

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

REVISION NO. 182 OF 2020

(Originating from Labour Dispute No. CMA/DSM/KIN/485/19/387)

BETWEEN

FREEDOM HOUSE TANZANIA LTD..... APPLICANT

VERSUS

ROSEMARY MWAKITWANGE..... RESPONDENT

JUDGMENT

Date of Last Order: 14/12/2021

Date of Judgment: 26/01/2022

I. Arufani, J.

The parties herein engaged into employment contract on 1st April, 2018 when the respondent was employed by the applicant as Chief of Party. Their relationship became sour on 23rd April, 2019 when the respondent was terminated from employment on ground of poor work performance. Aggrieved by the termination, the respondent referred the matter to the Commission for Mediation and Arbitration (CMA) claiming to have been unfairly terminated.

Upon determination, the CMA held the respondent was unfairly terminated from her employment both substantively and procedurally. The respondent was awarded Tshs. 844,966,365/=

being 40 months' salaries as compensation for legitimate expectation of serving the applicant for the duration of the project for which she was recruited, one month salary in lieu of notice, severance pay and certificate of good work.

The respondent felt resentful with the award and filed the present application in this court seeking for revision of the award on the grounds stated at paragraph 8 to 15 of the affidavit of Gervas Lufingo filed in the court to support the application. The application was challenged by the respondent's counter affidavit. By consent of the parties the application was argued by way of written submission. While the applicant was represented in the matter by advocate Blandina Kihampa, the respondent was unrepresented.

Ms. Kihampa submitted in relation to the first ground that, the respondent was terminated on ground of poor work performance. She argued that, the respondent was supposed to meet the performance standard provided in her job description which is part and parcel of her employment contract, admitted in the matter as exhibit P2. She stated that, the respondent was aware of the performance standard but she failed to meet the same. It was her submission that, as testified by DW1 who was also one of the

members of the disciplinary committee the respondent was terminated from her employment due to her underperformance of the work. She stated that, even in the minutes of the meeting admitted in the matter as exhibit D1 the respondent acknowledged her duties were outlined in her job description. Therefore, her failure to properly perform her duties and meet the KPI's caused the applicant to have valid reason of terminating her employment.

As for the second ground which states the commission erred in law and fact in holding that the termination was procedurally unfair, the counsel for the applicant stated that, the procedure for terminating an employee on poor work performance is provided under Rule 18 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. She argued that, Rule 18 (5) dispenses with the need to give time to improve if the employee is a manager or a senior employee whose knowledge and experience qualify him to judge whether he or she is meeting the standards set by the employer.

It was further submitted by the applicant's counsel that, as per exhibit D1, the applicant investigated the reasons for poor work performance and found five arrears of concern which were notified to

the respondent on 8th March, 2019 and discussed by the parties on the meeting held on 14th March, 2019. After the meeting, it was found it was apparent that the respondent's performance of work was below the professional skills required for the job. She stated the respondent's position of Chief of Party was sensitive and senior position in the organization. The position required high level of professional skills and that is why the respondent was employed.

The counsel for the applicant argued that, the applicant adhered to the required procedures and dispensed with the requirement of providing the respondent time to improve, because of the respondent's experience, knowledge and status. The respondent's failure to perform after one year in her position, had serious consequences to the applicant's budget, partner's relationship and project activities.

With regard to the third ground of revision, the counsel for the applicant submitted that, as appearing in exhibit P3 it is undisputed fact that the respondent's employment contract was for an unspecified period of time. That means the contract would have only been terminated on cause recognized by the law like misconduct, underperformance, retrenchment, incapacity etc. She went on

arguing that, it is also undisputed fact that the project which the respondent was overseeing was expected to run for five years. She however submitted that the cessation of the contract cannot be determined by the duration of the project. She argued that, if the respondent had legitimate expectation of remaining in the employment until the end of the project that expectation would have only been subject to none arising of any cause recognized by the law which would have warranted termination of her employment.

She argued that, it was the testimony of DW1 that, the respondent's employment contract had no relationship with the fact sheet (Exhibit P2) as it was meant to provide for the contract details for the responsible persons. She argued it was not intended to serve as yard stick for measuring the duration of the respondent's employment contract. She stated that, under the labor laws the legitimate expectation is only on a fixed term contract when an employee has been given reason to believe that her contract will be renewed for another term. She supported her argument with section 36 (a) (iii) of the ELRA. She submitted that Arbitrator erred to hold the respondent had legitimate expectation to work for the entire duration of the contract.

She argued in relation to the fourth ground that, the arbitrator erred in law and fact in holding that, the respondent is entitled to 40 months' salaries as compensation for breach of contract on the alleged legitimate expectation. She submitted that, the respondent is not entitled to compensation because termination was both substantively and procedurally fair. She went on submitting that, in absence of legitimate expectation to work for the duration of the project, the respondent is not entitled to such a compensation. She stated that, compensation for the contracts of unspecified period is provided under Section 40 of the ELRA.

It is her submission that, as the respondent had prayed for loss of expected earnings instead of reinstatement or re-engagement then the Arbitrator ought to have awarded the respondent compensation as provided under Section 40(c) of the ELRA. She submitted further that, compensation of 40 months was erroneously given hence it should be revised and set aside by the court. At the end she submitted that, the respondent was fairly terminated hence she is not entitled to any relief awarded to her and prayed the court to revised and set aside the award.

In reply, the respondent argued that, the applicant has totally misconceived the interpretation and application of the law. She argued that, there is no point of unilateral termination without legal consequences when there is binding contract between the parties. She argued that, the parties are legally bound by laws and the terms of their contract. She went on arguing that, although either party may terminate a contract but the same must be fair and must comply with the law, procedure and terms of the contract.

The respondent submitted that, any breach of the law and terms of contract gives right to the other party to claim for legal remedies. She stated the applicant breached Section 41 (1) (b) (ii), (3) (i) and (ii) and (5) of the ELRA as they failed to issue notice of termination as provided under article 1.10 and 1.11 of the employment contract. She asserted further that she was neither charged nor summoned to any disciplinary hearing and she was only handed over the letter of terminating her employment. She submitted that the applicant failed to execute his duty of proving fairness of termination as provided under Section 39 of the ELRA.

It was the respondent's further submission that, the project or contract was for a fixed period of five years. She stated she worked

for one year and had legitimate expectation to accomplish her term of five years, but the respondent unlawfully terminated her employment. She stated that, as found by the Arbitrator the respondent was still a lawful employee of the applicant and she was entitled to 40 months salaries pay as a compensation for termination of the contract. She went on submitting that, she was reinstated in her employment by the CMA and submitted she was entitled to be paid the 40 months' salary as a compensation for termination of the contract.

She argued that, the applicant was required to pay her 52 months' salary if they do not want to reinstate her. She referred the court to various provisions of the law like sections 37, 39 and 40 of the ELRA which she stated are dealing with unfair termination of employment and remedy for unfair termination. She also cited in her submission Rules 11, 12 and 13 of GN. No. 42 of 2007 which deals with allegations of misconduct or any allegation relating to performance. She also cited in her submission Rule 27 (1) of GN. No. 42 of 2007 which requires the employer to suspend an employee in case of serious misconduct. At the end she prayed for the application to be dismissed for lack of merits and the CMA's award to be upheld.

In rejoinder, the applicant's counsel reiterated her submission in chief and stated further that, the applicant has always been willing and ready to pay the respondent's one month's salary in lieu of notice and severance pay but the respondent was unwilling to accept the same. She stated the respondent could not have been suspended while undergoing performance appraisal. She stated the suspension defeats the purpose and that is why the law does not require suspension in occasions of poor performance. The counsel for the applicant insisted on the prayers she made in her submission in chief.

Having carefully considered the parties' submissions and after going through the records of the matter and the relevant laws the court has found the issues to determine in this matter are as follows:-

- (1) Whether the applicant had valid reason for terminating employment of the respondent,
- (2) Whether termination of employment of the respondent was made on fair procedures and,
- (3) To what relief(s) parties are entitled.

Starting with the first issue, the court has found it has been persuaded to agree with the respondent that, parties are bound by the terms and conditions of the contract they have entered. The court is also in agreement with the respondent that there is no point of

unilateral termination of employment without legal consequences. Besides, the court is also in agreement with the respondent that, either party may terminate their contract provided he has a fair reason and he has followed the fair procedure provided in the terms and conditions of their contract.

The court has also found that, in labour matters the law is well settled that, employers should only terminate employment of an employees on fair and valid reasons and in accordance with the fair procedures prescribed by the law. That concept is clearly stipulated under section 37 (2) of the ELRA and it has been emphasized in number of the court decisions. For instance, it was held by Hon. Abood, J in the case of **Tanzania Revenue Authority v. Andrew Mapunda**, Labour Rev. No. 104 of 2014 HC at DSM that:-

"It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness for termination of employment."

While being guided by the position of the law stated in the above cited case the court has found the record reveals that, the respondent was terminated from her employment on ground of poor

work performance and failure to meet the required performance standards. The court has found that, while the CMA's found the respondent was unfairly terminated from her employment both substantively and procedurally, the applicant argued before this court that, the CMA's finding was based on poor analysis of the evidence.

The court has found before going to the evidence adduced at the CMA to see whether it was properly analyzed, it is pertinent to have a look on what is provided under Rule 17 of the GN. No 42 of 2007 which provides for factors to be considered on termination of employment contract on ground of poor work performance. The cited provision of the law states as follows:-

"Rule 17 (1). Any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider-

- a) Whether or not the employee failed to meet a performance standard;***
- b) Whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;***
- c) The reasons why the employee failed to meet the standard; and***

*d) Whether the **employee was afforded a fair opportunity to meet the performance standard.***

[Emphasis added].

The applicant's counsel argued that, although the respondent knew the performance standard she was required to meet, but she performed her duties below the required standard. Having examined the records of the matter the court has found the Arbitrator stated at page 7 of the impugned award of the CMA that there is no evidence in the record showing the respondent was not given performance standard to achieve. The court has failed to see the basis of the Arbitrator to come to the stated finding after seeing it is not supported by the evidence adduced at the CMA.

The court has found the evidence adduced before the CMA shows the contract of employment and job description of the respondent tendered at the CMA by the respondent and admitted in the matter as exhibit P3 shows clearly what the respondent was required to do in her employment and what was the expectations of her employer. To the view of this court the stated contract of employment and job description gave the respondent the work or

duties she was required to perform. For clarity purpose clause 1.3 of the employment contract of the respondent states inter alia that:-

"The duties of the employee shall include the usual duties as defined in his/her job description and any other suitable duties, which the employer may call upon him/her to perform."

The job description annexed to the employment contract of the respondent shows clearly the principal duties, responsibilities and expectations which were supposed to be performed and achieved by the respondent. One of the duties of the respondent stated in the job description is that, apart from the duty of providing overall strategic leadership and oversight of programs to support civil society and human rights in Tanzania but she was also responsible for the daily operations of the office, which includes but not limited to: financial management, general office administration, public relations and staff management. Therefore, to the view of this court it was not right to say the respondent was not given the work performance standard she was required to achieve in her employment.

The question is whether the respondent failed to meet the set standard of the work performance. The court has found the

allegations that the respondent failed to perform her duties and responsibilities to the required standard are listed in the letter dated 27th November, 2018 addressed to the respondent by the applicant and annexed to the documents to be relied upon by the applicant filed at the CMA and admitted in the matter as exhibit D1.

The court has found it was stated in the said letter that, the respondent failed to perform her duties and responsibilities to the required standard in relation to the financial management, program activity management, partner relationship, communication and adhering to the HQ guidance. The court has found that, as stated by DW1 the performance of the respondent was discussed in the meeting conducted through skype which was attended by DW1, the respondent and the applicant's Director at Washington DC. The evidence available in the record shows that, after the respondent failed to improve her work performance her employment was terminated on ground of poor work performance as stated in the letter of terminating her employment dated 23rd April, 2019.

The court has considered the respondent's evidence that her work performance was good and she was even considered valuable asset in the team of the applicant. The court has been of the view

that, although the evidence adduced by the respondent shows it is true that she was commended for her good performance at one point in time but that alone cannot be sufficient ground to establish that she would have not been found in future time her work performance was not to the standard set by her employer.

The court has found the evidence adduced before the CMA shows that, there were several communications through email between the Director of the applicant, one Jon Temin and the respondent concerning the respondent's daily performance. The court has found the record of the matter shows that, the respondent was afforded with adequate time to improve her work performance but she failed to meet the required standard.

The court has come to the above finding after seeing that, after the respondent being informed of her poor work performance by the applicant, she ought to have taken initiatives to improve her work performance; taking into consideration her position in the organization and the essence of the project but she failed to do so. Basing on the above stated finding the court has come to the view that, the applicant had a fair and valid reason for terminating employment of the respondent.

The court has found the respondent has argued in her submission that she had legitimate expectation that she would have worked for the applicant for five years duration of the project and stated she had worked for more than a year. She argued that, as her employment was terminated before the stated period of time, she was entitled to be paid the salaries of remaining 40 months in her contract as awarded to her by the CMA.

The court has found that, as rightly argued by the counsel for the applicant, payment of legitimate expectations and compensation of an employee normally depends on type of employment contract. When the employment contract is a fixed contract, the principle as stated in the cases of **Salkaiya Seif Khamis V. JMD Travel Service (Satguru)**, Revision No. 658 of 2018, **Benda Kasanda Ndassi V. Makafuli Motors Ltd.**, Revision No. 25 of 2011 and **Good Samaritan V. Joseph Robert Savari Munthu**, Revision No. 165 of 2011 HC (all unreported) cited by the counsel for the applicant is that, the compensation to be awarded is for the remaining period of the contract.

The court has found that, although the respondent argued her contract of employment was a fixed contract but as stated by DW1

the contract does not specify when the contract would have come to an end. It states the contract would have continued until when it would have been terminated in accordance with the contract itself or by the local laws and regulations of the Tanzania. Even if it would have been taken the contract was a fixed contract, on ground that it would have come to an end after five years of the project but the respondent was not entitled to be paid compensation of the remaining period of the project because the court has already found the applicant had valid and fair reason for terminating her employment.

Coming to the second issue, the court has found the applicant argued that, they complied with the procedures for termination of the employment of the respondent as required by the law. The respondent alleged that termination was procedurally unfair as she was neither charged with the offence, no disciplinary hearing conducted against her and she was not suspended from her employment as required by the law. The court has found the procedure for termination of employment of an employee on poor work performance, is governed by Rule 18 (1-9) of the Employment

and Labour Relations (Code of Good practice Rules) GN. 42 of 2007

which states as follow:-

*"Rule 18 (1) **the employer shall investigate the reasons for unsatisfactory performance.** This shall reveal the extent to which is caused by the employee.*

*(2) The **employer shall give appropriate guidance, instruction or training, if necessary,** to an employee before terminating the employee for poor work performance.*

*(3) The **employee shall be given a reasonable time to improve.** For the purpose of this sub-rule, a reasonable time shall depend on the nature of the job, the extent of the poor performance, status of the employee, length of service, the employee's past performance record.*

*(4) **Where the employee continues to perform unsatisfactorily, the employer shall warn the employee** that employment may be terminated if there is no improvement.*

(5) An opportunity to improve may be dispensed with if:-

(a) The employee is a manager or senior employee whose knowledge and experience qualify him to judge whether he is meeting the standards set by the employer;

(b) The degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that

even an isolated instance of failure to meet the standard may justify termination.

(6) Prior to finalizing a decision to terminate the employment of an employee for poor work performance, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance.

(7) At the meeting, the employer shall outline reasons for action to be taken and allow the employee and/or the representative to make representations, before finalizing a decision.

(8) The employer shall consider any representations made and, if these are not accepted, explain why.

(9) The outcome of the meeting shall be communicated to the employee in writing, with brief reasons."

[Emphasis is added].

After carefully perused the record of the matter the court has found that, the applicant complied with the procedure for termination of employment of the respondent on poor work performance prescribed hereinabove. The court has come to the above finding after seeing it is apparent that the respondent was reporting to Freedom House at Washington DC where the Senior Program Manager for Africa was basing. The court finds that, through those

reports the applicant was able to identify the areas which the respondent was underperforming as reflected on the letter dated 27th November, 2018.

The respondent was afforded a chance to improve her performance and the applicant was even ready to sponsor her into the recommended courses to be taken for the performance improvement but still the respondent was under performing. The applicant was notified of the meeting concerning her work performance on 8th March, 2019 and the meeting was conducted on 14th March, 2019. She was afforded a fair hearing as per the minutes concerning Chief of Party Performance, which was not accepted by the CMA because it was not signed.

After the court going through the said documents, it has found the same was valid minutes of the meeting on the reason that, under the administrative system of the applicant, the management is in Washington D.C that is why the meeting was conducted through skype. This court would have ignored the same if the respondent would have disputed the contents of the said meeting. However, that was not the position.

On her part the respondent alleged that she was not suspended as per Rule 27 (1) of GN. No. 42 of 2007. The issue of suspension is not mandatory for the employer to do it as the same is done for the purpose of enabling the employer to investigate allegations of misconduct or incapacity. If there is no investigation which requires an employee to be suspended there is no reason of suspending an employee. Therefore, the issue of not suspending the respondent before terminating her employment cannot be a ground of making the court to find termination of her employment was unfair.

Coming to the 3rd issue of the reliefs the parties are entitled, the court has found the arbitrator awarded the respondent 40 months' salaries as a compensation for legitimate expectation of serving the applicant for the duration of the program for which she was recruited. The said award was made under section 40 (1) (c) and 41 (1) (c) of the ELRA. The court has found that, it is not only that there is no section 41 (1) (c) in the mentioned law but also as the court has already found termination of employment of the respondent was both substantively and procedurally fair, then the respondent was not entitled to be paid the compensation awarded to her by the CMA.

In the light of the above stated observation the court has found the application for revision filed in this court by the applicant deserve to be granted. Consequently, the entire award issued by the CMA is hereby revised, quashed and set aside for being irrational. The court is ordering the respondent be paid her statutory right of one month salary in lieu of notice provided under section 44 (1) (c) of the ELRA if she has not been paid and be issued with certificate of service provided under section 44 (1) (c) and (2) of the ELRA if it has not been issued to her. It is so ordered.

Dated at Dar es Salaam this 26th day of January, 2022.



I. Arufani

JUDGE

26/01/2022

Court: Judgment delivered today 26th day of January, 2022 in the presence of Ms. Blandina Kihampa, Advocate for the Applicant and in the presence of Mr. Msangalufu Mwamasika, Personal Representative for the Respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

26/01/2022