

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION NO. 801 OF 2019

**BHARYA ENGINEERING &
CONTRACTING CO.LTD..... APPLICANT
VERSUS
PIUS YUWANGI.....RESPONDENT**

JUDGMENT

Date of last Order: 24/8/2021

Date of Judgment: 24/08/2021

Z.G.Muruke, J.

On 12th October,2017 Pius Yuwangi, the respondent herein was employed by the applicant in a one-year fixed term contract as a building and construction foreman in the SGR project at Pugu site. He worked with the respondent until 12th December,2017 when he was terminated on ground of gross negligence. He appealed to the Commission of Mediation and Arbitration (CMA) where the arbitrator found that, termination was procedurally unfair and ordered the respondent be paid five (5) months' salaries as compensation and one month salary in lieu of notice. Being resentful with the decision, the applicant filed the present application challenging the award on the ground that, the arbitrator found that respondent had valid reason of termination but he yet awarded the respondent a compensation of five (5) months' salary and 1 months' salary in lieu of notice.



The application was supported by the affidavit of Manraj Singh Bharya, the respondent's Managing Director. In opposing the application, the respondent filed his counter affidavit. The application was disposed by way of written submission. The applicant's submission was prepared and argued by Advocate Michael Y. Mwambeta. And the respondent was served by Advocate Prosper W. Mrema.

In his submission Mr. Mwambeta submitted that, after finding that the applicant had valid reason for termination, ought to have dismissed the respondent's application as there was no breach of any term of the contract. However, the arbitrator continued to award the respondent five (5) months' salary as compensation for unfair termination. That was contrary to the law as the principles of unfair termination are not applicable to employees on a fixed term contract, referring the case of **Mtambua Shamte and 64 Others v. Care Sanitation and Suppliers**, Rev.No.154/2010. He thus prayed for the application be granted.

In response to the applicant's averments, Mr Mrema prayed to adopt the respondent's affidavit to form part of his submission. He averred that the respondent's claims were of breach of contract and not termination of employment as reflected under CMA F1. However, since this is a labour matter the principles of unfair termination should be complied as provided under Section 37(2) of the Employment and Labour Relations Act, CAP 366 RE 2019. The respondent was not afforded with a right to be heard before his termination. He further submitted that, the arbitrator overlooked the reason for termination as there was no any evidence to prove the misconduct of over excavation.

It was further submitted that the case of Mtambua Shamte (supra) cited by the applicant is irrelevant since this case is on breach of contract while the same is of specific tasks contract.

Furthermore, the respondent's counsel contended that the award is rational as the respondent had a one year fixed term contract, which was breached by the applicant just on the second month of his contract. The respondent was supposed to be compensated with a remaining period salary as per the case of **Good Samaritan v. Joseph Robert Savari Munthu**, Rev.No.165/2011. He thus prayed for this court to partly revise the award by making changes on the compensation awarded to be of 10 months' salary and not 5 months as awarded by the arbitrator. He therefore prayed for dismissal of the application for being frivolous and vexatious.

Having considered the opposing submission of the parties, records and applicable laws, the issues for determination are: -

- i. Whether the arbitrator correctly applied the principles of unfair termination to determine their dispute.
- ii. To what relief are the parties entitled to.

As regard to the first issue, it is the applicant's contention that the arbitrator erred in law by applying the principles of unfair termination while the respondent's contract was of a fixed term contract, relying his argument on the case of Mtambua Shamte (supra). Am not in disregard of the referred case, however, the law under Section 35 of the Employments and Labour Relations Act provides clearly for circumstances where the principles of unfair termination shall not apply. It is provided that, the relevant provision shall not apply to employees



with less than six (6) months. I find worth to reproduce the same for easy reference.

"The provision of this Sub-Part shall not apply to an employee with less than 6 months employment with the same employer, whether under one or more contracts."

This is also was emphasized in the case of **Agness B. Buhere Vs. UTT Microfinance Plc**, Rev. No. 459 of 2015 (unreported) where it was held that: -

"Section 35 of our Employment and Labour Relations Act 2004 precludes also employee who are under probation from the scope of relevant provision concerning unfair termination."

In the application at hand, the respondent had a one year (1) fixed term contract, therefore it is not among the circumstances stipulated under Section 35 cited above. Therefore, the arbitrator was right to determine the fairness of respondent's termination.

It is my firm view that, the employee under a fixed term contract is not precluded from suing under the principles of unfair termination as provided under Part IV sub Part E of CAP 366 RE 2019. So long as he/her contract is of not less than six months and he/she is not a probationary employee can sue under the unfair termination.

On the second issue as to parties' reliefs, the applicant alleged that the arbitrator erred in awarding the applicant 5 months' salary while she has found that the applicant had valid reason of termination. In the CMA F1 the respondent prayed for salaries of the remaining period of the



contract. It is an established principle that the compensation in any unfair termination of fixed term employment contract is the remaining period of that contract. This is also the position in the case of **Benda Kasanda Ndassi V. Makufuli Motors Ltd.**, Rev. No. 25 of 2011 HC. DSM (unreported) where it was held that:-

"In the circumstances when termination is unfair and is of a fixed terms contract, the award of compensation of remaining period is appropriate."

The provision above provides for circumstance to order compensation of the remaining period salary, after finding that there was unfair termination. When termination is substantively fair and procedurally unfair, the remedy cannot be similar to the one stated in the above cited case. This was also prescribed in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported) where it was held that: -

'.....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA.....'

On basis of the above position, since it was the CMA's finding that the respondent's termination was substantively fair, I find no reason to interfere with the arbitrator's order of compensation of five (5) months salary as ordered by the Arbitrator.

Consequently, I find the application with no merit and I therefore dismiss it. CMA's award is hereby upheld.

It is so ordered.



Z.G.Muruke

JUDGE

24/08/2021

Labour Court TZ.