. But there is no evidence that the employer's business was not properly running although it is alleged that there was a proposal for another available employment for the respondent, which the respondent is alleged did not accept. I think, if the applicant had no business, it was due to the applicant to find any remedy available to the employee before termination.



After all, it is true that in CMAF1, the respondent did sue for unfair termination but rather for breach of contract. The learned counsel for the respondent is also clear to that effect. In my considered view, the decision of the commission ought to deal with breach of contract and consequences thereof. Therefore, compensation for unfair termination is set aside.

Further the applicant has submitted that the award was delivered after 30 days, it should therefore be nullified. I have to agree with the respondent that this point is baseless. Section 88(11) of ELRA does not say that an award delivered after 30 days should be nullified. It only directs that an award should be given in 30 days. Failure of which fetches no legal remedy. The arbitrator has to at least give reasons, as it was done in this matter.

Since I have found that there is breach of contract, then consequences of breach of contract is payment of damages. The same should be in my view assessed based on the nature of the case. As the damages therefore, the respondent is entitled to compensation amounting to 2,000,000/=. Each party to bear its own costs.



  
**A.K. Rwizile**  
**JUDGE**  
**20.12.2021**