

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

*(ARISING FROM LABOUR DISPUTE NO. CMA/DSM/KIN/846/20/10/21)*

**REVISION NO. 266 OF 2021**

**BETWEEN**

**SUMBUKO ZAKARIA..... APPLICANT**

**VERSUS**

**SOCIAL ACTION TRUST FUND..... RESPONDENT**

**JUDGMENT**

**K. T. R. MTEULE, J.**

**15<sup>th</sup> August 2022 & 18<sup>th</sup> August 2022**

The applicant filed the present application challenging the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni (CMA) in Labour Dispute No. CMA/DSM/KIN/846/20/10/21 dated 11<sup>th</sup> June 2021 delivered by Arbitrator Nyagaya P. The dispute arose out of the following context. The applicant and the Respondent engaged into a written employment contract where the Applicant was employed as an Information Technology and Maintenance Officer under fixed term contract of two years. Their employment relationship ended on 15<sup>th</sup> October 2020 where the Applicant alleged the respondent on breach of contract. The applicant referred the

matter to the CMA on 26<sup>th</sup> November 2019 claiming for compensation for breach of contract. At the CMA, a point of law regarding the time of filing dispute was raised by the respondent. CMA decided found the matter to be time barred and dismissed it.

Aggrieved by the CMA's decision, the applicant filed the present application praying for this Court to call for the records of the proceedings CMA, revise it and set aside the whole decision and make appropriate order. The Applicant further prayed for costs of the application and any other order the Court may deem just to grant.

The Application is supported by the Applicant's affidavit where at Paragraph 11, three grounds of the revision have been laid as follows;-

1. That the Mediator erred in law and fact for failing to take into consideration that the claim of breach of contract should be filed within sixty days from the date of the breach of contract.
2. That Mediator the erred in both law and fact in dismissing the application without considering that the applicant had denied a right to be heard without any justifiable cause and

3. That the mediator erred in law and fact for not determining the matter on merit.

By a way of counter affidavit, the Respondent disputed the Application and maintained that the Application in the CMA was filed out of time hence the arbitrator was correct to have dismissed it.

On hearing, the Applicant enjoyed the legal service of Mr. Jeston Justin Mhizwi, Advocate whereas the Respondent was represented by Mr. Emmanuel Godson Miage, Advocate. The hearing of the application was by way of written submissions.

Arguing in support of the first ground as to whether the matter was filed out of time Mr. Jeston Mhizwi submitted that the applicant referred the dispute to the Commission by filing the required CMA Form No. 1 and therein highlighted the nature of the respective matter to be "breach of contract". He submitted further that the actual dispute was expressly stated to have arisen on 15<sup>th</sup> October 2020 while the dispute was filed on 24<sup>th</sup> November 2020. He asserted that the matter was instituted at the Commission within the statutory time as per **Rule 10(2) of the Labour Institution (Mediation and Arbitration) Rules G.N No. 64 of 2007** which directs all

other disputes to be referred to the Commission within sixty days from the date when the dispute aroused.

Mr. Jeston Mhizwi argued that even in mediation stage, the dispute was of breach of contract as stated in CMA Form No. 6 (Certificate of Non settlement). He challenged the arbitrator for changing the matter and treat the breach of contract to mean unfair termination. In Mr. Mhizwi's view, there is a difference between breach of contract and unfair termination. In supporting his contention, he cited a range of cases including the case of **Juma Aloyce Chananja and Jafari Hamis v. Kaserkandis Construction and Transport Co. Ltd, Revision No. 3 of 2021, High Court o Tanzainia, at Mwanza, (unreported).**

In reply to the application Mr. Emmanuel Miage submitted that Rule 10(1) of the Labour Institution (Mediation and Arbitration), Rules G.N No. 64 of 2007 states clearly that all dispute relating to unfair termination should be filed at CMA within thirty days from the day when it arose.

Mr. Emmanueli Miage submitted that according to the CMA Form No.1, the dispute arose on 15<sup>th</sup> October 2020 the day when the applicant was terminated from employment. He averred that after the

termination, the applicant filed the dispute at CMA on 24<sup>th</sup> November 2020 that's means there was a delay of 41 days contrary to Rule 10(1) of GN. No. 64 of 2007.

It was further submitted that since the matter was filed out of time then CMA lacked jurisdiction to entertain it. He stated that applicant ought to have filed an application for condonation for the CMA to establish as to whether the applicant had a good cause for delay. Cementing his position, he cited the case of **Peter's Secondary School v. Heri Gabriel**, Rev 273 of 2018. He goes on by challenging cases cited by the applicant including the case of **Aizack Adam Malya versus Willy Mlinga, Revision. No. 443 of 2019** as it purely concerns salary arrears and not termination of employment. But the case of **Juma Aloyce Xhananja and 1 another v. Kaserkandis Construction and Transport Co. Ltd**, Revision No. 3 of 2021, High Court of Tanzania, at Mwanza, (unreported) concern unpaid leave and whether there was a contractual relationship.

Having considered the submissions made by both parties, affidavit and counter affidavit and CMA record I find that the issues for determination in disposing this application is **whether the**

**applicants have provided sufficient cause/ground for this Court to revise the CMA award.**

In this application the applicant argued only two issues among the ones raised in the affidavit, I will account the unargued issue as disregarded. I will therefore start with the question as to whether the breach of contract should be filed within sixty days from the date of the breach of contract. This was the center of dispute, particularly on time of filing application relating to breach of contract. The relevant provision is Rule 10 (1) (2) of G.N No. 64 of 2007 which provides; -

*'10 (1) Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate.*

*(2) all other disputes must be referred to the Commission within sixty days from the date when the dispute arised.'*

It is undisputed that **Rule 10(1) (2) of G.N No.64 of 2007** directs time limit of filing application of two categories; first, the disputes which fall under fairness of an employee's termination while the second one referring to other disputes which do not fall under

fairness of termination. At the CMA the arbitrator found that the matter was filed out of time hence dismissed it. Her reasoning was based on the fact that the Applicant was seeking compensation for the remaining months for breaching a specific term contract which was terminated before expiry. The arbitrator interpreted this scenario as a termination of the dispute and found it covered by Rule 10 (2) of G.N No. 64 of 2007 which requires filing of complaint to be within 30 days. Was this interpretation correct?

The law has made a distinction between fairness of termination of employment contract and other claims which are not related to termination of employment contract. In this regard, one has to differentiate between the breach of employment contract and breach of terms of employment contract. In the CMA Form No. 1 which contains the applicant's pleadings, Part B is filled by the applicant stating as I reproduce hereunder.

***"BREACH OF CONTRACT BY TERMINATION  
WITHOUT LEGAL AND JUSTIFIABLE CAUSE"***

In determining the above claim, there is no way can a decision maker conclude the matter without exploring the fairness of the termination

of the contract. The words "without legal and justifiable cause" entails examination of fairness of the termination of the contract.

Apart from that claim under Item 4 (the expected outcome) of Form No 1, The Applicant is claiming for compensation of the remaining period of contract, which is 18 ½ months. In my view, this means that there was unfair termination resulting from breach of employment contract which ended applicant's employment. Since the breach of contract resulted from unfair termination, then one could not treat it as other disputes like unpaid leaves or salary claim while an employee is continuing to render his service. This is what distinguishes the instant case with the cases cited by the Applicant. As rightly submitted by the Respondent's counsel, that in **Aizack Adam Malya versus Willy Mlinga, Revision. No. 443 of 2019** it is purely concerned with salary arrears and not termination of employment; while **Juma Aloyce Xhananja and 1 another v. Kaserkandis Construction and Transport Co. Ltd**, Revision No. 3 of 2021, High Court of Tanzania, at Mwanza, (unreported) concerns unpaid leave and whether there was a contractual relationship.

From the foregoing, I agree with the arbitrator that the matter falls under unfair termination, and it is covered by **Rule 10(1) of G.N**

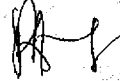


**No.64 of 2007.** In such circumstances, the applicant's dispute was supposed to be filed within 30 days and not 60 days as asserted by the applicant's Counsel. From the above reasoning I have to say that the framed issue is answered negatively.

It is for the above reason I find the application unfounded and uphold the Arbitrator's award. The Application is dismissed for lack of merit. I give no order as to the cost since the matter is a labour dispute.

It is so ordered.

Dated at Dar es Salaam this 18<sup>th</sup> day of August 2022.



KATARINA REVOCATI MTEULE

**JUDGE**

**18/08/2022**

