IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 568 OF 2024

(Arising from an Award issued on 21/12/2023 by Hon. Kiwelu, L, Arbitrator in Labour dispute NO. CMA/DSM/ILA/133/2021/43/2021 at Ilala)

AGA KHAN EDUCATION SERVICE TANZANIA..... APPLICANT

VERSUS

JOSEPH NICHOLAUS ACHILA..... RESPONDENT

JUDGMENT

Date of last Order: 26/2/2024
Date of Judgment: 4/3/2024

B. E. K. Mganga, J.

Brief facts of this application are that, on 20th July 2020, applicant and respondent entered a two-year fixed term contract of employment commencing on 1st August 2020 and was expected to terminate automatically on 31st July 2022. In the said fixed term contract, respondent was employed as a teacher. On 1st April 2021, applicant served respondent with a suspension letter showing that, respondent being the head of department, after DP2 Mathematics Mock papers were submitted to him by teachers in his department, the said papers were accessed by students before the scheduled examination time. On 10th

May 2021, applicant terminated employment contract of the respondent allegedly, due to gross misconduct.

Respondent was unhappy with the applicant's act of terminating his employment as a result, on 4th June 2021, he filed Labour dispute No. CMA/DSM/ILA/133/2021/43/2021 before the Commission for Mediation and Arbitration henceforth CMA showing that applicant unfairly terminated his employment. In the Referral Form(CMA F1), respondent indicated that he was claiming to be paid (i)TZS 76,952,232/= being 24 months' salary compensation, (ii)TZS 2,206,343/= being leave pay, (iii) TZS 2,206,343/= being one month salary in lieu of notice, (iv) TZS 1,068,781/= being severance pay all amounting to TZS 84,433,699/=.

On 21st December 2023, Hon. Kiwelu, L, Arbitrator, having heard evidence of the parties, issued an award in favour of the respondent that termination was unfair. The arbitrator awarded respondent to be paid TZS 44,888,802/= being salary compensation for 14 months that is the remaining period of the contract and TZS 2,137,562 of the remaining twenty (20) days making the total amount respondent was awarded to be TZs 47,026,364/= only.

Applicant was aggrieved with the said award as a result, she filed this application for revision. In the affidavit of Fauzia Karlo in support of the Notice of Application, she raised three (3) grounds and one (1) issue namely:-

1. *That, the arbitrator erred in law and fact in awarding the complainant remedies that were not pleaded for in the complainant Form No. 1.*
2. *Whether the remedies of termination of employment contract as pleaded in CMA form No. 1 can extend to specific terms contract of the respondent.*
3. *The Commission erred in law and fact by failing to draw adverse inference to the respondent's failure to challenge the applicant testimony by way of cross examination means admission.*
4. *The Commission erred in law and facts by failure to the respondent on presences of two CMA forms without withdrawing one form, therefore render the award to be procured by irregularities.*

Respondent opposed this application by filing his counter affidavit.

When the application was called on for hearing Mr. Daniel Yona Masaga, advocate, appeared and argued for and on behalf of the applicant, while Godson Nashon, Advocate, appeared and argued for and on behalf of the respondent.

In arguing in support of the application, Mr. Masaga, learned advocate for the applicant submitted that, Respondent filed two CMA F1 one of the said CMA F1 was accompanied with annextures of respondent's claims while in the other there was no anexture. He further

submitted that, in CMA F1, respondent claimed that he was unfairly terminated but the arbitrator wrongly awarded him based on breach of contract. To support his submissions, learned counsel cited the case of ***Madonna Hospital Limited v. Tamali Stepheno Mtengwa***, Revision No. 155 of 2023, HC(unreported). He referred the court to the provisions of section 36 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] and submit that, the remedy for unfair termination does not apply to a fixed term contract. He argued that, Applicant had a fixed term contract of two years that was expected to expire on 20th July 2022 but was terminated on 10th May 2021 and concluded that respondent was not entitled to the remedy awarded. To support his submissions, learned counsel cited the case of ***Hamidfu Abdallah Mbekae & 11 Others v. Be Forward Tanzania Co. Ltd***, Civil Appeal No. 380 of 2019, CAT (Unreported). In the course of his submissions, learned counsel for the applicant conceded that, in all the two CMA F1, respondent indicated that the dispute was relating to termination of employment.

It was submitted by counsel for the applicant that, the arbitrator failed to draw adverse inference against the respondent who failed to cross examine applicant on some issues hence the evidence was unchallenged. Learned counsel argued that, respondent failed to cross

examine applicant whether it was breach of contract or unfair termination. He argued further that, failure of the respondent to cross examine witnesses, means that respondent accepted evidence of applicant to be true. To support his submissions, learned counsel for the applicant cited the case of ***Paul Yustus Nchia vs. National Executive Secretary of Chama Cha Mapinduzi***, Civil Appeal No. 85 of 2005, CAT, (unreported). Learned counsel for the respondent concluded his submissions praying that the application be allowed.

Responding to submissions made on behalf of the applicant Mr. Nashon, learned advocate for the respondent submitted that, the award is based on breach of termination because there is no distinction between unfair termination and breach of contract. To support his submissions, he cited the case of ***DRT Auto Spare Parts Limited vs. Rehema Masalapa***, Revision No. 40 of 2023, HC(Unreported). In his submissions, counsel for the respondent conceded that, in ***Masalapa's case***(supra), the court did not consider as to why the drafters of CMA F1 required the employee to fill part B that is only for termination if at all there is no distinction between termination and breach of contract. He further conceded that, CMA F1 is pleading. Counsel for the respondent further submitted that, it was proper for the arbitrator to depart from the pleadings of the parties.

On the complaint relating to presences of two CMA F1, learned counsel for the respondent conceded that there were two CMA F1 one filed on 28th May 2021 that did not have annexture or amount claimed and the other that was filed on 4th June 2021 with annexture showing that respondent was claiming to be paid TZS 84,433,699. He further submitted that, the award was issued based on the CMA F1 with annexture. He further conceded that, there was no prayer to amend CMA F1 because the record does not show that there was an order for amendment. Learned counsel for the respondent was quick to submit that, CMA had jurisdiction to act on the CMA F1 that was filed on 4th June 2021. Counsel for the respondent concluded his submissions praying that the application be dismissed for want of merit.

In rejoinder, Mr. Masaga, learned counsel for the applicant submitted that, there is a distinction between termination and breach of contract. Learned counsel for the applicant submitted further that, the distinction can be traced from CMA F1 where these disputes are put in different categories. On presence of two CMA F1, he submitted that, there was no prayer for amendment. He argued further that, in the award, the arbitrator considered the CMA F1 that was filed on 4th June 2021. He further submitted that, CMA had no jurisdiction because the

CMA F1 that was filed on 4th June 2021 attached with annextures was time barred.

I have examined evidence of the parties in the CMA record and considered rival submissions made thereon. In resolving this application, I will first consider the issue relating to presence of two CMA F1 and the effect thereof. It is undisputed by the parties that, the arbitrator acted on the CMA F1 that was filed on 4th June 2021. It was submitted on behalf of the applicant that, based on the CMA F1 that was filed on 4th June 2021, the dispute was time barred. With due respect to counsel for the applicant, according to evidence of the parties, the dispute arose on 13th May 2021 as evidenced by termination letter (exhibit D13). I have examined CMA the Referral Form(CMA F1) that was initially filed at CMA on 28th May 2021 and the one that was filed on 4th June 2021 and find that, applicant indicated that the dispute relates to termination of employment and that it arose on 10th May 2021. In terms of Rule 10(1) of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007, the dispute for termination must be referred at CMA within thirty (30) days from the date it arose. It is clear that, the referral Form(CMA F1) that was filed on 4th June 2021 was filed on the 24th day hence not time barred. It was submitted that, the CMA F1 that was acted upon by the arbitrator was filed without a prayer to amend the 1st

CMA F1 that was filed on 28th May 2021. I have examined the CMA record and find that, after filing the 1st CMA F1, no summons was issued to the herein applicant. Summons were issued on 8th June 2021 for mediation on 16th June 2021. The record shows that, when the parties appeared on 16th June 2021, before Hon. Mahindi, P.P, Mediator, they signed a certificate of non-settlement(CMA F6) showing that mediation failed. It is my view that, it was an oversight on part of the arbitrator not to record that the CMA F1 that was filed on 28th May 2021 was not operative. At any rate, no injustice was occasioned to the parties. I am of that view because, the nature of dispute in all the said two CMA F1 was the same. The only difference is that, in the CMA F1 that was filed on 4th June 2021, respondent indicated the amount he was claiming while in the former he did not. In my view, failure by the respondent to indicate the amount he was claiming in CMA F1 he filed on 28th May 2021 is inconsequential as I will explain in this judgment. I therefore dismiss criticisms levelled against the arbitrator in relation to CMA F1.

It was submitted that, the arbitrator erred for not drawing adverse inference against the respondent who failed to cross examine applicant whether the dispute was breach of contract or termination. With due respect to counsel for the applicant, adverse inference cannot be drawn merely for failure to cross examine. Failure to cross examine a witness,

makes evidence of that witness to be deemed as true. See the case of ***Issa Hassani Uki vs Republic*** (Criminal Appeal 129 of 2017) [2018] TZCA 361 (9 May 2018), ***Paulina Samson Ndawavya vs Theresia Thomasi Madaha*** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019) and ***Nchia's case***(supra). It is not a requirement of the law that a party must cross examine a witness to every statement or evidence adduced. The party can only cross examine the witness of the opponent for various reason. One; to lay a foundation for his possible defence or his or her case. Two; to discredit evidence of the witness. In my view, if a party thinks that cross examination will not advance his or her case, or will not discredit the witness or that, the evidence is immaterial, cannot cross examine the witness of the opponent. In my view, failure to cross examine will only affect the one who failed to cross examine if that evidence is found to be material to the case. Submissions that respondent did not cross examine applicant whether the dispute was termination or breach is immaterial because, from the beginning, respondent indicated that the dispute relates to termination. I have read evidence of the parties and find that, there was no reference to breach of contract. Therefore, submissions by counsel for the applicant has no merit.

On the other hand, adverse inference can be drawn if there is non-disclosure of important information or evidence which would have been against the person who was supposed to adduce it. See the case of ***Lazaro Kalonga vs Republic*** (Criminal Appeal 348 of 2008) [2012] TZCA 201 (7 December 2012), ***Bashiri s/o John vs Republic*** (Criminal Appeal 486 of 2016) [2019] TZCA 89 (16 May 2019), ***City Coffee Ltd vs Registered Trustee of Ilolo Coffee Group*** (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019) and ***Hamza Byarushengo vs Fulgencia Manya & 4 Others*** (Civil Appeal 246 of 2018) [2022] TZCA 833 (12 April 2022) to mention but a few. In the application at hand, it was not submitted by counsel for the applicant the nature of evidence that was not disclosed by the respondent for the court do draw adverse inference. I should also point out that, not every non-disclosure is sufficient ground for the court to draw adverse inference. In fact, the Court of Appeal put it clear in the case of ***Chandrakant Joshubhai Patel vs Republic*** [[2004] T.L.R. 218 (CA) also (Criminal Application 8 of 2002) [2003] TZCA 37 (29 April 2003)Tanzlii wherein it held:-

> *"...it is not the law that an adverse inference has to be drawn every time there is non-disclosure."*

It was submitted by counsel for the applicant relying to what was held by the Court of Appeal in the case of ***Hamidu Abdallah Mbekae & Others vs Be Foward Tanzania Ltd*** (Civil Appeal No. 380 of 2019) [2023] TZCA 62 (24 February 2023) that the herein respondent was not entitled to remedies of unfair termination. With due respect to counsel for the applicant, ***Mbekae's case*** (supra) is inapplicable in the circumstances of this case. In ***Mbekae's case*** (Supra) the parties had specific task contract unlike in the application at hand where the parties had two years fixed term contract. A distinction must be made between these two terms. Specific task is defined under section 4 of the Employment and Labour Relations Act[Cap 366 R.E 2019] as follows:-

> *"Specific task means a task which is occasional or seasonal and is non-continuous in nature."*

As pointed out shortly hereinabove, respondent had two years fixed term contract and not a specific task. Termination of fixed term contract is covered under section 36 of cap. 36 R.E. 2019(supra). My conclusion is fortified by what was held by the Court of Appeal in the case of ***St. Joseph Kolping Secondary School vs Alvera Kashushura*** (Civil Appeal 377 of 2021) [2022] TZCA 445 (18 July 2022) wherein the Court of Appeal held inter-alia 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 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. The expectation is defeated, if the same can be terminated at any time without reason.

In view of the foregoing discussions, therefore, the Labour Court Judge was right in holding that, termination of respondent's employment contract could not be fair without being based on fair reasons and procedure set out under section 37 of the ELRA."

In my view, what is excluded, as it was held by the Court of Appeal in ***Mbekae's case*** (supra) is specific task and not fixed term contract.

In the application at hand, the two-year fixed term contract of the respondent commenced on 1st August 2020 and was terminated on 10th May 2021 while respondent had already worked with the applicant for about eight (8) or nine(9) months. In fact, at the time of termination, respondent had already worked for more than six (6) months provided for under section 35 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] hence he was covered by the law and was entitled to be awarded remedies for unfair termination. Therefore, the arbitrator having found that termination of the fixed term contract of the respondent was unfair, cannot be faulted by awarding the respondent to

paid compensation for the remaining period of the contract. During hearing of this application, it was not argued that applicant had valid reason and or that she followed procedures for termination. As a matter of completeness, I examined evidence of the parties in the CMA record and I do hereby concur with the findings of the arbitrator that, termination was unfair both substantively and procedurally hence arbitrator correctly awarded the respondent to be paid the remaining period of the contract.

For the foregoing, I hereby confirm the CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 4th March 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 4th March 2024 in chambers in the presence of Daniel Yona Masaga, Advocate for the Applicant but in the absence of the Respondent.

B. E. K. Mganga
JUDGE