

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 278 OF 2022

*(Arising from the decision of the Commission for Mediation and Arbitration at Kinondoni in
Labour Dispute No. CMA/DSM/KIN/286/2020)*

IRENE JOHANSEN NYAMWIZA APPLICANT

VERSUS

ST. ANNE MARIE ACADEMY LIMITED RESPONDENT

JUDGMENT

S. M. MAGHIMBI, J:

The has moved this court under the provisions of Section 91(1)(a), (b), and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 ("the ELRA"), Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f) and 24(3)(a), (b), (c) (d) and Rule 28(1)(b), (c), (d) and (e) of The Labour Court Rules GN. No. 106 of 2007 ("the Rules"); moving the court to revise the whole proceedings, ruling and the subsequent orders of the Commission for Mediation and Arbitration at Kinondoni ("CMA") in Labour Dispute No. CMA/DSM/KIN/286/2020 ("the Dispute") dated 29th July, 2022. The application is supported by an affidavit of the applicant herself deponed on 18th day of August, 2022. On the other hand, the respondent challenged the application through the counter affidavit of

Mr. Sigfrid Sosthenes Lweyemamu, the respondent's Principal Officer, dated 16th September, 2022.

The dispute emanates from the following background; the applicant was employed by the respondent as a teacher in a fixed term contract of one year which commenced from 01/01/2019. When the referred contract expired, the parties automatically renewed into another term of one year. On 17/03/2020 the applicant was terminated from employment for an alleged misconduct. Aggrieved by the termination, the applicant referred the matter to the CMA claiming for unfair termination. For the reasons which will be apparent hereunder; the CMA dismissed the applicant's claim. The dismissal did not amuse the applicant, she has lodged the present application urging the court to determine the following legal issues: -

- i. Whether a specified period contract like that cannot be subject of unfair termination.
- ii. Whether it is legally accepted for the Arbitrator having noted that in Form no. 1 there was point which was neither among the issues and which was not put into the attention of the parties to raise it suo motto and deny the parties including the applicant to address

the Commission on the particular point as it was perceived by the Arbitrator.

- iii. Whether the Arbitrator understood clearly the dispute which was before the Commission and the submission of the parties.
- iv. Whether the trial Arbitrator understood and applied properly the case of *Bosco Stephen vs Ng'amba Secondary School* (Revision 38 of 2017) [2020] TZHC 390 (20 March 2020) and others as cited by the Arbitrator.
- v. Whether in specified period kind of contract when terminated the only available remedy is always in all circumstances to sue in breach and not otherwise.
- vi. Whether the Commission did not have jurisdiction to determine the matter which was before it.
- vii. Whether the Arbitrator acted legally to dismiss the application (*mgogoro nautupilia mbali*) instead of striking out the same.

The matter was argued by way of written submissions. Before the court the applicant was represented by Mr. Mawazo Tweve, Personal Representative from legal aid providers named Legal Eye and Justice

Foundation whereas, Dickson Johnson Ngowi, Learned Counsel from Modern Law Chambers represented the respondent.

I appreciate the comprehensive submissions of the parties which shall be taken on board in due course of constructing this judgement. After considering the rival submissions of the parties, CMA and court records as well as relevant laws, I find all grounds of revision can be determined in one issue that is; whether the CMA had jurisdiction to determine the application.

The record shows that at the CMA, the applicant instituted the dispute of unfair termination against her employer, the respondent herein. The record shows further that the following issues were framed by the Arbitrator:-

- i. Endapo kulikuwa na sababu za msingi za kuachishwa kazi mlalamikaji.
- ii. Endapo utaratibu wa kumuachisha kazi ulifuatwa.
- iii. Nafuu kwa pande zote.

The above issues can be loosely translated as follows:-

- i. Whether there was valid reason to terminate the complainant.
- ii. Whether the termination procedures were followed.

iii. What are the parties' reliefs.

The record also shows that the matter was heard by the Arbitrator where both parties presented their evidences. I have noted while composing the award, before determining the above quoted issues, the Arbitrator noted another issue which she found it prudent that she determined that issue before going to the merits of the dispute. The Arbitrator noted that in the CMA F1, the complainant indicated the cause of action to be unfair termination of employment. The arbitrator noted that to the contrary, in her testimony during arbitration, the applicant testified that she was under a fixed term contract of one year which commenced from 01/01/2015. (see page 15 of the impugned award).

In view of the above findings, the Arbitrator held that she had no jurisdiction to determine the application because the complainant/applicant herein was supposed to sue under breach of contract since she was under fixed term contract and not unfair termination as she did. Thereafter the Arbitrator proceeded to dismiss the application for what she termed to as her lack of jurisdiction.

As clearly captured from the records, the issue as to whether the CMA had jurisdiction to determine the dispute before it was not one among the issues agreed to be determined. The same was suo motto

raised and determined by the Arbitrator during composition of an award and without affording the parties the right to be heard on the same. As rightly submitted by Mr. Tweve; the practice of the Arbitrator/court raising issues suo motto and determining the same without affording the parties the right to be heard has been condemned in range of decisions including the cited Court of Appeal case of **Alisum Properties Limited vs Salum Selenda Msangi (Civil Appeal 39 of 2018) [2022] TZCA 389 (24 June 2022)** where it was held that:-

"We are increasingly of the view that, what was done by the learned High Court Judge to introduce the said new two issues in the course of composing the judgment was contrary to the law and principles of natural justice on the right to be heard. Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court."

Again, in the case of **Halima Hassan Maraella Vs. Parastatal Sector Reform Commission**, Civil Application No. 84 of 1999 cited in

the case of **St. Joseph Kolping Secondary School vs Alvera Kashushura** (Revision Application 21 of 2018) [2020] TZHC 4398 (18 December 2020) it was held that: -

"The concern is whether the applicant whose rights and interest are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such opportunity even if it appears that he/she would have nothing to say, or that what he/she might say would have no substance."

On the basis of the foregoing decisions, it is my view that the Arbitrator's finding that the he had no jurisdiction to determine the dispute is a nullity because the same was arrived at without affording the parties the right to be heard. Owing to that, the award of the CMA is hereby quashed and set aside.

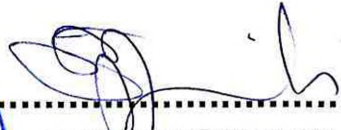
In the result, on the basis of the above finding, I find the present application to have merit. The Arbitrator's award dated 29/07/2022 is hereby quashed and set aside. Since the matter was not determined on merit, this court cannot step into the shoes of CMA and determine the same. Thus, the case file is remitted back to the CMA for the award to be recomposed in respect to the issues framed and further accord the

parties the right to be heard on whether or not the arbitrator had jurisdiction to entertain the matter, should the arbitrator still find it necessary to do so.

It is so ordered.

Dated at Dar es Salaam this 16th day of November, 2022.




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S.M. MAGHIMBI
JUDGE