**UNITED REPUBLIC OF TANZANIA**

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 632 OF 2018**

**BETWEEN**

**TANZANIA BREEDERS FEEDS MILLS LTD.....APPLICANT**

**AND**

**LARSON ROMANUS CHUMI.....RESPONDENT**

**JUDGMENT**

**Date of the last order 01/03/2020**
**Date of the Judgment 30/04/2020**

**A. E. MWIPOPO, J.**

Tanzania Breeders Feeds Mills Ltd, the Applicant herein, filed the present application for revision against the Commission for Mediation and Arbitration (CMA) award in labour dispute no. CMA/DSM/KIN/R.89/17/301. The Applicant is praying for the Court to revise and set aside the respective CMA award which was delivered by Hon. A.A. Makanyaga, Arbitrator, on 31st August, 2018 in favour of the Respondent namely Larson Romanus Chumi.

The application is supported by Applicant's Affidavit which contains three grounds/legal issues for determination in paragraph 11. The respective grounds are as follows hereunder:-

1. That the Arbitrator erred in law by exercising jurisdiction so vested in it by law with material irregularity.
2. That the trial Arbitrator erred in law and facts by failure to critically analyse the documentary evidence adduced by parties during hearing of the matter.
3. That the award does not reflect proceedings during hearing of the matter.

The brief historical background of the dispute is that the Respondent was Applicant's employee serving in the post of Sales Manager for a fixed contract of two years starting from 1st December, 2015 to 30th November, 2017. The Respondent was paid monthly salary of shillings 4,583,810/=. He was terminated for gross misconduct on 5th January, 2017. The Respondent referred the dispute before the Commission which decided in his favour on 31st August, 2018. The Applicant was not satisfied with the Commission award and decided to file the present application.

Both parties to the application enjoyed legal services of advocates. The Applicant was represented by Mr. Praygod Uiso, Advocate, whereas the Respondent was represented by Mr. Selemani Athanas, Advocate. Hearing of the application proceeded by way of written submissions following the prayer by Applicant's Counsel which was granted by the Court.

In their submission, the Applicant's Counsel abandoned the third issue and consolidated the 1st and 2nd legal issues and form one ground. Submitting in respect of the consolidate ground, the Applicant Counsel averred that the trial Arbitrator failed to exercise jurisdiction vested by failure to frame proper issues which could lead parties to testify on issues in controversy. The duty to frame issue is vested to the Commission according to rule 24(4) of the Labour Institutions (Mediation and Arbitration guidelines) Rules, G.N. No. 67 of 2007. The proviso to rule 24(3) of the G.N. No. 67 of 2007 requires the employer to prove that termination was fair if the dispute is about fairness of termination. He is of the view that if the dispute is not about the fairness of termination then the employee is duty bound to prove the claim according to section 111 of the Evidence Act, Cap. 6, R.E. 2019.

The counsel argued that since the dispute was about the breach of contract and not on the fairness termination the Respondent was supposed to prove the claims against the Applicant. But, the Arbitrator shifted the burden of proof to the Applicant and punished him for weakness of his evidence rather than basing on the strength of Respondent evidence. The Respondent indicated in CMA Form No. 1 that the nature of the dispute is breach of employment contract and on the apart of the outcome the Respondent prayed for damages for breach of contract. From the pleadings the Commission framed two issues. The first one is whether the Respondent

Contract was unlawful breached; and the second issue was what are reliefs entitled to both parties.

The Counsel argued that employment contract – Exhibit A1 provides in clause 9 (a) that the contract may be terminated by either party giving the other one month notice. The Applicant decided to pay the Respondent with one month salary in lieu of notice as provided by section 41(5) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019. The parties are bound by the terms of the employment contract according to rule 4(1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. Exhibit D8 shows that the Respondent was paid among other things one month salary in lieu of notice. The Arbitrator held in page 10 to 11 of the Commission award that the Applicant failed to prove that the reason for termination was fair and concluded that the Respondent was unfairly terminated. He is of the view that the issue framed by the Commission was concerning the breach of contract thus the Arbitrator was not supposed to invoke provision for unfair termination as provided under section 37(2) of the Act.

To support his position the Counsel cited the case of **Mtambua Shamte and 64 Others vs. Care Sanitation and Suppliers, Revision No. 154 of 2010, High Court Labour Division, at Dar Es Salaam, (Unreported)**, where the Court held that:-

*"Now the principles of unfair termination under the Act do not apply to specific task or fixed term contract which come to an end on the specified time or completion of a specific task."*

Counsel submitted further that the Arbitrator failed to consider Exhibit D8 which provides the terminal dues paid to the Respondent which caused for the Arbitrator to award remedies which had already been paid upon termination hence acted in double jeopardy against the Applicant. The Arbitrator ordered payment for 12 months' salary compensation without considering that remedies under fixed term contract does not fall under section 40 of the Employment and Labour Relations Act. The Counsel prayed for the application be allowed and the impugned award be revised and set aside.

Replying to the Applicant submission, the Respondent's Counsel submitted that the alleged consolidated ground does not seem to be a single ground but rather there are two grounds of the revision. The grounds are the one touching on arbitrator failure to exercise jurisdiction so vested by law and failure of the Arbitrator to analyse the documentary evidence critically. The Applicant has raised the new ground of revision that the Arbitrator failure to frame issues properly which was not earlier on affirmed on the applicant affidavit. The material irregularity alleged to have been committed by the arbitrator on failure to frame issues properly were

supposed to be raised on the affidavit in support of the applicant and not to be raised during submission in order to give chance to the opposite side to oppose it by way of counter affidavit. The Respondent is taken by surprise and it would be unfair to him. Thus, it should not be entertained as it was outside the boundaries of the applicant's affidavit. This court in the case of **TANZANIA BROADCASTING CORPORATION (TBC) Vs. JOHN CHIDUNDO MBELE, Misc. Application No. 146 of 2013, High Court Labour Division, at Dar Es Salaam, (unreported),** stated at length on compliance of this legal requirements.

The Counsel submitted further that the arbitrator properly exercised her jurisdiction vested by law in framing the issues. As evidenced by the CMA records of the proceedings at page 4 and 5 on the proceedings of 23/05/2017, the arbitrator after consultation with Advocates of both parties rightly framed the issues which were supposed to be proceed or disapproved during full trial. The evidence of the Respondent starting at page 6-12 of the CMA records of the proceeding clearly disclosed what transpired from the time of employment until his termination leading to the breach of respondent employment contract. The respondent tendered exhibit A3 discloses his allegations followed by notice of disciplinary hearing exhibit A4. On all those claims, respondent testified in fully that the allegations leading to termination of his employment contract was not proved taking into account on whole

proceeding the applicant has even failed to prove the presence of any guidelines or rules of procedures on the applicant work place which respondent was bound to follow. The case of **MTAMBUA SHAMTE & 64 OTHERS vs. CARE SANITATION AND SUPPLIES, (supra),** which was referred by the Applicant provided at page 9 that:-

> *"There is no doubt that fixed term contracts are also prone to abuse by employers."*

Therefore, after the respondent has tendered a number of exhibits and tangible testimonies substantiating his claims, the applicant employer was further obliged to disapprove the respondent claims.

The Respondent's Counsel averred that the Respondent testified that during his period of employment he was only given employment contract - Exhibit A1 and Job Description - Exhibit A2. There was no standard procedures which he was bound to follow which was set by applicant. The said testimony was disclosed at page 9 of the CMA proceedings and was also not challenged during cross examination. The Respondent's evidence proved that his contract was unfairly breached hence the applicant was supposed to adduce such evidence which would have refuted the respondent testimony, the task which he failed. The Applicant did not address the substantive question as to whether the respondent employment contract was unfairly breached. The Arbitrator answer to the question was that the respondent

employment was unfairly breached by applicant. The CMA award at page 9-12 analyses at length both parties testimonies and came to a correct decision that the respondent employment was unfairly breached.

The Court of Appeal of Tanzania in the case of **National Microfinance Bank vs. Victor Modest Band, Civil Appeal No. 29 of 2018, Court of Appeal of Tanzania, at Tanga, (unreported),** emphasized on the requirement to adhere to the provisions of Rule 12 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. Though the rules provided guidance on how an allegation on unfair termination could be handled, but it also applies mutatis mutandis on fixed term contract which is unfairly breached or abused by the employer. Rule 12(1) (a) and 12(b) (i), (ii), (iii), (iv) (v) emphasizes on the presence of the special standard or rule regulating conduct relating to employment. The use of the above prescribed Rule was also emphasized in the case of **National Microfinance Bank vs. Leila Mringo & 2 Others, Civil Appeal No. 30 of 2018, Court of Appeal of Tanzania, at Tanga, (Unreported).**

The Respondent's Counsel distinguished the case of **MTAMBUA SHAMTE & 64 OTHERS Vs. CARE SANITATION AND SUPPLIES,** (Supra), which has been referred by applicant that it is applicable on the circumstances of the present application. The Applicants in **MTAMBUA**

**SHAMTE's case** their fixed term contracts were automatically terminated after termination of the tender period. However, in the present application, the respondent employment contract was not automatically terminated but unfairly breached following unproven allegations raised against the respondent.

Regarding the Applicant's argument that Exhibit D8 collectively proved that Respondent was paid all benefits disclosed at Exhibit D8, the Counsel submitted that it is important to note that Exhibit D8 was tendered as a single exhibit with no other attachment and was not marked collectively. This can be observed at page 16 of the CMA records. Despite the fact that the respondent was bound by the terms of contract, the employer is not allowed by the law to terminate the respondent wishes without justifiable cause. The Applicant failed to disclose the reasons for termination of Respondent's employment contract. Thus, clause 9 (a) of exhibit D8 cannot be invoked without adherence to prescribed procedures.

It was submitted by the Respondent's Counsel that the Arbitrator was correct in awarding terminal benefits to the Respondent since the Respondent denied to be paid those terminal dues at page 11 of the CMA typed proceedings. That testimony by the Respondent was never challenged by way of cross examination during trial. It is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance

of the truth of the witness evidence. In addition, there is no evidence in record to prove that the Respondent was paid his terminal dues in accordance with exhibit D8. Hence, this ground has no legal basis thus is bound to fail. Furthermore, the arbitrator awarded compensation for the salaries remaining on the period of contract equivalent to 11 months and not 12 months compensation as submitted by the applicant.

On the fairness of reason for termination, the Respondent's Counsel submitted that exhibit D8 - termination letter states that the reason for termination was bypass the credit approval process. This was not disclosed during hearing. The testimony of DW1 at page 17 of the CMA records shows that before customer is being given credit or products the Audit Controller from financial department have to approve the release of the cargo or commodity. Even at page 22 of the CMA records DW2 conceded during cross examination that respondent is not responsible for approving credit and release of commodity. DW1 admitted at page 18 of CMA records that here was no evidence that WASCO did not receive commodity/cargo. Therefore, the whole of the evidence presented at the CMA proves that respondent employment contract was unfairly breached by applicant and the Commission rightly granted the reliefs. The Counsel prayed for the application to be dismissed for want of merits.

The Applicant did not file rejoinder submission.

From the submissions, there are three issues for determination of this Revision Application. The issues are as follows:

1. Whether the trial arbitrator failed to frame proper issues which could lead parties to testify on issues in controversy.
2. Whether the Applicant unfairly breached the Respondent's employment contract.
3. What reliefs are entitled to parties?

In determination of the first issue whether the trial failed to frame proper issues which could lead parties to testify on issues in controversy, it is important to look at the Law providing for framing of issues. Framing of the issues is one of the stages of arbitration process according to rule 22 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007. Under the rule there are five stages of the arbitration process. Opening statement and narrowing of issues is the second stage of arbitration process. Narrowing of issues in dispute is done at the conclusion of the opening statement according to rule 24(4) of the G.N. No. 67 of 2007. Its purpose is to eliminate the need of evidence in respect of factual dispute. This means framing of issues helps parties to the dispute to adduce evidence on facts which were disputed. Failure to frame issues from the opening statement is against rule 24(4) of G.N. No. 67 of 2007. Also, failure to frame

crucial issue(s) may lead to the wrong award. In **Safi Medics v Rose Peter, Mganga Mussa and Richard Karata, Revision No 82 of 2010, High Court of Tanzania Labour Division, at Tanga, (Unreported),** the Court held that:-

> *"A successful arbitration requires that both the arbitrator and the parties in the dispute have a common understanding of the issues in controversy".*

According to rule 24(4) of the G.N. No. 67 of 2007 it is the arbitrator who shall narrow down the issues in dispute. Parties to the dispute may assist in the framing of issues to the dispute, but it is the duty of the Arbitrator to frame issues in the dispute before the Commission.

In the present matter, the Applicant was of the opinion that the trial Arbitrator failed to frame proper issues which could lead parties to testify on issues in controversy. He argued that the dispute was about the breach of contract and not on the fairness termination of employment hence the Respondent was supposed to prove the claims against the Applicant. In the other hand the Respondent averred that the arbitrator properly framed issues in controversy and the Respondent's evidence in record clearly disclosed what transpired from the time of employment until his termination leading to the breach of respondent employment contract. The Respondent was of the view that this is the new ground of revision which was not earlier

on affirmed on the applicant affidavit. The issue was supposed to be raised in the Applicant's Affidavit and not to be raised during submission in order to allow the Respondent to oppose it by way of counter affidavit. The Respondent is taken by surprise and it would be unfair to him. Thus, it should not be entertained as it was outside the boundaries of the applicant's affidavit.

The Commission award and the CMA typed proceedings shows that the Commission framed two issue in controversy. The issue are whether the Applicant unfairly breached the employment contract and what are reliefs entitled to the parties. I have read the CMA Form No. 1 and the opening statement and I'm of the opinion that the respective issues reflects the facts stated in the CMA Form No. 1 and opening statement of the parties. The CMA Form No. 1 shows that the nature of dispute is breach of contract arising from termination of Respondent employment contract. This means that the respective breach of contract did arise from unfair termination of Respondent's employment contract. The Respondent was employed by the Applicant for a fixed term contract but the respective contract was terminated before it expiry date for misconduct. It is obvious that the contract has come to an end before it expired. This is breach of contract. The Respondent challenged the fairness of ending the contract before its

expiry date and the Commission properly determined the breach of contract on the basis of fairness termination of the respective employment contract.

The evidence available in record shows that the Commission did find that the termination of the Respondent's employment contract for misconduct was not fair since the reason and procedure for termination was unfair. As submitted by the Applicant, parties are bound by the terms of the employment contract according to rule 4(1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. The employment contract – Exhibit A1 provides in clause 9 (a) that the contract may be terminated by either party giving the other one month notice. But in the present matter the evidence available provides clearly that the Respondent was terminated for misconduct. The employer was required to follow the procedure for termination for misconduct provided by the law. This is when the breach of employment contract in this case was determined by Commission on the fairness of termination of Respondent's employment since fixed term contracts are also prone to abuse by employers as it was held by this Court in the case of **MTAMBUA SHAMTE & 64 OTHERS vs. CARE SANITATION AND SUPPLIES, (supra).**

Further, as submitted by the Respondent the issue of the failure of the trial arbitrator to frame proper issues which could lead parties to testify on

issues in controversy is a new issue which is raised for the first time during submission. It was not among the issues or facts contained in the Applicant's submission. The parties to the suit are bound by their own pleadings. The Court of Appeal in the case of **Astepro Investment CO. LTD vs Jawinga Company Limited, Civil Appeal No. 8 of 2015, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported),** held that:-

> *".....the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance: parties are bound to their own pleadings."*

Also, as it was held by this Court in the case of **TANZANIA BROADCASTING CORPORATION (TBC) vs. JOHN CHIDUNDO MBELE,** (Supra), under rule 24(3) of the Labour Court Rules, GN. 106 of 2007, the affidavit in support of application shall contain a statement of legal issues that arise from the material facts. The issue does not arise from the supporting affidavit. This means the evidence was not properly countered by the respondent through a counter affidavit. For that reason, it is improper in law and practice to allow a party in an application to present such issue or evidence. Thus, I find that the answer to the first issue is negative since the Commission properly framed issues in controversy and determined them.

The second issue for determination is whether the Applicant unfairly breached the Respondent's employment contract. As I find in the first issue

that the Arbitrator properly framed the issue on the fairness of the respective breach of contract and the respective breach was on the fairness of termination of Respondent's employment, then it was the duty of the Applicant to prove that the respective termination was fair. Section 37(1) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019, provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. The Act provides further in subsection (2) that the termination is unfair if the employer fails to prove that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair. Thus, it was the duty of the Applicant to prove that the respective termination fair. It is in record that the Respondent was charged for four disciplinary offences of contravening Applicant's policy and procedures. Unfortunately, the respective Applicant's policy and procedure alleged to be contravened was never mentioned or tendered before the disciplinary hearing and before the CMA. Further, there is no evidence or witness called by the Applicant to prove that WASCO account was closed due to Respondent's negligence or the goods were taken out of Company without approval of the Accountant. Also, the procedure for termination which is provided under rule 13 of G.N. No. 42 of 2007 was not adhere since no investigation was conducted to ascertain whether there are grounds for a hearing to be held.

The Applicant submitted that the principles of unfair termination under the Act do not apply to specific task or fixed term contract which come to an end on the specified time or completion of a specific task as it was held in cited the case of **Mtambua Shamte and 64 Others vs. Care Sanitation and Suppliers, (Supra).** However, the principle is not applicable in the present application since the respective fixed term contract did not come to an end on the specified time. The Respondent contract was terminated by the Applicant for misconduct. Therefore, I'm of the same position with the Commission that the Applicant failed to prove that the breach of the contract of employment of the Respondent who was terminated for misconduct was fair.

The Last issue is about the reliefs entitled to the parties. The Applicant alleged that the Arbitrator awarded remedies which had already been paid to the Respondent upon termination hence acted in double jeopardy against the Applicant. Also, the Arbitrator ordered payment for 12 months' salary compensation without considering that remedies under fixed term contract does not fall under section 40 of the Employment and Labour Relations Act. I have read the Commission award which shows that the Respondent was awarded payments for 11 months' salary remaining in his fixed term contract, notice pay, leave pay and clean certificate of service. This means

that the Applicant's allegation that the Respondent was paid 12 months' salary compensation for unfair termination is not true.

Also, it is in record that the Respondent stated in CMA Form No. 1 and testified before the Commission that he was not paid his terminal benefits. The facts that the termination letter – Exhibit D8 stated that the Respondent is entitled to a notice pay, salary for worked days, payment of accrued leave and severance pay do not prove that the Respondent was paid the listed benefits. There is no evidence whatsoever from the Applicant to prove that the Respondent was paid any entitlements listed in Exhibit D8. Thus, I find the remedy awarded to the Respondent by the Commission was according to the law.

Therefore, I find the revision is devoid of merits and I hereby dismiss it. Each party to take care of its own cost of the suit.

**A. E. MWIPOPO**
**JUDGE**
**30/04/2021**