

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

LABOUR REVISION NO. 406 OF 2021

(Arising from the decision of the Commission for Mediation and Arbitration of Pwani in Kibaha in Labour Dispute No. CMA/DSM/PWN/KBH/199/2020 (Lyimo J, Arbitrator))

GEOFFREY CHRISTOPHER & 2 OTHERS APPLICANTS

VERSUS

ZHONG JUNJUN HONG SECURITY SERVICES LTD..... RESPONDENT

JUDGMENT

K. T. R. Mteule, J

2nd September 2022 & 8 September 2022

In this Application for revision, the Applicants are seeking for this court to call for the record of the Commission for Mediation and Arbitration of Pwani at Kibaha (CMA) in **Labour Dispute No. CMA/DSM/PWN/KBH/199/2020** and revise the proceedings and set aside the arbitrator's award which has been improperly and illegally procured. In the affidavit deposed by the applicants, three legal issues have been formed to constitute grounds for revision. The issues are:

- (i) Whether the disciplinary reasons given by the honourable Arbitrator constitute sufficient for the fair termination of the Applicants employment.
- (ii) Whether the Honourable Arbitrator erred in law and facts for providing arbitral award in favours of Respondent while she

was unreasonable never appear to defend the claims against her?

- (iii) Whether the Honorable Commission erred in law and facts for ignoring the arguments and evidence adduced by the Applicants herein during hearing of arbitration about the claims of unfair termination and unlawful breach of the employment Contract?

The history of the matter as derived from the parties' sworn statements and the record of the CMA traces its source from a dispute which occurred amongst the parties when the Respondent alleged the Applicants of a theft. But the Applicants were security guards on one-year fixed term employment contract. A theft incidence occurred in the respondent's premises which lead to the arrest of the applicants being implicated with the incident. The police did not proceed with the criminal matter. The applicants were charged with a disciplinary offence of negligence which occasioned the loss of the stolen properties. The disciplinary process confirmed the offence of negligence, and the applicants were consequently terminated from their employment.

Being aggrieved by the termination, the applicants lodged the aforesaid labour dispute in the CMA claiming to have been unfairly terminated and for compensation of 10 months remuneration remaining from their term of contract plus other terminal benefits to the tune of TZS 9,536,000.00.

In the CMA, the arbitrator found that there was a fair reason for termination and that the procedure was followed. The arbitrator awarded only one month salary which was illegally deducted from the salaries of the applicants. The applicants were dissatisfied with the decision of the CMA and decided to lodge this application for revision.

Despite of being served with the summons, the respondent never failed notice of opposition neither attended in court. As a result, the court allowed the matter to proceed ex-parte. The applicants were represented by Mr. Revocatus Sedede Advocates from Legal Lions Attorneys. It was argued by oral submission.

In his submissions, Mr Revocatus having adopted the affidavit of the applicants as part of the submissions, I pray to abandon the 3rd legal issue which he believe, it can be covered in the 1st and 2nd issues.

Starting with the first legal issue, as to whether the disciplinary reasons given by the Hon arbitrator constitute sufficient reasons for a fair termination of the Applicant's employment.

Mr. Revocatus submitted that the arbitrator erred in law in blessing a breach of contract which was done by the respondent on a wrong theft allegation. He faulted the arbitrator for relying on the allegation of theft and take as a grave negligence committed by the applicant's while

performing their duties and consider it as a valid reason which was sufficient to breach the employment contract.

According to Mr. Revocatus, there was no any evidence adduced in the CMA that there was a theft incidence at the workplace apart from one witness brought by the respondent as per page 5 of the award, who acknowledged that the respondents were arrested by the police force on the said theft allegation but they were later discharged when the police confirmed that there was no theft committed by the Applicants.

Mr. Revocatus challenged the arbitrator's finding that the said theft was caused by negligence of the Applicants which is contrary to item 10 of the employment contract amongst the parties hence upholding the termination of the contract. In Mr. Revocatus's view this was contrary to **Section 39 of the Employment and Labour Relations Act Cap 366 R.E 2019** which requires the employer to prove that the decision of terminating a contract was fair. According to him, the role to prove the fairness of termination is imposed on the employer and not the employee.

Referring at page 5 of the CMA award, Mr. Revocatus submitted that the employer confirmed that the contract was terminated because of theft allegation and not negligence. He thought that the reason of negligence

was generated by the arbitrator from the theft allegation since it has never been discussed in the CMA even by the employer. Referring to **Section 37 (2) of Cap 366**, he submitted that it is upon the employer to prove the fairness of the termination, and not the arbitrator. He concluded that the arbitrator erred by holding that negligence was the valid reason to justify termination.

With regards to the second issue as to whether the arbitrator erred in law by issuing a decision which favoured the respondent without any justification, Mr. Revocatus blamed the arbitrator for having considered unfinished evidence of the Respondents witness one Salumu Said. According to Mr. Revocatus this witness could not manage to give his evidence on what he said to be missing of some documents which he wanted to carry with him in the CMA. Mr. Revocatus averred that the witness prayed for another date to bring the remaining documents, but he never came back, and his evidence ended there as indicated in the proceedings of the CMA. According to Mr. Revocatus, it is as well confirmed by the arbitrator at page 5 of the award, where the arbitrator said that the respondents had not submitted their evidence and therefore it proceeded with the decision. In his view, this shows that the CMA was acknowledging that the employer could not prove before the CMA that the termination was fair as per section **37 (2) of Cap 366**.

Mr. Revocatus submitted further that the record shows that there has never been any evidence before the CMA to prove that the termination was correct. He gave an example of the disciplinary proceedings which were never submitted to the CMA. In his view, it was contrary to **section 39 of Cap 366 and Rule No 9 (3) and (5) of the Code of Good Practice, GN No 42 of 2007**, which requires the employer to prove beyond reasonable doubt and give valid reasons that the termination was fair. He contended that the respondent could not do this.

He therefore, argued that the arbitrator erred in awarding in favour of the respondent who never appeared to prove that the termination decision was correct.

Mr. Revocatus therefore prayed for the court be pleased to revise the decision of the CMA, quash it and set aside the orders therein and that the court confirms that there was a breach of contract which was unfair and contrary to employment laws. He finally prayed for the court to compel the respondent to pay compensation arising from the breach of contract as stated in CMA Form No 1.

In this application, I find it appropriate to formulate two issues. The first issue is whether there is a sufficient reason adduced by the applicant for

this court to revise, quash and set aside the decision of the CMA. The second issue is to what relief are the parties entitled to.

From the applicant's submissions, it appears that what is contested in the award is the arbitrator's finding that there was a prove of reason for applicant's termination and that the procedure was properly complied with.

It is not disputed that the Applicants were employed by the respondents under a fixed term contract. I have gone through the terms of their contracts which were tendered and admitted as exhibits in the CMA and noted that the period of the contracts were as follows. For Daudi Tandila, it commenced on 1st May to end on 30th April 2021; Magnus Cosmas commenced on 1st June 2020 expected to end 30 May 2021 while Geoffrey Christopher commenced on 1st May to end on 30th April 2021. From the foregoing, it is apparent that all the applicants were terminated before their fixed term contract expired.

It is an a legal position that any termination of a fixed term contract made before the end of the term should have reasons assigned for that termination. This is the position in **St. Joseph Kolping Secondary School versus Alvera Kashushura, Civil Appeal No. 377 Of 2021** Court of Appeal of Tanzania where the Justices of Appeal stated:

"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 addition, creation of a specific duration of contract gives the employee legitimate expectation that if everything remains constant, he or she will be in the service throughout the contractual period."

From the above authority, the fairness of both reason and procedure must be analysed and ascertained by a decision maker to ensure fairness in them.

In this application the applicants are complaining that the arbitrator did not consider the validity of the reasons used to terminate the contract but relied on an alleged theft which was never proved.

Section 39 of the Employment and Labour Relations Act, Cap 366 imposes a burden to prove fairness of termination upon the employer. As well **Section 15 (1) of Cap 366** requires the arbitrator to keep record of employees. It was expected that the respondent's witness was to produce sufficient evidence to prove the fairness of termination of the applicant and the fairness of the procedure followed.

As submitted by Mr. Revocatus, the witness in the CMA did not produce the report of the alleged disciplinary meeting held in respect of the applicants. Likewise, the witness explained that the applicants were taken to police, but they were released after the police was satisfied that they were not involved in the theft. The arbitrator's reliance on the unproved theft incidence which was not supported by any proved termination procedure is an apparent misdirection. This led the arbitrator to arrive at an unfair conclusion in finding fairness in both reason and procedure.

Consequently, it is my finding that the applicants were unfairly terminated which amounted to breach of fixed term contract. I therefore find the framed issues as to whether the applicants have adduced sufficient reasons to warrant the CMA award to be quashed and set aside answered affirmatively.

Regarding to relief, it is already established that the easiest foreseeable consequences of unfair termination of a fixed term contract is loss of remuneration which can be compensated by payment of the remaining salaries in the contract. This is the position in the cases of **Joakim Mwinukwa vs. Golden Tulip, Revision No. 268 of 2013 (unreported)** and **Samji vs. Mango Co. Ltd (2004) TLR 155.**

Guided by these authorities, I similarly hold that the relief entitled to the applicants is payment of salaries for the months remaining in their respective contracts. It is not clear in this matter if the applicants were paid the mandatory statutory benefits. But if not paid, they are entitled to such payments.

Consequently, I hereby revise the CMA proceedings, quash and set aside the award there in. I hereby order that each applicant is entitled to compensation in terms of payments of remuneration for the remaining months in their respective fixed term contracts and other terminal benefits entitled under a fixed term contract if not paid.

It is so ordered.

Dated at Dar es Salaam this 8th Day of September 2022



KATARINA REVOCATI MTEULE

JUDGE

8/9/2022