IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 465 OF 2021

MACEDONIA NURSERY AND PRIMARY SCHOOL ..... APPLICANT

VERSUS

FRANCO CHACHA NYAKIMORI ..... RESPONDENT

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

(Chrisantus, Arbitrator)

Dated 30th June 2020

in

REF: CMA/DSM/ILA/165/2020/95/2020

JUDGEMENT

27th June & 12 August 2022

Rwizile J

This application is against the decision of the Commission for Mediation and Arbitration (CMA) delivered by Hon. Lucia Chacha, Arbitrator in labour dispute No. CMA/DSM/ILA/165/2020/95/2020. At the CMA the respondent instituted a dispute of breach of contract against his former employer, the applicant. The respondent stated that he was employed by the applicant as a teacher in a fixed term contract of two years which commenced on 02nd May 2017 and ended on 02nd July 2019. After expiry of the contract, parties entered into another contract which began on 03rd May 2019 to end on 03rd May 2021.

However, on 20th August 2020, the respondent was terminated from his employment. As stated earlier, aggrieved by termination, the respondent referred the dispute of breach of contract to the CMA.

After considering evidence of both parties, the CMA found that there was breach of contract because the respondent was unfairly terminated. Therefore, the CMA awarded the respondent a total of TZS. 9,880,000.00 being 13 months salaries as a remaining period of the contract.

Aggrieved by the award, the applicant, filed this application urging the court to determine the following grounds: -

i. *Whether failure to read an admitted document after admission is fatal.*

ii. *Whether failure by the Arbitrator to append her signature after every page of the witness statements during examination in chief and cross examination is fatal.*

iii. *Whether CMA is bound in the conduct of its proceedings by the strict rules of procedures in receiving evidence during trial of the complainant.*

iv. *Whether the principles of unfair termination do apply at CMA while hearing and determining the disputes based fixed term contract.*

v. *Whether the Arbitrator erred both in facts and law when she failed to consider the electronic signature evidence which was showing the extent on how the complainant committed some serious gross misconduct by absconding from work for more than 60 days.*

vi. *Whether the Arbitrator erred both in facts and law when she failed to give an opportunity to an employer to prove whether termination was fair.*

vii. *Whether it was right for the employer to prove his unfair termination before the employer could prove fairness of termination.*

Arguing in support of the application Mr. Bana jointly argued the sixth and seventh issues and the rest were separately argued. Starting with the first issue, Mr. Bana submitted that when documents are tendered, they should be read over to the parties for the purpose of cross examination. He submitted that when the respondent tendered the employment contract (exhibit P1), it was not read over to the parties hence infringed the applicant's right to be heard. The Counsel argued that such irregularity vitiates the proceedings.

Coming to the second issue, Mr. Bana submitted that the Arbitrator did not append signature at the end of every witness's evidence hence vitiates the proceedings. To support his submission, he referred the court to the case of **Baraka Imanyi Tyenyi vs Tanzania Electric Company Ltd and another**, Civil Appeal No. 38 of 2019.

Regarding the third ground, Mr. Bana submitted that parties at the CMA are laymen and are represented by lay members. He stated that the applicant when defending the case informed the Arbitrator that his evidence was in his opening statement, however, the Arbitrator disregarded the same and proceeded to determine other issues. The counsel submitted that the Arbitrator ought to have considered the evidence which was in the applicant's opening statement, since the labour court is a court of equity. To support his submission, he cited the case of **Zanzibar Telecommunication Limited v Ali Hamadi Ali and 105 others**, Civil Appeal No. 295 of 2019 and **Sharaf Shipping Agency (T) Ltd v Bacilia Constantine & 5 others**, Civil Appeal No. 56 of 2019.

Regarding ground four, Mr. Bana submitted that a fixed term contract does not apply rules of unfair termination as it was held in the case of **Asanterabi Mkonyi v TANESCO**, Civil Appeal No. 53 of 2019. He

stated that the Arbitrator ought to have dealt with terms of the contract breached.

As to the fifth ground, Mr. Bana submitted that this is the first appellate court and it is bound to step into the shoes of the first court. He submitted that electronic evidence keeps records of attendance of the employees annually. He added, the CMA did not consider the evidence tendered properly and therefore urged the court to step into the CMA's shoes and consider such evidence. To support his submission, he referred the court to the case of **Abuu Kahaya Richael v The Republic**, Criminal Appeal No. 577 of 2017.

Mr. Bana went on to submit that the respondent checked in on 11th December 2019 and came back to work on 13th February 2020. No reason for abscondment were adduced. He insisted that the applicant justified why he terminated the respondent because he absconded from work for 5 consecutive days.

Turning to the sixth and seventh grounds, Mr. Bana submitted that Rule 24(3) of GN 67/2007 requires the employer to start defending disputes of unfair termination.

However, in this case, the respondent started to prove the fairness of termination. In his view, the anomaly amounted to serious irregularity

hence the CMA proceedings should be quashed and trial denovo be ordered.

Responding to the first ground Mr. Denis submitted that the applicant was afforded the right to cross examine in all matters.

As to the second ground, he simply submitted that all parties were present at the hearing. He argued, the evidence of witnesses was duly signed at the end by the arbitrator.

On allegation against admission of exhibits, Mr. Denis submitted that the applicant's exhibit was admitted as exhibit D1.

Turning to the fourth ground, Mr. Denis submitted that the dispute was about breach of contract and not unfair termination as submitted by Mr. Bana. He added, the dispute being of breach of contract the applicant was not duty bound to start defending the case in terms of Rule 24(3) of GN 67/2007.

As to the fifth ground, it was submitted that there was no notice of electronic evidence pursuant to section 18(1)(2)(3) of the Electronic Transaction Act, (Act No. 13 of 2015). He stated that the document was tendered in contravention of the law, hence the CMA did not consider the same.

Regarding the last grounds, an argument was similar to the fourth ground. He added, that both parties agreed, the contract to be of a fixed term, hence the authorities cited are irrelevant. The personal representative further submitted that at the CMA, evidence is governed by Rule 22(1) of GN 67/2007. It was argued that the exhibit to be considered should have been tendered and admitted. He supported it with the case of **Sharaf Shipping Agency (T) Ltd (supra)**. In the upshot, he urged the court to dismiss this application.

In a rejoinder, Mr. Bana reiterated his submission in chief. But added on the fourth ground that, he cited many authorities which were not challenged by Mr. Denis, hence the same be considered by the court. He added that, electronic evidence was not challenged by the respondent thus, the Arbitrator should have considered the same. He, therefore asked the court to order trial denovo.

I have considered the parties submissions for and against this application, I find the court is called upon to determine the grounds of application as listed above, therefore the court will proceed to determine them one by one.

The first and the fifth grounds will be jointly determined as parties submitted. Starting with the first ground, as to whether failure to read

an admitted document after admission is fatal. The contested exhibit is the termination letter (exhibit P1). In his submission, unfortunately, Mr. Bana has not cited any provision of the law which mandatorily require the Arbitrator to read over the exhibit to the parties before it is admitted. I believe the referred principle is developed in case laws though none of the decision has been cited.

Nonetheless, after perusal of the CMA records, the court noted that during admission of the contested exhibit, the applicant was present via the representation of Mr. Adam Matiku, applicant's Human Resource Officer. The records indicates that the respondent testified that he was terminated from employment and prayed for the termination letter to be admitted as part of his evidence. On his part the applicant's representative had no objection on the applicant's prayer.

Then the Arbitrator proceeded to admit the contested exhibit. Hereunder is the summary of what transpired in the records: -

'Mlalamikiwa: sina pingamizi

Tume: Kielelezo kinapokelewa kama kielelezo P1 hakijasomwa'

Therefore, in the circumstances of this case, it is my view, that the termination letter was properly admitted by the Arbitrator. Since the

applicant was present, if he had any objection on the content of the termination letter written from his own office, he ought to have raised the same before admission but not at this stage. I think, the rule that documents admitted should be read does not have a legal backing. As I have said, there is no law or case law and the advocate has not cited any, that holds that such a procedure to be applied in the proceedings before the CMA and that failure to observe the same renders it nugatory.

As to electronic evidence alleged to have been disregarded by the Arbitrator, first the same was wrongly admitted during cross examination. As a matter of procedure all evidence is supposed to be tendered during examination in chief. Again, it should be noted that an exhibit may be admitted, but during assessment, it may be found to have no probative value. This is the position of the court in the case of **Edward Sijaona Mwinamila v. Abdul Idd Almas Katende**, Land Case Appeal No. 59 of 2019, High Court of Tanzania, Bukoba Registry (unreported) where it was held that: -

> *"But it should be noted that admitting an exhibit is one thing and an assessment of the exhibit to determine its weight/its probative value is another thing altogether. Thus, admission of*

the exhibits is not synonymous with its relevance. The weight and content of it can still be objected..."

In the basis of the above analysis, it is my view that although the electronic evidence was admitted, it had no sufficient value to counter the respondent's evidence. Thus, the grounds in question lacks merit.

Regarding the third ground as to whether CMA is bound in the conduct of its proceedings by the strict rules of procedures in receiving evidence during trial of the complainant. Mr Bana submitted that the Arbitrator disregarded the applicant's opening statement while his representative testified that his evidence was contained therein.

It has been decided by the court of appeal that opening statements cannot act in lieu of evidence of the parties. A party has to prove each fact pleaded in the opening statement. This is the position in the case of **Fredy Ngodoki v Swissport Tanzania Plc**, Civil Appeal No. 232 of 2019 where the court held that:-

"We are well aware of the existence of the respondent's opening statement at page 28 of the record of appeal, but that one had clearly no evidential value and could not be acted upon in lieu of testimonial accounts of witnesses or

documentary evidence. The respondent's opening statement remained, but it was not by way of evidence tested."

In line with the above quoted decision, it is my view that the Arbitrator was not bound to consider the applicant's opening statement. Therefore, the cases cited by Mr. Bana to invite this court to step into the shoes of the Arbitrator are irrelevant. Hence, this ground also lacks merit.

In the first issue, the applicant wants this court to determine whether failure by the Arbitrator to append her signature after every page of the witness statements during examination in chief and cross examination is fatal. The relevance to append signature at the end of every witness's testimony is emphasized in various Court of Appeal decisions which are binding to this court, including the case of **Baraka Imanyi Tyeni v Tanzania Electric Supply Company Ltd** (cited by the applicant's Counsel) where it was held that: -

"The purpose behind a judge or magistrate appending signature at the end of each witnesses' testimony is to ensure the authenticity and veracity of the court's proceedings as it has been pronounced in the various decision of the Court."

Although the laws governing proceedings before the CMA are silent on the requirement to append signature at the end of every witnesses'

testimony the court of appeal in the case of **Iringa International School v Elizabeth Post**, Civil Appeal No. 155 of 2019 the court had this to say:-

> *"Although the law governing proceedings before the CMA happen to be silent on the requirement of the evidence being signed, it is still a considered view of this Court that for purposes of vouching the authenticity, correctness and providing safe guards of the proceedings, the evidence of each witness need to be signed by the arbitrator. On this, we need to draw inspiration from the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) wherein it is mandatorily provided that the evidence of each witness must be signed. Order XVIII rule 5 of the CPC provides as follows:*
>
> *"The evidence of each witness shall be taken down in writing, in the language o f the Court, by or in the presence and under the Personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and the judge or magistrate shall sign the same. "*

Further, under section 210(1) of the CPA it is provided that:

"S, 210(1) In trials other than trials under section 213, by or before a Magistrate, the evidence of the witnesses shall be recorded in the following manner-

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record"

In line with the above cited court decisions, it is my view that appending signature at the end of every witness's testimony is mandatory though the laws governing CMA do not provide so. The only signature appearing on the proceedings is after the last order of adjournment. But it is also clear that the evidence was taken in the same transaction. It was not taken differently and the parties did not complain that the evidence taken by the arbitrator was not as accurate as it was testified. Therefore, this case is quite different from the decisions cited. This ground has no merit as well.

Regarding the fourth ground as to whether the principles of unfair termination apply to fixed term contracts. This issue has been addressed

by the recent court of appeal decision in the case of **St. Joseph Kolping Secondary School v Alvera Kashushura**, Civil appeal No. 377 of 2021 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 line with the above cited provision which is binding to this court, it is my view that the principles of unfair termination do not apply to fixed term contracts. I have also noted Mr. Bana's submission that since it was the dispute of unfair termination the applicant ought to have started to defend the case. Indeed, that is the correct position of the law as it is provided under Rule 24(3) of GN 67/2007 which provides as follows:-

> *"The first party to make an opening statement shall present its case first throughout the proceedings. If the parties do not agree about who shall start, the Arbitrator shall be required to make a ruling in this regard.*

Provided that, in a dispute over an alleged unfair termination of employment, the employer will be required to start as it has to prove that the termination was fair."

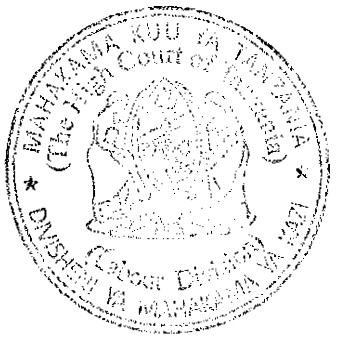
Looking at the record of the matter at hand, it is crystal clear that the respondent referred the dispute of breach of contract as it is indicated in the referral form (CMA F1).

Therefore, since the dispute was for breach of contract the respondent rightly started to present his case.

Turning to the last issues, Mr. Bana alleges that the Arbitrator did not consider the evidence properly. I have critically examined the records, the termination letter (exhibit P1) indicates that the respondent was terminated from employment on the ground of absenteeism which falls under misconduct. The procedures for termination of employment on such ground are provided under Rule 13 of GN 42/2007. Looking at the matter at hand, the laid down procedures were not followed at all.

The applicant was not afforded with the right to be heard before termination. He was neither summoned to the disciplinary meeting to answer the allegations against him. Such conduct is against the principles of natural justice. In the premises, I fully agree with the Arbitrator's findings that the respondent was unfairly terminated from

employment hence, there was breach of contract. I find the present application has no merit. All grounds of revision raised by the applicant have no merit. In the event, the application is dismissed with no order as to costs.



A. K. Rwizile

JUDGE

12.08.2022