IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., RUMANYIKA, J.A., And MDEMU, J.A.)

CIVIL APPEAL NO. 102 OF 2022

HELLENIC FOUNDATION OF TANZANIA t/a ST. CONSTANTINE'S INTERNATIONAL SCHOOL .....APPELLANT

VERSUS

JESSICA TEFFE.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Gwae, J.)

dated the 8th day November, 2021

in

Revision Application No. 113 of 2020

JUDGMENT OF THE COURT

12th & 24th February, 2025

RUMANYIKA, J.A.:

On 15th March, 2018, the appellant and the respondent executed a fixed term contract of employment. It was to run from 1st August, 2018 to 31st July, 2020. During her tenure, the respondent worked in capacity of a fulltime teacher at St. Constantine International School, the appellant's property. However, the respondent alleged that the said contract was threatened on 19th June, 2019 when the appellant notified her in writing that the contract ends on 31st July, 2019. Apparently, the

said notification was preceded by the appellant's emails that all was necessitated by downfall of number of the newly admitted pupils causing economic hardship to the employer. And that on that account the respondent should not expect further renewals of the contract. Aggrieved by that notification, the respondent filed Labour Dispute No. CMA/ARS/ARB/221/2019 in the Commission for Mediation and Arbitration in Arusha (the CMA). She challenged the reason and procedure for the intended termination being unfair. As such, the respondent sought the following reliefs:

1. *TZS. 15,316,695.00 being three months' salary in lieu of notice;*
2. *TZS. 66,373,515.00 being the remaining thirteen months' salary for the period of July, 2019 to July, 202;*
3. *TZS. 61,267,860.00 being twelve months' salary compensation for unfair termination;*
4. *TZS. 10,211,310.00 as severance pay of eight months from 1st August, 2018 to 31st July, 2020; and*
5. *Any other reliefs that the CMA would deem fit to grant.*

The appellant denied the respondent's claim stoutly on account that the termination was mutually agreed by the parties. Further, it was contended that the issue of breach of employment contract was neither here nor there.

In resolving that dispute, the CMA had to determine two issues, namely; **one**, whether the respondent was unfairly terminated and, **two**, whether if any, the termination was preceded by mutual agreement binding on the parties.

Upon hearing both parties, the CMA ruled it in favor of the respondent. It was convinced that the said termination was substantively and procedurally unfair, contrary to section 37(1)(2) of the Employment and Labour Relations Act No.6 of 2004. Consequently, the appellant was ordered to pay the respondent TZS. 10,800,000.00 being twelve months' salary compensation.

Dissatisfied, the appellant challenged the arbitrator for having entertained the dispute prematurely and not considering the evidence adduced. That, the respondent, had volunteered the termination and accepted TZS. 5,085,940.00 being the payment of benefits in full.

On revision before the High Court, the appellant lost the battle. It was held that the respondent's complaint was timely filed on 16th June, 2019 in the CMA just as the termination was bilateral sanctioned by the parties. Based on the appellant's notification (exhibit D2), the High Court viewed it as threat to constructively terminate the respondent with effect from 19th June, 2019.

Aggrieved with the decision of the High Court, the appellant is before this Court on three points of grievance. Nevertheless, for the reasons which will come to light shortly herein, we will reproduce only the third ground of appeal as we deem it solely decisive to the appeal. Paraphrased, the point reads:

That, the High Court erred in law and fact in holding that there was constructive termination of the respondent's employment contract by the appellant.

At the scheduled hearing of the appeal, the appellant and respondent enjoyed services of Mr. Andrew Maganga, learned counsel and Ms. Juliana Mono, also learned counsel, respectively.

The learned counsel had filed the respective written submissions which they successfully sought leave to adopt to form part of their submissions as hereunder.

Mr. Maganga began by referring us to the learned Judge's operative words which appear on page 11 of the impugned judgment. He faulted him to find that the respondent's employment was constructively terminated, without according the parties a hearing on it. It is so, he argued, because the point of constructive termination was not raised before as a ground of revision for determination by the High

Court. He added that, there was no evidence on record to show that the appellant had even caused the respondent's employment to be intolerable to force her resign in terms of rule 7 of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007.

Responding, Ms. Mono did not tell anything about the manifestation of denial of a right to be heard. Nonetheless, she contended that the respondent was demoted from previous position of a fulltime teacher who earned monthly salary of TZS. 3,600,000.00 to TZS. 900,000.00 as assistant teacher without room for renewable. For her, the appellant's act amounted to constructive termination of the respondent. She added that, the respondent's act not to resign did not vitiate agreed terms of the existing employment contract with the appellant. Therefore, Ms. Mono commended the learned Judge to hold that the appellant constructively terminated the respondent.

Upon hearing the learned counsel's oral contentions and having reviewed the record and their written submissions, the focal point for our determination is whether the High Court raised the issue of constructive termination *suo motu.* If it is answered in the affirmative, whether the parties were accorded a hearing on it.

It is worth noting, as intimated earlier on that the issue of constructive termination did not arise until such time the learned Judge was composing his judgment. That, the appellant's email dated 15/03/2018 which the respondent received in March, 2019 constituted a constructive termination, just as the letter was alert that she would not get further renewals of her contract. For clarity, at page 117 of the record of appeal the learned Judge stated that:

> *"...the constructive termination of the respondent's employment had started since March 2019 that is prio to the applicant's issuance of the termination letter..."*

Taken from the excerpt above, and upon reviewing the record of appeal, now our task has become easier. As such, the learned Judge raised the issue of constructive termination of the respondent's employment *suo motu*. Equally important, the issue was raised late in the day at the stage of composing the impugned judgment. It was neither pleaded before the CMA nor was it canvased by the respondent in her opening statement or at the revision stage for the High Court's determination. It is very unfortunate, remotely though, that the said issue formed the basis of the impugned judgment as observed above.

Fortunately, the Court, on different occasions has tested the law relating to the doctrine of constructive termination of employment contracts. See, for instance **Omary Rishael Kitomari v. Kuringe Real Estates Co. Ltd** (Civil Appeal 250 of 2022) 2024 TZCA 799 (22 August 2024; TanzLII). While borrowing a leaf from a similar South African case of **Solid Doors (Pty) Ltd v. Commissioner Theron and Others** (2004) 25 ILJ 2337 (LAC) and following our stance in **Kobil Tanzania Ltd v. Fabrice Ezaovi**, Civil Case No. 134 of 2017 [2021] TZCA 485 (16 September 2021; TanzLII) the Court held;

> *"...there are three requirements for constructive dismissal to be established....that* ***the reason for termination of the contract must be that the continued employment has become intolerable for the employee****...that it must have been the employee's* ***employer who had made continued employment intolerable****...If one of them is absent, constructive dismissal is not established...".*

Therefore, flowing from the position of the law restated above, it is clear that the conditions for invocation of the doctrine of constructive termination of employment contact have to be met cumulatively. However, it is evident in the instant case that not only no evidence was

led before the two courts bellow to meet the said requisites but also the parties were not heard in order to have their evidence recorded and tested. It is very unfortunate that despite of its vital nature the issue was raised by the court casually improperly and was quietly relied in arriving at the impugned decision.

It is a settled legal principle that failure of the court to accord parties a hearing as it is in the instant case has far reaching effects. It is immaterial to say that even if the parties were heard the results would remain the same. See-the Court's decisions in **Mbeya-Rukwa Auto Parts & Transport Ltd v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (unreported) and **Danny Shasha v. Samson Masoro And Others** (Civil Appeal No. 298 of 2020) [2021] TZCA 653 (5 November 2021; TanzLII). We agree with Mr. Maganga's assertion that the denial of hearing, let alone a fair hearing was fatal as it abrogated the parties' constitutional right to be heard thus, renderring the resultant judgment a nullity.

Now that, without exception to the settled legal position, parties were not heard on the said issue of constructive termination, we are inclined to allow this appeal, as we hereby do. In the result, we quash the impugned decision and set aside the subsequent orders for being a

nullity. We also order immediate dispatch of the record to the High Court for it to do the needful before it ventures to compose a fresh judgment expeditiously.

DATED at **ARUSHA** this 22nd day of February, 2025.

R. K. MKUYE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2025 in the presence of Mr. Andrew Moses Maganga, learned counsel for the Appellant and Ms. Juliana Japhet Mono assisted by Ms. Violeth Samson Iddy, learned counsel for the Respondent; is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL