IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 220 OF 2022

(From the Ruling/Award of the Commission for Mediation and Arbitration at Dar Es Salaam (Hon. William R – Arbitrator) in Labour Dispute No. CMA/DSM/KND/54/2021/4/2021 dated 17th June, 2022)

BETWEEN

COCA COLA KWANZA LIMITED ..... APPLICANT

VERSUS

ERASTUS VINCENT MTUI ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The dispute at hand emanates from a termination of employment of the respondent/employee by the applicant/employer. The reasons for the termination were Disciplinary misconduct which included Gross Negligence and Gross Dishonest. At the time of his termination, the respondent was serving as the Director of Finance, a position he held from 22nd September, 2017 (EXA3). The respondent was aggrieved by the termination and on the 29th day of April, 2021, the respondent lodged a dispute at the Commission for Mediation and Arbitration for Ilala ("the CMA") which was registered as Labour Dispute No. CMA/DSM/KIN/54/2021/4/2021 ("the Dispute").

In his CMA No. 1, the respondent claimed for payment of salaries from the date of termination 09th April, 2021 to the date of retirement which was equal to 204 months. He also claimed for payment of one month's salary in lieu of notice and general damages at the tune of Tshs. 2,000,000,000/-. In the award dated 17th day of June, 2022, the CMA found the termination of the respondent to be substantively and procedurally unfair and subsequently awarded the respondent a compensation in terms of his salaries for 180 months which amounted to Tshs. 5,776,848,000/- for unfair termination. He was further awarded general damages to the tune of Tshs. 1,000,000,000/-. The total amount of compensation being Tshs. 6,808,941,600/-.

Aggrieved by the award, the applicant has lodged the current application under the provisions of Section 91(1)(a) & 2(b),2(c) and 94(1)(b)(i) of the Employment and Labour Relation Act, Cap 366 R.E 2019 ("ELRA") and Rule 24(1), 24(1), 24(2)(a),(b),(c),(d),(e),(f) and 24(3)(a),(b),(c),(d) and 28(1)(c),(d),(e) of the Labour Court Rules, GN No. 106 of 2007 ("The Rules"), challenging the legality, propriety, rationality, logic and correctness of the award. The applicant's prayers are that:

1. This Honourable Court be pleased to call for the record and examine the proceedings and award grant of the Commission for Mediation and Arbitration at Dar Es Salaam (Hon. William R – Arbitrator) in Labour Dispute No. CMA/DSM/KIND/54/2021/4/2021 dated 17th June, 2022 to satisfy itself as to legality, propriety, rationality, logical and correctness thereof.
2. This Honourable court be pleased to revise and quash the award of the Commission for Mediation and Arbitration at Dar es Salaam in Labour Dispute No. CMA/DSM/KND/54/2021/4/2021 dated 17th June, 2022 by making appropriate orders on grounds set forth in the accompanying sworn affidavit.
3. Any other relief(s) as this Honourable Court deems fit and just to grant.

In the affidavit to support the Chamber Summons, the applicant raised the following 13 grounds of revision:

i. That it is not correct for the findings of the arbitrator that the respondent committed no offences at place of work while his involvement in the charged offences was of paramount.

ii. That out of the three letters sent to TRA was authored by the respondent and accredited the two previous letters which had been accompanied by wrong attachments against the TRA policy but the Hon. Arbitrator unjustifiably cleared the respondent.

iii. The documents referred to by the arbitrator as board resolutions are not board resolutions but are bank forms where the respondent filled in the insertions appearing therein which are the subject of the dispute.

iv. That it is not in dispute that the bank forms containing falsified information regarding existence of Applicant's Board Resolutions were executed by the respondent and presented to the bankers for creation of the impugned facilities while the respondent was in full knowledge that no such Board of director's meetings was convened and resolved the impugned asserted resolution.

v. That the respondent had executed the bank forms containing falsified information but the arbitrator had exonerated the respondent liability for being signed by fellow employees and the company secretary (DW 3) who witnessed the respondent signing his signature as a notary public.

vi. That the records at trial reveal that the respondent was given all the requested documents that were available at the applicant's place of work and adduced reasons for the missing ones for want of existing.

vii. That it is incorrect findings of the award for the constitution of the applicant's disciplinary hearing panel at place of work to be invalidated just for failure to include one optional member while the quorum was valid.

viii. The respondent did not exercise his right of representation of a fellow employee at disciplinary hearing stage as the respondent never chose any employee and the applicant never made restrictions as alleged.

ix. The arbitrator did not consider and evaluate the type of contract of employment that was in place, the contract was a fixed term contract and not one of permanent and pensionable terms between the litigants.

x. The award of general damages is not supported by the pleadings and evidence. The respondent in his CMA Form No. 1 has pleaded harassment and humiliation which were adjudged time barred, the

Confederation of Tanzania Industries defamation was not pleaded and not related to the awarded general damages.

xi. The finding by the arbitrator that the respondent was terminated by DW 5 the deponent herein, is wanting in evidence as DW 5 had acted on an internal Email from the appointing authority to communicate the decision.

xii. There is a relationship between the Applicant Company and Coca Cola SABCO (PTY) Ltd one being a subsidiary company of the other and is administered by the mother company. The arbitrator has awarded the respondent incentives from Coca Cola SABCO (PTY) Ltd and she rejected its administrative decisions over Coca Cola Kwanza Co. Ltd.

xiii. The respondent is not entitled to one month salary in lieu of notice as the termination had valid reasons and was procedurally fair.

From those ground, the applicant raised the following legal issues:

a) The Honorable Trial Arbitrator erred in law and in fact by her failure to hold that the respondent's contract of employment was that of a fixed term and not one of permanent and pensionable terms thus

arriving at a wrong conclusion in awarding compensation in excess of the contract period.

b) The Honorable Trial Arbitrator erred in law and infact when she failed to hold that Exhibit A-1 was the contract governing the parties and once it was admitted as an exhibit it formed part of the record of the commission and was wrong to be ignored for technical reasons on who tendered it as decided by the Arbitrator.

c) Whether the Commission for Mediation and Arbitration and the Honorable trial Arbitrator had jurisdiction when it adjudicated the respondent's claims based on unfair termination of employment as the evidence on record reveal that the dispute revolved on a fixed term contract in Exhibit A-1 and its award of 180 months' salary compensation for unfair termination.

On his part, the respondent opposed the application by a notice of opposition arguing that there are no sufficient grounds for revising and setting aside the award of the CMA. The application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Alex Mgongolwa, learned Counsel while respondent's submissions were drawn and filed by Mr. Mohamed Muya, learned Counsel.

Having appreciated the submissions of both parties, and having thoroughly gone through the records of this revision, I find the issue for determination revolves around the fairness of the termination of the respondent both substantively and procedurally and the type of contract that the respondent had with the applicant. There is also an issue of the consequential reliefs that were sought for and awarded by the CMA.

However, I have noted an issue that was raised by the applicant as the first issue, which challenge the jurisdiction of the arbitrator with regard to the cause of action that was pleaded at the CMA. The issues mainly attacked the reliefs awarded on the ground that the arbitrator arrived at a wrong conclusion in awarding compensation in excess of the contract period. It was the applicant's allegation that the employment relationship between the applicant and the respondent was that of a fixed term contract and not for unspecified period hence the respondent could not claim remedies for unfair termination under Section 40 of the ELRA. This being an issue of law, I will begin with that issue before proceeding to other issues pertaining the fairness of the termination of the respondent.

In his submissions on the issue, Mr. Mgongolwa argued both the first and the second issue and renamed the first issue to be that Arbitrator

erred in law and fact by failure to hold that the respondent's contract of employment was that of a fixed term and not one of permanent and pensionable terms thus arrived at a wrong conclusion in awarding compensation in excess of the contract period. It is obvious that the applicant is challenging the cause of action in relation to the damages that were awarded by the CMA and not the course of reasoning on the substance of the fairness of the termination.

Mr. Mgongolwa's submission was that it is undisputed that on 9th August, 2011, the Applicant and the Respondent herein entered into an employment contract for two years running from 10th August, 2011 to 9th September, 2013 (EX-A1) and the same was to run in accordance to its terms and conditions specified pursuant to the consent of both parties. While the employment contract between the Applicant and the Respondent was still subsisting, the Respondent was appointed to the post of Country PAC Manager effectively from 12th February, 2012 and he signed the contract which improved his salary and other benefits and confirmed his new appointment, but in this contract which is exhibited as EXA-2, it provided specifically that the original contract terms and conditions of the first contract (original contract) will remain the same. He argued that

Exhibit A-2 specifically altered the remuneration, position and other benefits but all other terms and conditions remained the same as stipulated in the contract of employment. That the clause is indispensably fundamental in interpreting the parties' employment contract.

He went on submitting that after execution of the new Employment Contract (EXA-2) the Respondent's employment contract duration was transmitted from ending on 2013 as provided in first employment contract to starting on 12th February, 2012 and to end 11th February, 2014 on the basis that the same had to run in the same specified employment contract of two years (2). That the Respondent continued to work pursuant to the terms, conditions and position as conferred under the employment contract exhibited as (EXA-2) which on the basis same terms and condition as stipulated in contract of employment exhibited as A-1 and in between this contract he was promoted from country PAC Manager to PAC Director, apply.

Further that on 22nd September, 2017 the Respondent was appointed as a Finance Director (EX-A3) whereby the remuneration, benefits and position were changed but once again, at the end of the new employment contract it was expressly provided that all other terms and

conditions remains the same as stipulated in the contract of employment A-1, pointing out that the new contract started from 22nd September, 2019 on the basis that it is a two years fixed term contract as the initial contract which was exhibited in EX-A1. His argument was that in the literal and plain construction of the said employment contracts exhibited as A-2 and A-3, which preceded the original contract EXA-1, it continued employment and working relations between the employer (Applicant) and the employee (Respondent) beyond the lapse of the employment contract. This is to mean that the employment contract status between the two parties has been renewed by default for the terms and conditions which had not been expressly changed by parties in the renewed contracts which followed contracts in exhibits "A-1", "A-2" and A-3".

He emphasized that the automatic renewal or renewal by default is not a new phenomena in our jurisdiction as the same is clearly enshrined under the Laws and Regulations governing Employment and Labour Relations matters in Tanzania. He supported his submissions by directing the court to Rule 4(3) of Employment and Labour Relations Act (Code of Good Practice) Rules, G.N No. 42 of 2007 ("the Code") which is clear that a fixed term contract may be renewed by default if an employee continues to

work after expiry of the fixed term contract and circumstances warrant. He then argued that from the wording of Rule 4(3) of the Code, the Respondent's employment contract renewed automatically by default immediately after working beyond the fixed term duration of the contract under the same terms on in exclusion of expressly altered terms. Further that the wording of Rule 4(3) of the Code complements the fact that Respondent's employment contract status is that of a fixed term contract and the same is emphasized by the wording of section 14(1)(b) of the ELRA that the Respondent shall be for specified period of time and under the circumstances at hand, such specific time is two years as renewed by default indifferent times till its termination.

Mr. Mgongolwa then elaborated that termination of employment contract under fixed term basis can be executed on different ways such as resignation, expiry of time or termination by the employer. That in the circumstances at hand, the employer, through following all relevant procedures terminated the contract of employment on the basis of gross dishonesty and gross negligence. He argued that the employer termination was fair in both procedural fairness and validity of the reason. However, he argued, the Respondent was aggrieved by such decision and eventually

referred the matter to the Commission of Mediation and Arbitration (CMA) through CMA form No. 1. That to the applicant's surprise, the respondent being fully aware of his employment contract status as a fixed term contract by virtue of Regulation 4(3) of the Code and by virtue of being the Manager Cadre Employee who is a professional, he is subject to fixed term contract as provided under Section 14(1)(b) of the ELRA, he referred the matter to CMA Form No. 1 as unfair termination, and sought the remedies of unfair termination instead of breach of contract. He argued that the employee under a fixed term contract is prohibited to seek remedies of unfair termination as the same are not tenable in a fixed term contract as it was provided in the key case in respect of the remedies of unfair termination and breach of contract in. He supported his arguments by citing several cases of this court and the Court of Appeal including the case of **Tambua Shamte and 64 Others Vs. Care Sanitation and Suppliers, Revision No. 154 of 2010** (Unreported), whereby this court put forward this general rule, following a dispute on unfair termination by employees who were under fixed term contracts and held that:

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

He then submitted that this decision not only barred referral to the CMA of labour disputes on unfair termination arising from fixed term contracts but also cemented the position that fixed term contract employees' cannot benefit under the unfair termination remedies. He also cited the cases of **Consolidated Revision No. 921 of 2019 in Precision Air Service PLC Vs David Jibo, Jordan University College Vs Mark Ambrose in Revision No. 37 of 2019 and Malaika B Kamugisha Vs Lake Cement in Revision No. 591 of 2019,** whereby this Court denied employees under fixed term contracts the remedies of re - engagement, re - instatement and 12 months compensation, stating that the only remedy available for a dispute under fixed term contract was payment for compensation for the remaining period of the contract.

He went on submitting that in compliance with the above cited Landmark decisions, the current CMA Form No.1, a labor dispute referral form was introduced through The Employment and Labour Relations (General) Regulations Government Notice No. 47 of 2017, has placed an

option for breach of contract to be filed by employees who are under fixed term contracts. That in our case at hand, the respondent never sued for breach of contract but for unfair termination, his complaint before the CMA was misplaced and liable for dismissal in its entirety. That the effect of failure to comply with the referral brought in by the Regulations is to make the whole filed referral form by the respondent which culminated into the impugned award null and void. That in this case at hand no evidence was led by the respondent connoting that there was reasonable expectation of renewal of the contract of which the only exception to the general rule that employees under fixed term contract can sue for unfair termination remedies as this court held in Mtambua Shamte and 64 others (supra) could apply. That the exception is based on the Court's interpretation of Section 37 (a) (iii) of the ELRA, read together with Rule 4 (4) of the Code. He then cited the case of **Malaika B Kamugisha vs Lake Cement, Revision No. 591 of 2019** where this court held that the remedies that this court can grant under fixed term contract of employment is compensation for the remaining period of contract. He also cited the case **of St. Joseph Kolping Secondary School Vs Alvera Kashushura, Civil Appeal No. 377 of 2021**, where the same position was held.

"We also do not agree with him that, under our laws a fixed term contract of service can be prematurely terminated without assigning reasons. This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. (See section 35 of the ELRA). In addition, creation of a specific duration of contract gives the employee legitimate expectation that if everything remains constant, he or she will be in the service throughout the contractual period. The expectation is defeated, if the same can be terminated at any time without reason."

He further cited the decision of the Court of Appeal of Tanzania in the case of **Asanterabi Mkonyi Vs TANESCO, Civil Appeal No. 53 of 2019**, where the court confirmed and commended the holding of the High Court in Mtambua Shamte (supra) that the principles of unfair termination do not apply to a fixed term contract (or even a special task contract) unless it is established that the employee reasonably expected a renewal of the contract. That in terms of rule 34) (a) and (b) of the Code, a fixed – term contract exists where the agreement to work is for a fixed time or

upon completion of a predetermined task while a contract is for a permanent term where the agreement to work is without reference to time or task- see also Mtambua Shamte (supra). He further cited the case of **Ibrahim S/o Mgunga and 3 Others Vs African Muslim Agency, Civil Appeal No. 476 of 2020,** where the same position was held, arguing that the respondent never led evidence exhibiting whether he had reasonable expectation of renewal of his contract so that he would benefit under the exception rule, and yet still he never pleaded any claims regarding reasonable expectation of renewal of his contract of employment, his plea and grant for remedies revolving remedies for unfair termination employees are out of place and should be reversed on sole ground that the respondent is not among the beneficiaries as ably submitted above in extension.

In conclusion, he submitted that in respect of the first and second legal issue that the status of employment contract between the Applicant and the Respondent was of a fixed term basis, hence the remedies of unfair termination to the Respondents are not tenable as provided in and the Court of Appeal decisions. That the trial Arbitrator lacked Jurisdiction

by entertaining and awarding remedies of unfair termination instead of remedies for breach of contract.

In reply, Mr. Muya did not specifically deny the fact on whether the respondent was in a fixed term contract. His argument was mainly based on the fact that the issue was never raised at the CMA hence it could not be raised at this point. His submission was that the issue of fixed term versus permanent was not part of issues that were to be determined by the Honorable Arbitrator and the applicant never even argued any such issue in their main case at CMA. That the respondent did not get a chance to prepare evidence and respond the allegation since it was not among the issue for determination. He however admitted that the said argument was briefly introduced by the Applicant in his cross examination of Respondent (then the applicant at CMA) and in final submission as it is shown last paragraph of page 141 to the first paragraph of page 142 of the award. He pointed out that when one read therein he will find the act of the Honourable arbitrator to respond into the said allegation emanated from the said arguments being introduced by the applicant in her submission and was not part of the agreed issues.

He went on submitting that the matter of fixed contract versus permanent is not a small or a peripheral issue and that there is no way that respondent requested for 204 salaries at CMA Form no. 1, but Appellant did not request the issue of fixed versus permanent contract to be determined among issues for determination and never raised it at all in their main case at CMA. Further that the applicant is wrangling and rambling trying to find a point to hold on to which is not there and should not be entertained in our able laws and jurisdiction. That this is the new issue which was not among the issues for determination before the CMA. He then argued that since the matter raised by Mr. Mgongolwa is an issue of facts and not of law, it is not proper to be raised at this stage of revision. He supported his argument by citing **Land appeal no. 49 of 2019 between Yosia Mankala and another Vs. The registered trustees of ELCT Northern Diocese** where the court held that an issue which is not among the raised grounds in the memorandum of appeal cannot be raised at the appellate stage. He further cited several decisions of this court and the Court of Appeal including **Civil Reference No. 04 of 2019 between Harison Mandali and 9 other Vs The registered trustee of archidiocese of Dar es Salaam (Court of Appeal), Land**

Appeal No. 39 of 2017 between Ramadhani Msangi vs Sunna G. Mandara and two others and Farida and Another V.Domina Kagaruki, Civil Appeal no. 136 of 2006 (unreported) whereby in all these cases, the courts emphasized that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and or raised at the lower court.

Mr. Muya submitted further that it is a settled principle of the law that arbitrators are supposed to confined themselves on addressing framed issues as what presided arbitrator did. Therefore it is irrational for the respondent to challenge by alleging that honourable arbitrator erred in law for not to hold that the respondent contract was fixed without notice that this was not among the issues for the honourable arbitrator to determine. He supported this line of argument by citing the decision of this court in **Revision Application No. 7 of 2019 between Beachresidence Ltd T/A Ramada Resort Dar es Salaam.** He then argued that since the issue of whether the contract was fixed or permanent was not among the framed issue, then the arbitrator is not bound to entertain them and if by doing the award would be quashed and set aside

In the alternative, in answering the substance of the issue raised by Mr. Mgongolwa, Mr. Muya submitted in agreement with the findings and the conclusion of honourable arbitrator that the contract of the respondent when terminated was permanent and pensionable not fixed term as suggested by the applicant. His submission was that in **exhibit A1,** the applicant and the Respondent entered into a fixed terms contract for the respondent serve a role of **Finance manager** effective from the 10/9/2011 to 09/09/2013. But before this contract come to an end, parties signed another contract admitted as **exhibit A2** for the respondent to serve as Country PAC Manager effective from 1st February 2013. He then argued that the contract period of **exhibit A3** is not the same as it was in the exhibit A1 because in exhibit A3 the contract period was for at least 3 years not two years as in the exhibit A1. That from the findings above, it is not true as submitted by the Counsel for the applicant that the employment of respondent was of fixed term nature. For the applicant to compare the time frame of the of exhibit A1 and A3 while each contract contained different time frame, leaves a lot to be desired. He questioned how can one be given a fixed term contract of **two years** as alleged by the Applicant's counsel but at the same times been asked to serve the

position for **three years**? That the two years and **at least** 3 years are two different time therefore the applicant cannot argue that they are the same.

He then argued that in exhibit A1, the time frame was so specific from 10/9/2011 to 09/09/2013 while in exhibit A2 the word used therein just to quote is *"you have committed to serve the role for at least 3 years.* That the plain meaning of the word at least is not less than. Therefore if the time frame of the exhibit A2 is not less than 3 years and it effectively started from 1st February 2013 without ending date it means that the end time of the said contract is not specified as in exhibit A1. He pointed out that it for this reason that the respondent worked on the said position for the period of 4 years and 9 months before he signed another permanent contract with a different position.

Mr. Muya went on submitting that it is worth noting that before the respondent was appointed as Country PAC Manager as per Exhibit A2 from 1st February 2013, he was appointed as General Manager for Zanzibar Bottlers Ltd, a fact which wittiness DW5 of the Applicant did confirm during the cross examination at CMA. From this fact and evidence it is very clear that the fixed term contract of Finance Manager role did not even last to

09/09/2013 as was agreed, rather the contract squarely ended immediately when respondent was appointed as General Manager for Zanzibar as he later proceeded to being appointed as Country PAC Manager-Exhibit A2.

Further that on the 22nd day of September 2017, the respondent signed another contract with the applicant to serve for the role of Finance director effective from 1st November 2017 without specifying when would this contract come to an end as was specified in the exhibit A1. Therefore if this contract does not specify the end period and the records show that the respondent served in this position for the period of more than 3years and 6months then that was the permanent contract. This was in addition to 4 years 9 months he served in open-ended contract of Country PAC Manager-Exhibit A2.

On the applicant's argument that exhibit A2 and A3 contained the clause which states that ***"all other terms and condition remained the same as stipulated in your contract of employment"*** make them to be fixed contract of 2 years as it was exhibit A1, Mr. Muya argued that there are immaterial with the intention to mislead this honorable court. That the court should take note that exhibit A1 contains about 19 clauses

and the said clause is applicable only to clauses which were not altered by the by the followed contracts exhibit A2 and A3. But is not applicable to the altered clauses including time frame of the contract clauses. His argument was that clauses altered by exhibit A2 and A3 from the clauses in exhibit A1 were all other clauses except the clauses of duration of the contract, salary clauses, position clause, reporting relationship clause and entitlement clause.

That the new contract Exhibit A2 also added new clauses apart from changing the ones referred to above including continuation with Zanzibar responsibilities pending to successor appointment, entitlement of company car consistent with CCKL policy, Entitlement of Management incentives as per CCS Policy and Participation in SAR (Shares Appreciation Rights) Scheme as per CCS Policy. While in the exhibit A3 the clauses which were changed were position clause, duration of the contract and salary clause. That the tenure of employment was open ended and permanent as it was silent but also as per contract-Exhibit A2 and it cannot be construed to have been two years fixed contract which expired on 09/09/2013. That Exhibit A3 picked relevant clauses of all previous contracts because respondent continued to enjoy entitlements which were stipulated in

Exhibit A2 such as Company Car (witnessed by DW5), Management incentives and long term incentive (SAR scheme) as evidenced in Exhibit A15, but were not stipulated in Exhibit A3, which means "*all other terms and conditions remain the same as stipulated in your employment contract*" included clauses mentioned in Exhibit A2.

Mr. Muya also took time to define what constitutes an "appointment" as per the Applicant's human resources policy (Staff Handbook) which is the basis for employment contract. That Page 30 of the Staff handbook (Exhibit D7) defines an appointment "*means filling a vacant post by recruitment of a new employee, re-categorization of the existing employee or assigning an employee's duties of a higher post in an acting capacity*". That it means contract exhibits A2 and A3 were full contractual appointments and Exhibit A3 picked some of the exhibit A2 contract as indicated above. He concluded that had applicant raised the issue of fixed term and open-ended/permanent contract as one of the issues for determination, the respondent would have proved using exhibit A2 and A3 that those employment contracts are inline with Section 14 (1) (a) of the Employment and Labour Relations Act , Cap. 366, R.E. 2019 and that it is wrong to still say the new contracts contain same meaning as it shown in

exhibit A1 while already amended and the former contract exhibit A1 completely expired.

Having heard the parties' submissions on this issue, my findings are as elaborated. It is undisputed that a contact of employment, just like any other contract, has to be interpreted according to the terms and conditions which shows the intention of the parties and the meeting of their minds, the ***consensus ad idem*** at the time of execution of the contract. Indeed as argued by Mr. Mgongolwa, the three documents, EX-A1, 2 and 3 cannot be read in isolation but have to complement each. This is because a close look at the contract of employment EX-A1, it is the original document that created the initial employment relationship between the applicant and the respondent. In the said contract, the applicant employed the respondent on a fixed term contract of two years commencing on the 10/09/2011 to come to an end on 09/09/2013. This contract is as stipulated under Section 14(1) (b) of the ELRA, a contract for a specified period of time for professionals and managerial cadre. It is conclusive that from the initial stage, the applicant was employed in managerial cadre; this fact has not been disputed by both parties.

Further to the above, Section 15 of the ELRA stipulates the written particulars to be specified in the contract of employment, the Section provides:

15.-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely-

(a) name, age, permanent address and sex of the employee;

(b) place of recruitment;

(c) job description;

(d) date of commencement;

(e) form and duration of the contract;

(f) place of work;

(g) hours of work;

(h) remuneration, the method of its calculation, and details of any benefits or payments in kind; and

(i) any other prescribed matter.

From those provisions therefore, the terms of contracts as provided for under Section 15 of the ELRA are stipulated in the EX-A1 which stipulated the form and duration of the contract; that it was a fixed term

contract and for a period of two years. The issue in controversy is on the subsequent contracts, EX-A2 and EX-A3, whether the two documents materially altered the terms of the initial contract (EXA-1) and changed it to an unspecified period contract.

Before I proceed to determine the issue above, I must say at this point, looking at those two exhibits EX-A2 and EX-A3 which the parties allege to be new contracts, they are not contracts in terms of Section 15 of the ELRA, but as said above, they have to be read together with the initial contract the EX-A1. These are rather promotion letters which in the labour regime, in the absence of new employment contract, have to be interpreted with a lot of caution and care when certain rights and obligations have to be determined in relation to the initial contracts. Prudence would require that if an employee is being promoted to a higher position which will make him perform a key role, where the new terms are of particular importance, it is preferable to issue a new contract in order to avoid any suggestion that the new terms are judged against the old role or the danger of having multiple interpretations like the case at hand.

The above being said, as correctly so argued by Mr. Muya, looking at the EX-A2, which is an appointment letter which promoted the respondent to the position of Country PAC Manager effective from February 2013; the other terms of the contract were unaltered. Although the contract is not very clear on whether the new promotion was for a fixed period, para 7 the EX-A2 stipulated the term of the contract that: *"all other conditions remain the same as stipulated in your contract of employment".* Since there is no expressed clause which changed the terms of employment to unspecified period, the condition that the contract was for a fixed term remained the same, only that the duration of it now became that of three years and not the initial two years stipulated under EX-A1. This is exhibited at para 5 of the EXA-2 where it reads *"You have committed to serve the role for at least three years".*

It would appear from the records, the applicant served the contract for 5 years before the subsequent promotion in 2017. Rule 4(3) of the Code provides:

> *"Subject to sub-rule (2),* ***a fixed term contract may be renewed by default*** *if an employee* ***continues to work after the expiry of the fixed term*** *contract and circumstances warrants it."*

With that provision in mind, Mr. Mgongolwa's argument comes into being, that there was an automatic renewal of the contract because the employee continued to work for the same employer on the same terms and conditions. See also the case of **Ahobwile Yesaya Mwalugaja vs. M/S Shield Security (T) Ltd; Revision No. 333 B of 2013: High Court of Tanzania (Labour Division) at Dar es Salaam,** whereby this court held that when an employee continues to work after expiry of a fixed term contract, a contract is renewed by default.

The nest exhibit is the EX-A3, a letter termed "Status Change". In this exhibit, the employer was informing the employee that there was a mutual agreement to change the respondent's role from PAC Director to the Finance Director effective from 01st November, 2017. The letter was very categorical that *"All terms and Conditions remain the same as stipulated in your contract of employment".* In the absence of any other *"contract of employment"* between the parties apart from EX-A1, then the referred terms and conditions were that contained in the said contract, which is undisputed that it was a fixed term contract. However, as said earlier, the contract has to be read together with the alteration in EX-A2 which expressly, changed the terms of the contract to three years. Hence

the subsequent appointment was for a period of three years which were to end on 31st October, 2020. The record is undisputed that the employee continued to work for the same employer after the expiration of that period.

Owing to the continuation of work stipulated above, again the argument that there was automatic renewal comes into play because the respondent continued to work for the applicant up until 08th April, 2021 when he was terminated. Therefore the previous contract having ended on 31st October, 2020, then it follows that the new contract commenced on 01st November, 2020 to end on 31st October, 2023. Hence at the time of termination, the remaining period of the respondent's contract was 30 months and 21 days.

On those findings, the first and second issues are answered in the affirmative, that the respondent was employed in a fixed term contract hence he could not be awarded damages under unspecified period of contract.

The next issue is challenging the jurisdiction of the CMA when it adjudicated the respondent's claims based on unfair termination of

employment as the evidence on record reveal that the dispute revolved on a fixed term contract (Exhibit A-1). The applicant is further challenging the awarded compensation of 180 months' salary for the alleged unfair termination. At this point, I have also taken keen consideration of the alternative legal issues framed by the applicant and their significance to what I will determine shortly. I have also noted that in his submissions, the applicant's Counsel is only challenging the extent upon which the arbitrator lacked Jurisdiction by entertaining and awarding remedies of unfair termination instead of remedies for breach of contract.

To start with whether the arbitrator had jurisdiction to enteratin an issue of unfair termination while the contract is a fixed term contract. In determining this issue, I have considered the length of time and energy that the parties have invested in determining whether the contract that existed between the parties herein was that of fixed term contract or unspecified period. Since the issue consumed time of the parties and this court, it is obvious that the duration of contract was an issue that was to be determined by adduce of evidence and lengthy arguments. That is why the applicant, who should have raised the objection at the earliest time, failed to do so and raised it at the last stages of arbitration. Furthermore,

the way the contract was to be read is open to multiple interpretation, not an obvious case. This is why, at this point, I do not find relevancy or fairness in nullifying the proceedings of arbitration and order parties to start afresh at the CMA on the issue of breach of contract. I see that no much purpose will be achieved by so doing since the issue of duration of the contract from the chain of events, was subject of multiple interpretations.

It is also pertinent to note at this point that, although the EXA-2 and EXA-3 has a clause maintaining the terms and conditions of the contract, but looking at EXA-3, although all of the important terms of the written contract remain the same, but all of the important responsibilities in the EXA-1 significantly changed. The EXA-3 was also accompanied by changes of the salary and other benefits of the employee including the duration of the contract as per the EXA-2 which is to be read together.

I have also paused to ask myself, apart from the remedies that were awarded by the CMA which shall eventually be determined, how was the applicant prejudiced by the fact that the employee challenged the fairness of his termination given the ambiguity in defining nature of his contract.

The other question whether the principles in determining the substance of his termination differs because the duration of the contract was different? At this point, I borrowed the wisdom of the decision of the Court of Appeal in the case of **St. Joseph Kolping Secondary School Vs Alvera Kashushura, (Civil Appeal 377 of 2021) [2022] TZCA 445 (18 July 2022),** where it was held that:

> *"We also do not agree with him that, under our laws a fixed term contract of service can be prematurely terminated without assigning reasons. This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. (See section 35 of the ELRA). In addition, creation of a specific duration of contract gives the employee legitimate expectation that if everything remains constant, he or she will be in the service throughout the contractual period. The expectation is defeated, if the same can be terminated at any time without reason."*

From the holding above, the court was clear that under our laws, a fixed term contract of service cannot be prematurely terminated without

assigning reasons for the termination. This is because the conditions stipulated under Section 37 of the ELRA are mandatory and therefore implicit in all employment contracts, the current case cannot be of any exception. Whether or not the contract was for a fixed term or for unspecified period; as long as it was terminated before it came to an end, the employer is still bound under the provisions of Section 37 of the ELRA to have a fair reason and follow fair procedures before terminating an employee. Section 39 of ELRA further imposes an obligation on the employer to prove that the termination of the contract was for a fair reason and was done by a fair procedure.

Having made the above observations and findings, I will now proceed to determine the fairness of both the substance and the procedures of the contested termination of the contract. As said earlier, Section 39 of the ELRA requires that in proceedings concerning unfair termination of an employee, the employer shall be the one to prove that the termination is fair. In our case at hand, it is important to see whether the reason for termination of the respondent was fair (substantive fairness) and whether, in terminating the respondent, the employer followed the prescribed procedures (procedural fairness).

Starting with fairness of the reasons, under Article 4 of the **ILO Convention on Termination of Employment, 1982 (No. 158)**, an employer is prohibited from terminating employment of an employee unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. In our law, the convention is domesticated in Section 37(1)(2)&(3) of the ELRA which makes it unlawful for an employer to terminate the employment of an employee without a fair reason. Going to merits of this case, as per the records, the respondent was charged with two offences, the first offence was Gross negligence and the second one was Gross Dishonesty. The issue is whether those allegations were proved by the employer.

In the first ground of Gross Negligence, the respondent was convicted on the reason that in the period between 2018 to 2019 he failed to execute his duties with due diligence resulting to submission of three letters to the TRA demanding refund of 15% on sugar import duty under duty remission scheme and he did not meet the requirements. As a result, the applicant alleged to have incurred a loss of Tshs. 1,390,554,766/- (EXD-1).

On the charge of Gross Dishonesty, the respondent was alleged to have misrepresented himself to two Banks; namely Standard Chartered Bank and Stanbic Bank; that the Board of Directors had sat, deliberated and resolved what the respondent communicated to the bank as a request for a bank facility in terms of an overdraft facility and a term loam. According to the applicant, this fact is not true. The applicant concluded that the acts questioned the respondent's integrity and jeopardized the Company's image with those banks.

Staring with the first offence of Gross negligence I will have to see if, as per the requirements of Section 39 of the ELRA, the applicant proved that in the said the period between 2018 to 2019 the respondent failed to execute his duties with due diligence resulting the alleged loss of Tshs. 1,390,554,766/-. At the CMA, the respondent paraded 5 witnesses. Unlike the CMA arbitrator, I will not dwell much on the knits and grits of Tax issues because I am not sitting here as a Tax Tribunal, rather I have to see whether in its general context, the applicant proved the charges leveled against the respondent.

During hearing, the DW1 admitted the absence of crucial evidence to prove the negligence of the respondent. For instance, while being cross

examined by Mr. Mwalongo, learned Counsel who represented the respondent at the CMA, the witness admitted that by the time the respondent was terminated, there had never been any official communication from the TRA that the applicant; as a Body Corporate; will not be paid the demanded tax refund. The witness further admitted that there was no evidence of any report of the loss alleged to have been incurred apart from the minutes of meeting the applicants officers had with the TRA officers at the applicant's office. Under the EXD2 through which the applicant tried to prove the forgery, it was admitted that there was no independent tax audit conducted by any tax specialists to prove the loss. At the same time the applicant admitted to have been enjoying services of the auditing firms Ernest and Young and PWC, but no report to prove the loss. Further to that, it would appear that the applicant also based the allegations on EXD1 which is a collective exhibit showing that the respondent delayed to demand response from the TRA on the tax refund. The sequence of letters in the collection included letters written by other officers apart from the respondent. This officer was never charged. Looking at EXD-5, it was clear that no consultant was engaged to prove the

negligence hence in conclusion; there was no concrete professional evidence to prove the negligence.

On the second charge of Gross dishonesty, in EXD-1, it was alleged that the respondent, as Finance Director, failed to execute his duties with honesty and due diligence compromising the company values contrary to Rule 12(3) (a) of the Code. The allegations were alleged to have been discovered in the year 2021. The applicant's evidence to prove the offence was supported by the testimonies of four witnesses DW-1, Mr. Erick Ongara, DW-2 (Grace Mfunguo), DW-3 Mr. Godson Nyange and DW-5 Scollastica Augustine and some documentary evidence tendered before the CMA. Mr. Mgongolwa alleged that the evidence left no scintilla of doubt that the employee committed the offence because it was not in dispute that the employee initiated the applications for loans and overdraft facilities worth over 112 billion Tzs from Standard Chartered Bank and Stanbic Bank without the company's approval.

Mr. Mgongolwa further referred the court to the corresponding Emails on the subject (Exh. A-18) read together with the executed or signed bank forms appearing in (Exh. D-2 collectively). The exhibit shows that the EXD-2 mortgaged almost all the company landed, movable and floating assets

including the factories at Mikocheni in DSM and Iyunga mbeya without the company's board of directors' approval. He went on submitting that worse still the employee had cheated to the bank that his deeds were a result of a fictitious meeting of the company's board of directors to have been held on 3rd July, 2020, a fact which he very knew that was incorrect. He argued that this act alone of pledging the company properties as security for loans not approved by the Board of the company is a serious offense of high degree of gross dishonest which if allowed, the company's properties may be auctioned by banks in default of repayments leading to collapse the company. Further that the respondent never exonerated himself if he was mandated to do so and by this failure and the evidence on commission of the offence leaves no doubt that he had usurped powers that are not vested in him by virtue of his employment. That the evidence indicates he was liable for the offence as submitted above.

On this point, I have paid detailed attention to one fact which is crucial. The exhibits referred to in EXD2 are Board Resolutions which the respondent allegedly forged. However, looking at all these Resolutions, they were signed by three officers of the applicant, DW3 Mr. Godson Nyange, and one May Gard who was the Managing Directors. More so

crucial, the evidence shows that the DW3 admitted to have verified the resolution as Company Secretary, his signature was not forged. What caught my attention which I find to be fatal, in all the documents tendered on the disciplinary hearing, there is nowhere showing why the other two signatories were not prosecuted. I then turned to the provisions of Rule 12 (1)(a)&(b)(iv) of the Code which provide:

12.-(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider:-

a)whether or not the employee contravened a rule or standard regulating conduct relating to employment;

b)if the rule or standard was contravened, whether or not:-

(iv) it has been consistently applied by the employer;

The Rule cited above prohibits discrimination and unfair treatment of employees who have committed the same wrong whether severally or jointly. The Rule requires that whenever an employee contravenes a rule or standard regulating conduct relating to employment, the sanctions to be imposed (in this case termination) shall be consistently applied by the employer to all employees in the same wrong.

Coming to our case at hand, the employer did not prove which rule or standard was contravened and more so, the prosecution was discriminatory because there was no evidence to show why the other Senior Officers of Managerial Cadre who were engaged in the sequence of the same alleged misconduct (including those who signed the documents) were not prosecuted because they equally participated in the alleged misconduct. As if that was not enough, to show that there was no rule contravened, the DW1 admitted that the facilities requested by the alleged forged documents were granted to and consumed by the employer. Had the money not been advanced, then the issue would have been different. But in this case, the facility was actually advanced and consumed by the employer hence if there was fraud, then the entire management of the applicant was involved by conduct subsequent to the grant of the facility. To this court's dismay, the employer failed to prove the reason for the selective prosecution which is in contravention of Rule 12 (1)(a)&(b)(iv) of the Code cited above. It is conclusive that the offence of Gross Dishonesty was not proved.

On the above observations and findings, I find the termination of the respondent's contract of employment by the employer to be substantively

unfair. The next issue is whether the procedures for termination were adhered with.

It is the duty of the employer under Section 37(2)(c) of the ELRA to prove that the procedures for termination were followed. In determining whether the procedures for termination were followed, I will begin with Article 7 of the **ILO Termination of Employment Convention, 1982 (No. 158)** which provides that:

> *"**The employment of a worker shall not be terminated** for reasons related to the worker's conduct or performance **before he is provided an opportunity to defend himself against the allegations** made, unless the employer cannot reasonably be expected to provide this opportunity."*

The Article requires termination of employment to follow the procedures that will accord the employee an opportunity to be heard before his right to work is terminated. In our ELRA, as shown above, the requirements for procedural fairness is provided for under Section 37(1)&(2)(c). Going to records of this revision, the charge sheet was served to the respondent on 09/03/2021 while the investigation report was prepared on 12/03/2021 after the respondent was charged. It is hence

evident that the procedures were also not adhered to because the respondent was charged before the investigation report was completed. In the case of **Kiboberry Limited vs John Van Der Voort (Civil Appeal 248 of 2021) [2022] TZCA 620 (07 October 2022);** the court of Appeal emphasized on the importance of availing the employee with an investigation report. Further Rule 13(1)&(2) of the Code provides:

*"(1) The employer **shall conduct an investigation to ascertain** whether there are **grounds for a hearing to be held.***

*(2)Where **a hearing is to be held**, the employer **shall notify the employee of the allegations** using a form and language that the employee can reasonably understand."*

The above provisions are well coded and clear that the employer is first bound to conduct an investigation to see whether there are grounds to conduct a disciplinary hearing. When satisfied that a hearing should be held is when the employee should be notified of the hearing. In our case at hand, the charge sheet and notice of hearing were served on the respondent on 09/03/2021 while the investigation report was prepared on 12/03/2021. That means he was charged before the employer was to satisfy herself whether to conduct a hearing.

There is also evidence of PW1 that the investigation report that was availed to him was incomplete as shown at page 3 of EXD-3. During hearing (EXD3), the respondent is recorded to have raised a concern on the incompleteness of the investigation report but there was no solution given. There is also a procedural irregularity on the person who signed the respondent's termination letter.

Going to the termination of the respondent. From the testimony of DW5 while being cross-examined she admitted to have written a letter of termination. She however alleged that she got the mandate through an email from one Mr. Conrad who was the group Regional Manager for Central Africa. However, she admitted that the said Conrad is not reflected in the structure of the applicant neither was he her employee. DW5 further admitted that under normal circumstances, she did not have power to terminate the respondent let alone suspend an employee who was of the same managerial level as her. The testimonies, both DW1 and DW3 further show that it is the Managing Director who appoints the Finance Director of CocaCola Kwanza Ltd (then respondent) (EXA-3) hence the respondent was terminated by someone (DW5) who did not have that mandate (EXD-9). This is a serious procedural irregularity. All those are

conclusive proof that the termination of the respondent was procedurally unfair.

In conclusion of the issue, since the termination of the contract was both substantively and procedurally unfair, the applicant breached the contract of employment. The last issue is on the reliefs sought.

I will start with the issue of general damages pleaded by the respondent in the CMA Form No. 1. The arbitrator awarded damages based on alleged proof of harassment and humiliation. I see that the arbitrator based his findings on the fact that after suspending the respondent (EXD-4) and before investigation was concluded, the applicant wrote letters to CTI which the arbitrator found to be offensive. With respect I find this argument to be off the hook because the letters are precautionary measures whereby given the strong allegations against the respondent, the employer had to ensure that her clients were safeguarded from any conduct with the respondent during investigation. Much as I have concluded that the allegations were not proved against the respondent, but letters to employers' stakeholders suspending engagement with an employee under scrutiny do not amount to humiliation to justify the grant of general damages. After all, the employee was eventually terminated

hence the contemplated risk of continuing engagement with terminated employee could not be undermined. This does not mean that the termination was fair, but the letters to CTI did not amount to harassment to warrant award of general damages in labour disputes. Therefore the award of general damages to the tune of Tshs. 1,000,000,000/- is hereby set aside.

Going to the award of compensation, as it has been found that the employment of the respondent was on contractual term, then the remedy for the breach should be payment of salaries for the remaining period of the contract which was 30 months and 22 days. The salary of the respondent at the time of his termination was Tshs, 32,093,600/- then the employer shall pay the employee his salaries for the remaining period of the contract which is 30 months X Tshs. 32,093,600/- summing up to Tshs. 962,808,000/-. There is also 21 days 23,535,306.7/-. The contract EX-A1 also stipulates a period of one month's notice of termination of the contract, since that was not issued, the employer is further entitle to one month salary in lieu of notice which is Tshs. 32,093,600/-. In total the applicant shall pay the employee a sum of **Tshs 1,018,436,906.67/-.**

On those findings, the award of the CMA is hereby revised to the extent explained.

Dated at Dar es Salaam this 07th day of November, 2022.

.....

S.M. MAGHIMBI

JUDGE