IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 550 OF 2020

JOYLAND INTERNATIONAL SCHOOL ..... APPLICANT

VERSUS

SAMO SAMO MNANKA.....1st RESPONDENT

ONESMO MRISHO.....2nd RESPONDENT

FAROUQ KAKURWA.....3rd RESPONDENT

ISDORI MLELWA.....4th RESPONDENT

ELIA ELIEZA.....5th RESPONDENT

FRANK RWEJUNA.....6th RESPONDENT

LUKA YOHANA.....7th RESPONDENT

JULIETH MWAKISYALA.....8th RESPONDENT

DICKSON MJARIFU.....9th RESPONDENT

SHIJA MANONI.....10th RESPONDENT

DENIS HERMAN.....11thRESPONDENT

GEORGE PIUS.....12thRESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Temeke)

(Wandiba: Arbitrator)

Dated 20th November, 2020

in

CMA/DSM/TEM/103/2020/54

JUDGEMENT

24th March & 29th April 2022

Rwizile, J

As the record shows, parties to this application had a labour disputed way back 2019. The applicant, a school had employed the respondents as

teachers. They had renewable contracts of one year each. When their relationship turned hostile, the respondents were terminated. They were however, not satisfied. They filed a dispute with the CMA, claiming for severance pay, notice of termination, two months' salary remaining in their contracts for November and December 2019.

The CMA, upon hearing of their claims was satisfied that termination breached their terms of contracts and allowed their claims as prayed. The applicant was therefore ordered to pay a total amount of TZS 30,235,384.61. This order however, did not please the applicant hence this application.

The applicant has advanced two grounds for which this application is based. In her affidavit sworn by Deogratius Evodius, a principal officer, the applicant has issues at paragraph 8 that;

i. Whether it was legally justifiable for the Commission to hold that the applicant herein failed to comply with the procedure for terminating the respondents.
ii. Whether the order to pay the respondents herein was justifiable and/or an appropriate remedy.

When the matter came for hearing, Mr.Charles Benard Yotam of South *Law Chambers* advocates for the applicant appeared to argue the

application, Kisyeri Cosmas and Innocent Beda Msofe of Verum Attorneys and associates appeared for the respondents.

Making oral arguments before this court, it was argued for the applicant on the first ground that, the matter was on breach of contract and not termination as it was held in the case of **Upendo Malisa vs Kassa Charity Secondary School**, Revision No.68 of 2019 at page 14. It was argued that the respondents' contracts were not terminated. Instead, it was added, they absconded from their duties. The applicant, he argued, was aware of the respondents' case when it was filed at the Commission.

On the second ground, it was argued that payment for months of November and December 2019 was done without good cause. The learned counsel further submitted that based on the decision of this court in the case of **Upendo Malisa** (supra) at page 15, salary is paid for work done. Since they were not on duty, he added, they should not have been paid. The learned counsel asked this court to set aside the award.

For the respondents', Mr. Kisyeri argued that the application before the commission was based on unfair termination and not breach of contract. He argued that based on the award at page 2, the discussed issue is termination of employment and not breach of contract. He added therefore that the case of **Upendo Malisa** (supra) is distinguishable. It was his view further that the applicant did not comply with section 37 of

the Employment and Labour Relations Act for failure to prove fairness of termination in substance and procedure.

He argued that the respondents were proved to have been on duty on 28th based on exhibit JLS-5 as tendered by the applicant. The question of termination due to absenteeism, he argued, was not proved by the applicant. Reference was made to the case of **Kaizilege and Kemibos High Schools vs Esau Ndyetabula,** Revision No.11 of 2020 at page 5 and 6. The applicant, in his view, did not follow termination procedures as held in the case of **JS.Gear Exprocom AB (T) Ltd v Jumbe Karala and another,** Revision No. 04 of 2019.

When submitting on the second point, it was stated that the dispute is centred on payment of salaries only. In his view, other matters of fairness of termination are admitted. He therefore asked this court to dismiss the application.

By way of re-joining, it was submitted for the applicant that page 7 of the award clearly stated that the dispute is breach of contract, not unfair termination. The CMAF1 was clear about it. Lastly, he said, since the respondents were absent from duty, the award was unfair. He asked this court to set the same aside.

May be, it is important to start with the re-joining statement of the applicant's counsel. The commission categorically held, there is a

difference between breach of contract and unfair termination. In the view of the arbitrator, which I entirely share, the two are differentiated by remedies. Whereas the latter is not governed by law, the former has remedies clearly stated under the law.

I have to point out in certain terms that what determines the nature of the dispute whether here, or before the commission, is not the arguments of the parties. It is, in all forms governed by their pleadings. This is based in a common law principle that parties are bound by their pleadings. Before the commission, pleadings are commenced by CMAF1. The respondents were specific that their claims based on breach of contract. Indeed, breach of contract has been pleaded. The respondents brought evidence to prove the same.

Dw1, in his evidence, said that they were all employed as teachers. This is not in way disputed. As well, there was a conflict between the two parties that is proved by exhibits C1-C4. The applicant also disputes nothing in this respect. There is evidence therefore that by the time the dispute was brought before the commission in 2019, the respondents' contracts had expired. The evidence is not clear as to when the same commenced and ended. But there is evidence by the applicant which admits that there was default of payment of salaries for November and December 2019. There was a promise in exhibit C4 that the same would

be paid by 10th January 2020. This letter is dated 8th November 2019. It was plain that the respondents were not at that time working. The reason for not working, it can be gathered from exhibit C2 which shows there was long time failure of payment of salaries.

Exhibit C2, it is recalled is dated 25th October 2019. This letter was an information that their salaries have to be paid before the stated date. Since this was not dealing with salaries paid to them by the decision of the commission, which dealt with salaries of November and December, it is clear therefore, that the evidence of Dw1 bears weight. The respondents had long standing claims against the applicant.

In order to determine the first ground therefore, one would conclude that failure to pay salaries of the employees in time, amounts to breach of contract. Presumably, in the hierarch of responsibilities of the employers, payment of salaries is in my view ranked higher than others. One cannot therefore hold that the applicant had any justifiable reason for failure to pay the salaries of the respondents. It follows therefore that breach of contract was proved by the respondents before the commission. This, therefore answers the first issue in the affirmative.

Turning to the second issue, whether the commission was justified to order payment to the respondent in the manner it was done. The root of this issue is centred on the claims in CMAF1. The claims of two month's

salary, I think was proved. I have shown how ample evidence was poured by the respondents before the commission. Reference is made to exhibits C2 to C4. The applicant did not tender any tangible evidence to water down the respondents' case. The commission was keen in its analysis on what should be paid. I agree with the commission, there was enough evidence showing in terms of how many months were remaining in their contracts when the conflict arose. That is why, the same were not compensated more than 2 months proved were in arears.

The respondents were paid severance pay, the uncontroverted evidence shows, it the 1st respondent alone who testified that he was employed on 5th January 2019 and his contract was to complete in 5th January 2020. The rest of the respondents did not secure evidence to prove when they were employed. It is clear to me that there was no evidence that they had all served for more than 12 months. The document relied upon by the Commission to award the same to five of the respondents named at page 8 of the award is called ***Jedwli la majumuisho***. This in my view is not evidence that can be based to make a determination. Therefore, this court is convinced that there was no proof that the respondents had served for at least 12 months to enjoy the reliefs under section 42 of ELRA. To determine the last issue therefore, it is clear to me that the commission was right in all reliefs given except payment of severance pay as I have shown above.

Having said what, I have said, I partly allow this application to the extend explained. Therefore, the respondents are entitled to the following reliefs;

i. Two months salaries for November and December 2019
ii. Notice of one months to Onesmo Mrisho, Farouq Kakurwa, Frank Rwejuna, Julieth Mwakisyala, Dickson Mjarifu and George Pius.
iii. And leave to all the respondents.

The applicant is therefore to pay in total the sum of TZS 29,320,000.00 to the respondents. Parties to take care of own costs.

A.K. Rwizile

JUDGE

29.04.2022