IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 180 OF 2021

BETWEEN

SIMBANET (T) LIMITED ..... APPLICANT

VERSUS

HELIO ANDRE MORAO ABRANTES ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicant herein filed the present application challenging the award of the Commission for Mediation and Arbitration for Ilala ("CMA") in Labour Dispute No. CMA/DSM/ILA/R.259/18/07 dated 12th April, 2021 by Hon. Igogo, Arbitrator ("the Dispute"). In the impugned award, the CMA found that the termination of the respondent was unfair both substantively and procedurally and proceeded to order the applicant to pay the respondent a total sum of United States Dollars (USD) 288,000/- being a compensation of two months' salary for harassment at the total tune of USD 25,500/- and USD 262,500/- as 21 months' salaries compensation for breach of contract. The applicant, who was the employer of the respondent, was aggrieved by the award of the CMA and has lodged this revision under the provisions of Section 91(1)(a)

and (2)(b) and (c), Section 94(1)(b) (i) of the Employment and Labour Relations Act Cap 366 R.E. of 2019, Rule 24(1); Rule 24(2) (a),(b),(c),(d),(e) and (f); Rule 24(3) (a), (b),(c) and (d) and Rule 28(1)(c),(d) and (e) of the Labour Court Rules Government Notice Number 106 of 2007 and any other enabling provisions of the Law. She is moving the court for the following orders:

1. That, this Honourable Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration at Dar es Salaam in Labour Dispute Number CMA/DSM/ILA/R.259/18/07 with a view to satisfy itself as to legality, propriety, rationality, logical and correctness thereof.
2. That, the Honourable Court be pleased to revise and set aside the CMA Arbitration Award made on the 12the April, 2021 by the Honourable Igogo, M Arbitrator on the following grounds:-
   (a) That, the Arbitrator erred in law and fact in holding that there was breach of contract despite sufficient evidence that termination was based on redundancy.
   (b) The Arbitrator erred in law and fact in holding that the Respondent was discriminated while there was no evidence

of such discrimination within the meaning of discrimination under the labour laws.

(c) That the Arbitrator erred in law and fact in holding that the Respondent is entitled to compensation for unfair termination and discrimination.

(d) That, the Arbitrator erred in law and fact, in holding that the termination procedures were not adhered to despite evidence presented by the Applicant's witness

(e) That, the Arbitrator erred in law and fact in assigning wrong reason for the Respondent's termination.

(f) That, the Arbitrator erred in law and fact for entertaining a referral which was improperly before the Commission.

The brief background of the dispute takes us back to 01st August, 2016 when the respondent was employed by the applicant in the position of Chief Corporate Development Officer in a fixed term contract of 24 months (exhibit D1). The position attracted an annual salary of USD 150,000/- which were paid on monthly salary of USD 12,500/-. On 13th February, 2018, the respondent alleged to have been served with a notice of redundancy that his employment contract shall terminate from

23rd February, 2018 (EXP4). Dissatisfied by the termination, the respondent referred the dispute to the CMA on grounds of breach of contract, discrimination and harassment. After considering the evidence of the parties, the Arbitrator was convinced with the respondent's evidence and declared that the termination of the respondent was unfair both procedurally and substantively. The respondent was subsequently awarded a compensation of an amount totalling to USD 288,000 being 2 months compensation for harassment and 21 months' salary for the alleged breach of contract. Aggrieved by the CMA award, the applicant filed the present raising the following legal issues:

i. Whether the respondent established that the applicant breached employment contract between the parties.
ii. Whether there was a proof of respondent being discriminated by the applicant within the meaning of discrimination as provided in the employment laws.
iii. Whether the reliefs awarded by the Arbitrator are justified in law.
iv. Whether the dispute at the CMA was instituted in accordance to the law and regulations governing disputes at the CMA

The matter was argued by way of written submissions. Before this court the applicant was represented by Mr. Juvenalis Ngowi, learned

Counsel whereas Mr. Gilbert Mushi, learned Counsel appeared for the respondent. I appreciate the comprehensive submissions of both Counsels which shall be taken on board in due course of constructing this judgement.

To begin with, I have noted the respondent's objection that the applicant did not file the notice of revision pursuant to Regulation 34 (1) of the Employment and Labour Relations (General) Regulations, GN 47 of 2017. The relevant objection should not detain me much because it does not go to the root of the legality of the revision, in such circumstances; it was supposed to be filed at the earliest stage before hearing of the main application. The situation would have been different if the objection was on the legality of the revision like whether the CMA lacked jurisdiction or this court lacked jurisdiction because the application was filed out of the prescribed time. Secondly, in the case of **Adam Lengai Masangwa & Alphonce Manyama V. Mount Meru Hotel, Revision No. 01 of 2018,** High Court of Tanzania at Arusha (unreported), my Brother Jugde, Hon. Mzuna, while faced with a similar situation he made a finding that failure to comply with the provision in question is not fatal and the defects can be cured by the overriding objective. He further held that not in every case where the word *'shall'* is

used makes the provision mandatory like in this circumstance at hand. I therefore find that the omission did not go to the root of the substance of the revision; neither did it prejudice the applicant in any way. This being a labor matter whereby the main objective is expeditious disposal of labor matters without being derailed by technicalities, and given the time that the objection has been raised, I hereby overrule the objection.

I have also considered Mr. Ngowi's allegation that they were not served with the respondent's written submission on time to allow them to file rejoinder within time frame scheduled by the court. The record of this court shows that the respondent's written submission were filed on 06th January, 2022 which was within the time ordered by the court, as to the issue when the applicant was served that would have been a matter of proof. Further to that, post the order of court, on the 03/03/2022 when the matter came for necessary orders, the applicant raised the concern to this court and informed the court that rejoinder was filed out of time and prayed that the same should be taken into consideration. In this judgment, I have also taken into consideration the submissions of the applicant in rejoinder.

Since the applicant started to address the fourth issue, whether the dispute at the CMA was instituted in accordance to the law and

regulations governing disputes at the CMA; I will also start to determine the same. Mr. Ngowi submitted that this application was improperly file at the CMA because the respondent did not fill part B of the CMA F1 which is used to initiate disputes at the CMA. He stated that he raised such objection at the CMA and the Arbitrator disregarded the same. Mr. Ngowi argued that failure to fill the relevant part of the form which is based on termination of employment, the Arbitrator lacked jurisdiction to determine this dispute.

Responding to the ground, Mr. Mushi submitted that the arbitrator dismissed the objection on the ground that the point of objection shoud be on the outset of the pleadings and should not be on assumptions of fact which needs to be ascertained by evidence. He argued that looking at CMA Form No. 1, the respondent indicated the nature of the dispute to breach of contract which in the eyes of the law, an employee with a fixed term contract is not required to fill part B of the CMA Form No. 1. On the cited the case of **Bosco Stephen v. Ng'amba Secondary School,** Revision No. 38 of 2017 High Court Labour Division at Mbeya (unreported) which was also cited by the applicant, Mr. Mushi argued that the case also supports the position of the respondent that employee who is claiming for breach of contract is not supposed to fill part B of

the CMA F1 because by filing the said part it has the effect of combining two distinct claims which cannot stand at the same time.

I have keenly gone through the CMA Form No. 1 which initiates disputes at the CMA and as rightly submitted by Mr. Mushi, the nature of the dispute referred by the respondent at the CMA was breach of contract. As clearly stated above, the parties herein were under fixed term contract of two years as reflected in the employment contract (exhibit D1). Since the contract was terminated before expiry of the agreed period, the respondent was right not to fill the disputed part B of the CMA F1. The case of **Bosco Stephen** (supra) cited by the parties is the correct position of the law which was also confirmed by the Court of Appeal in the case of **Asanterabi Mkonyi vs TANESCO, (Civil Appeal 53 of 2019) [2022] TZCA 96 (07 March 2022)** where it was held that the principles of unfair termination do not apply to fixed term contract unless it is established that the employee reasonably expected a renewal of the contract.

On the basis of the above, the dispute was properly filed at the CMA and the Arbitrator correctly dismissed the objection in question. The issue lacks merit and it is dismissed.

As to the first issue, whether the respondent established that the applicant breached employment contract between the parties, Mr. Ngowi submitted that the respondent failed to prove the alleged breach of contract arguing that the respondent was fairly terminated on the ground of retrenchment. He further argued that since the applicant did not dispute about fairness of the termination in the CMA F1, the Arbitrator wrongly determined the fairness of the reason for termination and procedures thereof. He submitted further that the notice of termination dated 13th February, 2018 addressed to the respondent clearly indicates that it was the notice of redundancy termination (exhibit A4) where the respondent was notified that he was effectively terminated from 23rd February, 2018.

In reply, Mr. Mushi submitted that the dispute determined by the arbitrator was related to breach of contract as it can also be evidenced by the reliefs granted by the arbitrator at page 32 of the impugned award. That although the applicant alleges that the respondent was terminated on grounds of redundancy/retrenchment, he was terminated before expiry of the contract hence the arbitrator could not have done away with determining the fairness of the procedure and substance because that is what Section 38 of the ELRA requires if the dispute fall

under such category. That upon finding that the procedures under Section 38 were not complied with the arbitrator was bound to award the reliefs basing on the claims of the respondent by considering the nature of employment that existed.

Having considered the submissions of the parties, as indicated earlier, the contract entered between the parties commenced on 01st August, 2016 and was to end on 01st August, 2018 (EXP1) hence it was a fixed term contract. The record is also undisputed that the contract between the parties was terminated before the agreed period. Now the applicant's justification of the termination was that the respondent's position in the company became redundant, she was therefore required to prove that the procedures under Section 38 of the ELRA were complied with. Failure to do so, the termination cannot be anything by a breach of contract.

Therefore so long as the applicant alleges that the breach of the contract arose from redundancy, something which she could not prove, then the Arbitrator properly analysed the reason for retrenchment and procedures thereof and correctly came to find out that they were unfair. Retrenchment/redundancy as reason for termination is also known as operational requirement. The circumstances that might legitimately form

the basis of termination on such ground are provided under Section 38 of the ELRA and Rule 23 (2) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 ("the Code"). At the CMA, DW1 testified that the respondent was retrenched from employment because the total cost of his position did not match with the total cost value of output and that the respondent's works were performed by other officials. However, looking at the record, there is no proof of such allegation, therefore, the reason for retrenchment is not justified or backed up by evidence. The reason/substance of the termination was hence unfair.

As to the procedures of termination on the ground of retrenchment, the same are provided under section 38 of ELRA. In this matter the respondent was not notified of the intended retrenchment and there is no prove of the consultation meetings held before the said retrenchment. DW1 testified that the respondent was consulted prior to retrenchment as evidenced by the performance review minutes (exhibit D3). I had a glance of the relevant minutes, firstly as rightly contested by the respondent; there is no proof of existence of the alleged meeting. Secondly, the meeting was for review of the respondent's performance but not a consultation meeting about the retrenchment process.

On the basis of the foregoing, so long as the applicant alleges that the breach of the contract arose from redundancy, something which she could not prove, then the Arbitrator properly analysed the reason for retrenchment and procedures thereof and correctly came to a finding that they were unfair.

The raised second the issue for analysis is whether there was a proof of respondent being discriminated by the applicant within the meaning of discrimination as provided in the employment laws. On this issue, having analysed the records of the CMA, I join hands with Mr. Ngowi that there was no proof of the alleged discrimination and harassment as found by the Arbitrator. The Internal Labor Organisation (ILO) Convention on **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)** defines discrimination as:

> *"any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation"*

The key words in the said definition are distinction, exclusion or preference and the basis upon which such exclusion should be defined are sex, religion, political opinion, national extraction or social origin. The effect of the distinction or exclusion should be nullifying or impairing equality of opportunity or treatment. Therefore in order for the respondent to have proved that he was discriminated, the basics within the definition under the convention should have been established. As per the evidence, the respondent pleaded discrimination on the ground that his work was assigned to other people. Now in our law, discrimination is provided for under sub-part C of the ELRA. Section 7(4)&(5) of that Act provides:

(4) No employer shall discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any of the following grounds:

(a) colour;

(b) nationality;

(c) tribe or place of origin;

(d) race;

(e) national extraction;

(f) social origin;

(g) political opinion or religion;

(h) sex;

(i) gender;

(j) pregnancy;

(k) marital status or family responsibility;

(l) disability; (m) HIV/Aids;

(n) age; or (o) station of life.

(5) Harassment of an employee shall be a form of discrimination and shall be prohibited on any one, or combination, of the grounds prescribed in subsection (4).

Looking at the evidence adduced, there was no place that the respondent proved the harassment defined under the above quoted provisions actually existed. Sub-section 6 of the Section 7 of the Act explains situation which shall not form the basis of be termed as discrimination. The sub-section provides:

"(6) it is not discrimination –

(a) to take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;

(b) to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job; or

(c) to employ citizens in accordance with the National Employment Promotion Services Act."

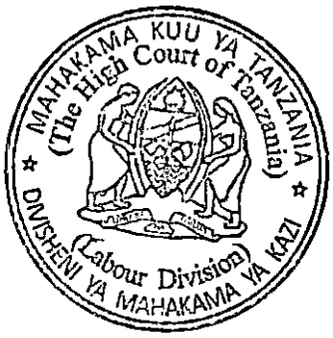
The respondent has not established how he was harassed by the termination of his contract, what the applicant did was to excludes the respondent's duty on what he termed to as the respondent's position became redundant. It was not discriminating, just an internal procedure as the respondent was also informed that his position became redundant. It should be borne in mind that by making this finding I am not contradicting myself to say that the reason for termination was fair, it is just the process that the applicant took in due course of termination did not amount to harassment. The fact that the respondent's duties were assigned to his colleagues does not prove the existence of harassment or alleged discrimination in the work place. This to me it is just a termination that was unfair in substance and procedure. On those findings, the part of the award that confirmed discrimination and the subsequent order of compensation of USD 25,500/- is also revised and set aside.

Turning to the parties' reliefs, as it is found that the respondent's employment contract was unfairly breached, the proper remedy to be awarded under the circumstances is the amount of salaries for the remaining period of the contract. Looking at the EXD1, it is crystal clear that the respondent's employment contract commenced on 01st August, 2016 and was to end on 31st July, 2018. As per the notice of termination the respondent was terminated on 23rd February, 2018 (EXD4) therefore, at the time of termination he had remained with only five (5) months and 7 days in his employment contract and not 21 months awarded by the Arbitrator which is not backed up by any law or evidence.

Coming to the calculation of the amount of compensation to be paid to the respondent, the applicant did not dispute that the respondent's salary was USD 12,500 per month. That being it, the applicant shall now pay the respondent USD 12,500/- times five (5) months and seven(7) days that had remained in the contract. Therefore she is supposed to pay him according to the following formula. USD12,500 x 5 months = USD 62,500. There is also 7 days worked in the last months, USD 12,500/26 days USD 480.8, this multiplied by 7, it is therefore USD 480.80 x 7 days = USD 3,365.6. In total therefore, the

applicant is ordered to pay the respondent the total sum of **USD 65,865.6** as compensation for the remaining period of the contract.

Dated at Dar es Salaam this 25th day of April, 2022.



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S.M. MAGHIMBI

JUDGE