IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 377 OF 2021

ST. JOSEPH KOLPING SECONDARY SCHOOL.....APPELLANT

VERSUS

ALVERA KASHUSHURA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Labour Division at Bukoba)

(Kilekamajenga, J.)

dated the 18th day of December, 2020

in

Revision Application No. 21 of 2018

.....

JUDGMENT OF THE COURT

11th & 18th July, 2022

MAIGE, J.A.:

The appellant is a secondary school duly registered under the laws of Tanzania. In this appeal, it is being represented by Mr. Mathias Rweyemamu, learned advocate. The respondent is represented by Mr. Dunstan Mutagahywa, also learned advocate. The appeal is against the decision of the High Court of Tanzania (Labour Division) at Bukoba (the

Labour Court) dated 18th December, 2020 dismissing an application for revision by the appellant.

The factual background giving rise to this appeal is common cause. The respondent had since 4th May, 2015 been in the service of the respondent as the school head mistress. The term of the contract as per exhibit D3 was three years renewable. Clause 3.2 (a) and (b) of the contract provided as follows:

> *"a) Termination of employment shall abide by the Employment and Labour Relations Act 2004.*
>
> *b) In the event the employee wishes to terminate the contract he shall give a notice in writing three months before or surrender a one month's salary; the same will apply with the employer."*

On 21st October, 2015 the respondent received a letter from the appellant accusing her for "unworthy reception of the school owner when he visited the school". The respondent apologised in writing. Two months later, the appellant terminated her service for want of cooperation with her fellow teachers and members of the stuff also using unworthy

language and bullying them. The respondent challenged the termination to the Commission for Mediation and Arbitration at Bukoba (the CMA) for being unfair. The CMA found the termination unfair both substantially and procedurally. It therefore, awarded the respondent the amount equal to the monthly salary of the remaining contractual period of 12 months as cash in lieu of reinstatement and other terminal benefits.

Aggrieved, the appellant preferred a revision to the Labour Court raising two complaints. **One**, the appellant was wrongly sued as the employer was Kolping Society of Tanzania. **Two**, the CMA was wrong in holding that, the respondent's contract was unfairly terminated. The Labour Court dismissed the appeal and upheld the decision of the CMA. Once again aggrieved, the appellant has preferred the instant appeal. She has raised the following grounds:

1. *That, the High Court judge grossly erred in law and fact for failure to revise the entire proceedings to cure all possible irregularities, illegalities and procedural impropriety in the proceedings of the Commission for Mediation and Arbitration.*
2. *That, the High Court judge grossly erred in law to refrain from revising the proceeding of Arbitration which was nullity*

for being commenced before the Mediation proceedings was closed.

3. *That, the High Court judge erred in law for failure to set aside the award which was unlawfully entered in awarding the respondent Tsh 20,400,000/= while the termination was substantively and procedurally fairly proved that termination was based on contract entered.*
4. *That, the High Court erred in law to find that the respondent was terminated without being given a right to be heard which she was afforded at all time.*
5. *That, the judge of the High Court grossly erred in law to hold that the respondent was employed by the appellant and not Kolping Society of Tanzania a fact which was an issue undetermined at the trial commission.*
6. *That, the judge of High Court after had found that the appellant substantially proved fair termination but failed to prove procedural fairness grossly erred in law and fact for failure to order that the respondent had no cause of action to complain.*

With the above factual elucidation of the nature of the controversy, it may be desirable to consider the substance of the appeal. Before doing so however, a brief exposition of the law governing an appeal from decisions of the Labour Court is necessary. It is governed by section 57 of

the Labour Institutions Act No. 7 of 2004 (now Cap. 300 R.E 2019), (the LIA) which provides as follows:

> *"Any party to the proceedings in the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania* ***on a point of law only."***
>
> (Emphasis is ours)

In different occasions, this Court has considered the above provision to mean that, an appeal against a decision of the Labour Court lies only on points of law. For instance, **Remiglus Muganga v. Barrick Bulyanhulu Gold Mine,** Civil Appeal No. 47, 2017 (unreported) it was stated:

> *"S. 57 of the LIA provides in mandatory terms that an appeal arising from a decision of the Labour Court must be based on a point of law only."*

In the second ground of appeal, the appellant was challenging the validity of the arbitral proceedings of the CMA for being conducted before conclusion of the mediation process. Nonetheless, after a brief dialogue with the Court, Mr. Rweyemamu abandoned the said ground. We shall thus not consider it in this Judgment.

On the first ground which was argued concurrently with the fifth ground, it was Mr. Rweyemamu's submission that, because all the employment documents in the record including the termination letter (exhibit D2), indicate that the employer was Kolping Society of Tanzania and not the appellant, the appellant was wrongly sued. The award and the whole proceedings of the CMA should thus be nullified. The counsel referred us to the decision in **Stella Temu v. Tanzania Revenue Authority** [2005] TLR 178 where it was held that;

> *"As the appellant was not an employee of the respondent and there was no termination of the appellant's employment by the respondent, the latter has no duty to give the appellant a hearing".*

In rebuttal, Mr. Mutagahywa submitted that, since the appellant is named in exhibit D3 as the employer, the respondent could not, under the doctrine of privity of contract, have a cause of action against the society for a breach of the contract. The name of the society in the headed paper of the contract, he further submitted, could not make the society a party to the contract unless it was expressly incorporated into the contract, which was not. In the alternative, he submitted, as the appellant represented herself in the contract as an employer, the respondent having

acted on the representation with a *bonafide* belief that it was true, the appellant is estopped, under section 123 of the Evidence Act [Cap. 6. R.E. 2022] from denying the fact. In further alternative, it was his submission that, the issue involved being a pure factual issue, it is not appealable in law.

Addressing the issue, the Labour Court observed at page 287 of the record of appeal as follows:

> *"On the first issue, the counsel for the applicant vehemently argued that the respondent was employed by Kolping Society of Tanzania and not by St. Joseph Secondary School. In addressing this point, I was obliged to revisit the contract that was signed by the respondent. There is no shred of doubt the contract of employment which is the foundation of the dispute shows the parties to be 'St. Joseph Kolping Seconndary School' and Alvera Felix Kashushura. The same contract has the headed title bearing the name of Society of Tanzania because the school is operated by the society. Throughout the file and evidence adduced before the trial commission, it was undisputed that St. Joseph Kolping Secondary School is owned and operated by Kolping Society of Tanzania. In my*

view, the allegation that the respondent was employed by Kolping Society of Tanzania and not St. Joseph Kolping Secondary School is just an invention of the counsel for the applicant. The same argument has no merit because it contradicts the documents available in file."

From the finding of the Labour Court, it is apparent that, the issue before it was not whether a person not a party to a contract of employment could be sued for a breach of the contract but whether the appellant was not the employer of the respondent. The Labour Court having reappraised the evidence on the record, including the employment contract in exhibit D3, concluded that, the appellant was the employer. In the circumstance, we agree with Mr. Mutagahywa that, the issue involved was factual. It could perhaps have involved some points of law if the issue was whether a non-party to an employment contract could be sued for unfair termination of the same.

There was also a contention that, the service of the respondent was terminated by the society and not the appellant. At the CMA where the appellant was sued, she did not raise it as a defence. Neither did she deny the fact that the service of the respondent had been terminated. The

basis of her defence was that, the same was fairly terminated. The finding of the Labour Court on the point can therefore not be faulted. For the fore going reasons, therefore, we dismiss the first and fifth grounds from the record.

We proceed with the third, fourth and sixth grounds of appeal wherein the Labour Court is faulted in effect for holding that the termination of the service of the respondent was unfair both substantially and procedurally. We wish to start our discussion by making a note that, in the revision at the Labour Court, the appellant justified the termination of the respondent's service based solely on the termination clause in exhibit D3. The CMA's finding on fairness of reasons and procedure was not at issue. For the avoidance of doubt, we reproduce hereunder the appellant's entire submissions on the issue which appear at page 278 of the record of appeal:

> *"Also the termination was part and parcel of the contract. The contract allowed each party to terminate the contract. The respondent was terminated and paid terminal benefits. The applicant was unlawfully condemned such an amount of money. My Lord, the applicant paid the*

respondent 3 months' salary in lieu of notice. According to the employment contract, the applicant exercised the rights according to the employment contract. So, the award by the CMA was irrational and illegal"

That being the case and indeed it is, we will not consider any submissions purporting to fault the concurrent factual findings of both the CMA and the Labour Court that the respondent's dismissal was not founded on fair reasons and procedure. The only issue which we shall consider and which sounds to be an issue of law is whether the employee could be terminated from her service basing on a termination clause in the contract without there being fair reasons and compliance with fair procedure. The Labour Court Judge at page 288 of the record, answered the issue as follows:

"On the second issue, the counsel for the applicant argued that the respondent's contract of employment was fairly terminated by the applicant. He further informed this Court that termination of the employment was part of the agreement entered between the parties and therefore the termination was just an implementation of the contract. Before venturing into the details of this

argument, I am saddened by the argument by the counsel for the applicant who knew that contracts of employment are governed by Labour Laws, rules and regulations. Such contracts must conform to the laws and Constitution of the country. In this case, the respondent's contract of employment was terminated before its lapse. For that reason therefore, its termination was supposed to comply with section 37 (1) of the Employment and Labour Relations Act..."

In his submission, Mr. Rweyemamu relying on the provision of rule 8 (2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, G.N. No. 42, henceforth, "the Code of Good Practice", read together with section 36 (a) of the Employment and Labour Relations Act, Act No. 6 of 2004 (now Cap. 366 R.E. 2019) (the ELRA) contended that; where the employee is engaged under a fixed term contract which sets out the mode of termination, the statutory requirement of fairness of termination do not arise.

In reply, Mr. Mutagahywa submitted that, the respective provision aside from clarifying what may be fair reasons for termination of a fixed term contract, does not dispense with the requirement as to fair reasons

and procedure under section 37 of the ELRA. According to him, the only contracts which are exempted from such requirement under section 35 of the ELRA are those whose terms of employment are less than 6 months.

At this juncture, we find it useful to put it clearly that, under section 37(1) of the ELRA, unfair termination of contract is illegal. It reads as follows:

> *"37- (1) It shall be unlawfully for an employer to terminate the employment of an employee unfairly."*

Termination of service is said to be fair according to section 37(2) if it is based on fair and valid reasons and carried out in observance of fair procedures stipulated in the provisions of ELRA. The fairness requirement under the ELRA emanates from the provisions of Termination of Employment Convention 158 of 1982, which establishes the core elements of the employee's rights as to include requirement for valid reason for any termination. The Convention recognizes three valid reasons as misconduct, incapacity and operational requirements which have been duly incorporated in section 37(2) (b) (i) and (ii) of the ELRA.

Mr. Rweyemamu has justified the termination under clause 6.2 (b) of the contract which provides for termination of contract by giving three months' notice or cash in lieu thereof. In his submission, such kind of termination is justified under rule 8 (2) of the Code of Good Practice without necessarily observing the requirements under section 37 of the ELRA.

We are quite aware that, under section 36 of the ELRA, termination of contract of service includes a lawful termination under common law. However, in understanding the broadness of the concept of termination of contract of service under the common law, rule 3 (2) of the Code of Good Practice defines termination under common law to mean; termination of contract by agreement, automatic termination, termination by the employee and determination by employee. Neither of the circumstances refers to termination at the instance of the employer (dismissal) as it is in this case. In our opinion, therefore, the application of the rules as to termination of contract under common law is subject to the provisions of the ELRA and its regulations, including section 37 of the ELRA.

We do not agree with Mr. Rweyemamu that, a notice of termination is by itself a reason or cause of termination but rather it is the way or mode of termination. That is why under the ELRA, unless the termination of service is on disciplinary grounds, the employer is bound to give the employee notice of termination even though it is not provided in the contract of service. Section 41(3) and (4) of the ELRA requires such notice to be in writing and state the reasons for and the date of the termination. Had notice been a cause for termination, the law would have not imposed the requirement for assigning reasons.

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 the upshot and for the reasons as afore stated, we find the appeal without merit. It is accordingly dismissed.

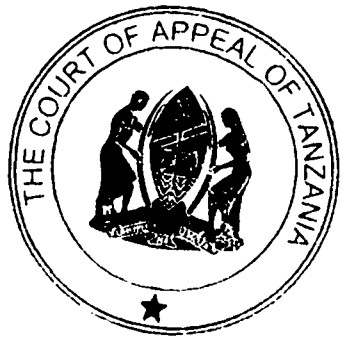
DATED at **BUKOBA** this 16th day of July 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2022 in the presence of Mr. Mathias Rweyemamu, learned counsel for the appellant and Mr. Dunstan Mutagahywa, learned counsel for the respondent, is hereby certified as a true copy of the original.



O. A. Amworo
DEPUTY REGISTRAR
COURT OF APPEAL