IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 48 OF 2021

CLEOPHACE NKUNDA ..... APPLICANT

VERSUS

ST. ANNE MARIE ACADEMY ..... RESPONDENT

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

(Mbeyale: Arbitrator)

Dated 22nd December 2020

in

REF: CMA/DSM/KIN/357/19

JUDGEMENT

14th July & 26th August, 2022

Rwizile, J

The application emanates from the decision of the Commission for Mediation and Arbitration (CMA). This Court is asked to call for proceedings, revise and set aside the award of the CMA dated 22nd December 2020.

Briefly, it has been stated that the applicant was employed by the respondent on 15th June, 2016 as a mason and bricklayer. He was

terminated on 07th May, 2019 for alleged misconduct. Being dissatisfied, he filed a labour dispute at CMA for unfair termination.

At mediation stage they partly agreed and the applicant was provided with certificate of service. The award was not on his favour, he was not happy with it, hence this application.

The application is supported by the applicant's affidavit which raised two grounds for revision as hereunder;

i. *Whether the arbitrator was correct in deciding that the applicant worked with the respondent for 5 (five) months.*

ii. *Whether the applicant's contract of employment was lawfully.*

The application was heard by written submission. The applicant enjoyed the services of Mr. Elias Pazzia, Personal Representative while Mr. Dickson Johnson Ngowi, learned Advocate appeared for the respondent.

Mr. Pazzia on the first ground submitted that, the arbitrator's finding that the matter falls under section 35 of the Employment and Labour Relations Act [CAP.366 R.E. 2019] was a mis-interpretation of the law. He stated that basing on the certificate of service, the applicant worked for the respondent from 15th June, 2016 to 07th May, 2019.

He was of the view that the arbitrator failed to interpret a fixed term contract as per section 14(1)(b) of the Act. According to Mr. Pazzia, fixed term contracts are for professionals and managerial cadres, the applicant was a mason and a bricklayer. He was also of the view that the case of **Jordan University Collage v Flavia Joseph**, Revision No. 23 of 2019 referred by the arbitrator is non comparable to the case at hand.

On the second ground, Mr. Pazzia submitted that at the hearing, neither parties nor the arbitrator who raised the issue of jurisdiction for the parties to have a chance to submit on it.

He was of the view that, in the award, it was the arbitrator who considered it and decided on it. By that act, he stated that the applicant was denied right to be heard. He then prayed for compensation of 24 months remuneration.

In reply, Mr. Ngowi started with the second issue and submitted that jurisdiction is the rock which the court on deciding matters rests. He stated that the issue of jurisdiction can be raised at any stage even suo moto. He supported his submission by citing cases of **Mwananchi Communications Limited and Others v Joshua K. Kajula and Others**, Civil Appeal No. 126/01 of 2016 (unreported), **Fanuel Mantiri Ngúnda v Herman M. Ngúnda and Another**, Civil Appeal No. 8 of

1995, Court of Appeal (unreported) as quoted in the case of **Chanshun Liu v Rebeca Daudi Mussa and Others**, Miscellaneous Application No. 387 of 2017 (unreported) and **Tusiime Holdings (T) Limited v Maria Chorobi and Allen Isaya**, Revision Application No. 378 of 2020 (unreported).

He continued to argue that, section 35 of the Act, was correctly interpreted by the arbitrator. It was his view, that the law prohibits employees with less than six months employment contract to be treated under grounds of unfair termination. He argued, the applicant was employed by the respondent under different employment contracts. This, he added, does not change the fact that he was under fixed term contract. He further stated that the applicant worked only for five months and so cannot be covered under provisions of unfair termination.

The learned counsel submitted further that the applicant's contract commenced on 01st January, 2019 and was supposed to end on 30th December, 2019 as per exhibit D1, he was terminated on 07th May, 2019. For him, there is no unfair termination on a fixed term contract. To cement his submission, he cited cases of **Msambwe Shamte and 64 Others v Care Sanitation and Supplies**, Revision No. 154 of 2010 as quoted in the case of **Jordan University Collage v Flavia Joseph (supra)** and

National Oil (T) Limited v Jaffery Dotto Msensemi & 3 Others, Revision No. 558 of 2016 (unreported).

Mr. Ngowi continued to vehemently argue that, the applicant being a mason and bricklayer did not qualify to be employed under a fixed term contract. He stated that parties are bound by the terms of contract. For that matter, he cited the case of **Group Six International v Musa Maulid and Another**, Revision No. 428 of 2015 as quoted in the case of **Abel Kikoti and 5 Others v Tropical Contractors Ltd**, Revision No. 305 of 2019 (unreported). He then prayed; the application be dismissed.

Upon hearing both parties, I am inclined to determine: -

i. *Whether the arbitrator was correct in holding that the applicant had fixed term contract and so was not to enjoy unfair termination provisions of the employment and Labour Relations Act.*

But to start with, the applicant stated that his contract was fixed at three years because he worked with the respondent since 15th June, 2016 until 07th May, 2019. Whereas the respondent stated that the applicant had only one year contract with the respondent. Going through the contract itself, it is evident that, parties entered a last contract which was for one

year. It was signed on 01st January, 2019. By its terms, it superseded the previous ones. It was in the following terms;

> *"**MKATABA WA AJIRI KWA FUNDI UJENZI***
>
> *Mkataba huu unajitosheleza na unasainiwa kwa makubaliano na maelewano. Baada ya kusaini makubaliano haya, hakuna madai mengine ya mdomo yatakayowasilishwa na upande wowote ule. Makubaliano haya yanafuta makubaliano ya awali baada ya kusaini Mkataba huu, na makubaliano ya awali hayana nguvu tena kwa namna yeyote ile ..."*

The arbitrator held that the applicant only worked with the respondent for five months. It was his view that, it could not be proper to hold that the applicant was unfairly terminated. The application was therefore dismissed on that ground. It is apparently clear to me that the arbitrator was wrong. The contract clearly states, it was of the period of one year. It states;

> *Kwa mkataba huu MWAJIRI NA MWAJIRIWA wanakubaliana kwa masharti na hali kama ifuatavyo;*

1. *"Mwajiriwa anaajiriwa kwa MWAKA MMOJA kuanzia tarehe 01 mwezi 01 mwaka 2019 hadi ajira itakapomalizika tarehe 30 mwezi 12 mwaka 2019 ..."*

Under section 35 of the Act, it is clearly stated that, provisions of unfair termination do not apply to an employee having a contract of less than 6 months. Since the applicant was under a contract of one year, he is therefore covered and was therefore to receive protection under sub-part E of the Act. It should be noted that sub part E contains provisions from section 35 to 40 of the Act.

It was therefore erroneous for the arbitrator to hold that since the applicant had served 5 months of the contract, he was prevented under section 35 of the Act to advance his claims. Rule 8(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 provides: -

An employer may terminate the employment of an employee if he-

(a) Complies with the provisions of the contract relating to termination;

(b) Complies with the provisions of section 41 to 44 of the Act concerning notice, severance pay, transport to the place of recruitment and payment,

(c) Follows a fair procedure before terminating the contract, and

(d) Has a fair reason to do so as defined in section 37(2) of the Act.

Further, rule 8(2)(a) and (d)(i)(ii) of G.N. No. 42 of 2007 provides for the procedure for termination of fixed term contract before its expiry date. It provides: -

Rule 8(2)

Compliance with the provisions of the contract relating to termination shall depend on whether the contract is for a fixed term or indefinite in duration. This means that-

(a) Where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract;

(b) ...

(c) ...

(d) The employer may terminate the contract

(i) By giving notice of termination; or

(ii) Without notice, if the employee has materially breached the contract

As exhibits show, the applicant has been warned several times due to actions. Exhibit D2, D5 and exhibit D3 showed the applicant was given suspension letter for being late at work, leave early before the time and to underperform.

I think, the respondent was therefore entitled to follow the procedure of termination stated in the contract of employment. The respondent did not in my considered opinion, follow procedure for termination of the said contract. Therefore, this application has merit, the arbitrator was not justified to hold as he did.

As reliefs therefore, the applicant to be compensated three months salary which is 270,000 * 3, per month = TZS. 810,000.00. The application has merit. CMA decision is quashed and orders set aside for the reasons stated above. No order as to costs.

A. K. Rwizile

JUDGE

26.08.2022