IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MKUYE, J.A., KAIRO, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 267 OF 2020

JORDAN UNIVERSITY COLLEGE .... APPELLANT

VERSUS

MARK AMBROSE .... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Division) at Morogoro)

(Wambura, J.)

dated the 19th day of June, 2020
in
Revision No. 37 of 2019

....

JUDGMENT OF THE COURT

28th May & 11th June, 2024

MLACHA, J.A.:

The respondent, Mark Ambrose, was employed by the appellant, Jordan University College, as a loan officer on fixed term contracts. He had three contracts; a one-year contract starting 1st September, 2012 up to 31st August, 2013, a two years contract effective 1st September, 2013 up to 31st August, 2015 and a three years contract which was effective 1st September, 2015 and was meant to end on 31st August, 2018. This contract did not reach the end. It was terminated on 28th July, 2016 hence the dispute now before the Court.

The background of the matter is reproduced, albeit briefly as follows. The appellant, a university college based in Morogoro town, needed an officer to deal with loan affairs of students. The respondent who is an accountant by profession, applied for the job and was awarded an initial contract of one year followed by two contracts as alluded to above. Their relationship was to be regulated by the contracts; fixed term contracts. The contracts provided for the duration, job title, the salary, summary of duties and responsibilities. They also had a termination clause. The respondent worked successfully on the first and second contracts. Problems started amidst the third contract which was terminated prematurely. Acting under the termination clause of the third employment agreement (clause 10), the appellant served the respondent with a termination letter promising to pay one month's salary in lieu of notice and his terminal benefits.

The respondent was not happy with the manner in which his job was terminated. He lodged a labour dispute, CMA/MOR/134/126 at the Commission for Mediation and Arbitration (the CMA) at Morogoro which attempted mediation without success. Following a failure in the mediation, the dispute was placed before the arbitrator (Hilary N.J.) for arbitration. CMA Form No. 1 contained a claim for unfair termination and payment of terminal benefits (one month's salary in lieu of notice, leave, gratuity,

unremitted NSSF contributions, repatriation expenses and subsistence allowance). The claim for terminal benefits had a total of TZS 4,710,230.00

The appellant denied the claim for unfair termination relying on clause 10 of the Employment contract. She had no problem with terminal benefits (the said TZS 4,710,230.00) which she paid before the award was made. She declined to pay repatriation expenses based on the employment agreements which showed that the place of recruitment was Morogoro not Iringa.

At the commencement of hearing at the CMA, the arbitrator framed and adopted four issues namely; **one**, whether there was fair termination of the third Employment contract; **two**, whether the procedure was followed; **three**, whether the respondent was recruited at Iringa and **four**, to what relief are the parties entitled to.

After receiving evidence from both parties and making a deliberation on issues number one and two, the arbitrator made a finding that the respondent was terminated unfairly. He had the view that much as the procedure provided under clause 10 of the employment agreement was followed by the appellant who gave one month's salary in lieu of notice, still there was need for giving reasons for termination of the employment

agreement. He discarded the evidence adduced by the appellant that there was a mutual understanding between the parties to terminate the contract. He needed concrete evidence on it which he could not see. Relying on rule 13(10) of the **Employment and Labour Relations (Code of Good Practice) Rules, 2007** (the Code of Good Practice), he held that the termination was unfair for want of reasons.

Guided by the decision of the High Court made in **Good Samaritan v. Joseph Robert,** Revision No. 165 of 2011 (unreported), the CMA ordered the appellant to pay salaries for the remaining part of the agreement, i.e, 25 months at the rate of the last salary. On repatriation expenses, it had the view that, much as the contract agreements showed Morogoro as a place of recruitment, but there is a letter written by the appellant in 2016 addressed to Iringa supporting the evidence of the respondent that he was engaged at Iringa. As for the reliefs, taking note of the above findings, he awarded the following:

i. 25 months' salary; 25 x 1,300,000 = 32,500,000.

ii. Bus fare to Iringa Tshs. 22,000:

Total TZS 32,522,000.

The salary of TZS 1,300,000 was picked from the oral evidence of the respondent at CMA that his last salary was TZS 1,300,000.

After considering the submissions of parties, examined the record and the law, the High Court Judge was confronted with two issues; **one,** whether there was breach of contract to justify the application of the decision of the High Court made in Revision No. 165 of 2011 and **two**, the reliefs entitled to the parties. After an appraisal of the evidence and consideration of the submissions made before the court, the learned Judge could not find difficult in finding that, the parties had a fixed term contract which started on 1st September, 2015 and which was expected to end on 31st August, 2018 but could not reach the end on account of its termination which was done on 28th July, 2016. Reading through the termination letter and clause 10 on which it was based, and following the decision of the High Court made in **Ntambua Shamte and 64 Others v. Care Sanitation and Suppliers,** Revision No. 154 of 2016 (unreported), the Judge agreed with the CMA that the termination was unfair for want of reasons. He restated the principle in **Beda Kasanda Ndasi v. Makafuli Motors Ltd**, Revision No. 25 of 2011 (unreported) and **Good Samaritan** (supra) that, when an employer terminates a fix term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action. She blessed the finding and decision of the CMA. She added that, much as the claim for 25 months' salary was

not pleaded in CMA Form No. 1, but it was just to make the award in the interest of justice. She reaffirmed the award of repatriation expenses making reference to the letter dated 29th July, 2016 which carried the Iringa address of the respondent. She supported the finding of the CMA that the respondent was recruited at Iringa.

Still undaunted, the appellant has come to this Court armed with three grounds of appeal which can be put as follow: **one,** that the High Court erred in law in upholding the award of 25 months' salary which was not prayed for in CMA Form No. 1. In the alternative to ground one, **two,** that, the High Court erred in law in approving a relief which was not pleaded, proved and prayed before the CMA; **three,** that, the High Court erred in law in approving the claim for repatriation expenses to Iringa instead of Morogoro as reflected in employment contracts.

When the case was called for hearing before us, the appellant was represented by Mr. Jackson Liwanga, learned advocate, whereas the respondent had the services of Mr. Geofrey Geay Paul, also learned advocate. Mr. Liwanga prayed to adopt his submission earlier on filed in terms of Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 and the list of authorities as part of his oral submission. He had nothing to add. Mr. Paul adopted his written submission like his learned friend but opted

to make oral submissions to amplify them. Mr. Liwanga responded at length in rejoinder.

Making reference to our decisions in **St. Joseph Kolping Secondary School v. Alvera Kashushwa,** Civil Appeal No. 372 of 2021 [2022] TZCA 445 (18 July, 2022) TANZLII and **International Commercial Bank v. Jodecam Real Estate Limited,** Civil Appeal No. 446 of 2020 [2021] TZCA 673 (15 November, 2021) TANZLII, Mr. Paul contended that, even if there is a fixed term contact, when it comes to termination, there must be valid reasons, failure of which make the termination unfair. Responding to the submission that both the CMA and the High Court erred in awarding 25 months' salary which was not prayed, he relied on two decisions of the High Court; **Generics & Specialities Ltd v. Kalenga Katele,** Revision No. 833 of 2019 (unreported) and **CocaCola Kwanza Ltd v. Erastus Vicent Mtui,** Revision No. 220 of 2022 [2022] TZHC 1078 (7 November, 2022) TANZLII which laid the principle that the court can grant remedies even if they were not pleaded for parties are bound by their pleadings not reliefs. He invited us to take inspiration from these decisions and hold that it was correct to award 25 months' salary despite the fact that it was not in CMA Form No. 1. He concluded that termination without reasons was a serious error justifying the making of orders issued by the CMA which were also upheld by the High Court. Responding to the

submission that terminal benefits have already been paid to the respondent to the amount claimed in CMA Form No. 1, he agreed that the amount was paid but contended that, the respondent is also entitled to payment of salaries for the remaining period on account of the unfair termination. On payment of repatriation expenses, counsel for the respondent contended that there is a letter and the CV of the respondent which show that he was based in Iringa at the time of recruitment. In totality, he urged the Court to dismiss the appeal for being frivolous and vexatious.

Mr. Liwanga spent time to make the rejoinder submission. He invited us to examine our decision in **Dew Drop Company Limited v. Ibrahim Simwanza,** Civil Appeal No. 244 of 2020 [2021] TZCA 525 (27 September, 2021) TANZLII where it was stated the CMA Form No.1 has the status of a plaint. He contended that anything expected to be considered by the CMA must be pleaded in CMA Form No.1 for it is the basis of the claim. He referred the Court to its decision in **Edson Mbogoro v. OC- CID Songea District and the Attorney General,** Civil Appeal No. 44 of 2004 [2004] TZCA 68 (2 June, 2004) TANZLII page 6 where it was stated "*Since the respondent did not apply for costs, we will not make order for costs*". Further reference was made to our decision in **Magnus K. Laurean v. Tanzania Breweries Limited,** Civil Appeal

No. 25 of 2018 [2021] TZCA 578 (12 October, 2021) TANZLII, page 27 where we stated thus; "*It is settled that generally an arbitrator or the High Court Labour Division has no jurisdiction to grant a relief which is not prayed for in the referral form, the said form being understood synonymously with a plaint – See* ***Security Group (T) Limited v. Samson Yacobo and 10 Others,*** *Civil Appeal No. 76 of 2016 and* ***Dew Drop Co. Limited v. Ibrahim Simwanza,*** *Civil Appeal No. 244 of 2020 (both unreported).*" He reiterated his earlier position that both the CMA and the High Court erred in awarding 25 months' salary for unlawful termination which was not prayed for. He urged the Court to allow the appeal.

We plan to start with termination. As alluded to above, termination of the respondent's employment was done by the letter of the appellant dated 28th July, 2016 headed 'TERMINATION OF EMPLOYMENT AGREEMENT'. It was done under clause 10 of the 3rd employment agreement which read in part as under:

> *"10. TERMINATION OF SERVICE: Either party may terminate this employment contract by giving the other part, a three months' notice in writing or* ***one months' salary in lieu of notice".***

Acting under this clause, the appellant wrote the termination letter to the respondent. It reads in part as under:

> *"In reference to the caption above, I have to communicate to you the deliberations and decision of JUCO Governing Board meeting held on June 17, 2016 following the directives of the owner, to terminate your service at JUCO as loan officer in accordance with clause 10 of the Jordan University Collage 'Employment Agreement', which states:*
>
> *'10. TERMINATION OF SERVICE. Either party may terminate this employment contract by giving the other party three months' notice in writing or one months' salary in lieu of notice.'*
>
> *Accordingly, the employer has chosen to give you **'one month's salary'** in lieu of notice and your service comes to an end on 28th July, 2016. .... All your rights relating to **Employment Agreement** entered with Jordan University College up to its termination shall be honoured".*

As it is apparent above, no reasons were given for this termination. We think, as rightly expressed by counsel for the respondent, despite the fact that this was a fixed term contact which has a termination clause providing for the procedure of termination, but clause 10 was not supposed to be read in isolation of the law for parties cannot contract and

chose to operate outside the law. Clause 10 was supposed to be read with rule 13 (10) of the Code of Good Practice which reads as under:

> *"(10) Where employment is terminated,* ***the employee shall be given reason for termination*** *and reminded of any right to refer a dispute concerning the fairness of termination under the collective agreement or to the Commission for Mediation and Arbitration under the Act."*

This provision apply to all forms of employment contracts including fixed term contracts. There must be reasons for termination in any termination of employment. In other words, in whatever situation, the employee must be given reasons why his job is coming to an end. It follows that, apart from giving one months' salary in lieu of notice a provided under clause 10 of the employment agreement, still the appellant was supposed to say why she was terminating the respondent. This is a legal requirement under rule 13 (10) of the Code of Good Practice and has a purpose; to operate against arbitrary termination and secure jobs. Failure to give reasons termination make the termination unfair with legal consequences. One of the legal consequences in fixed term contracts, as correctly observed by the CMA, the High Court and submitted by counsel for the respondent, is payment of salaries for the remaining part of the employment agreement.

Next is a consideration for the grounds of appeal. We will follow the approach of the learned counsel; discussing grounds one and two conjointly and ground three separate. We will start with the combined ground one and two. Both the CMA and the High Court had the view that payment of 25 months' salary was not prayed in CMA Form No. 1 but they granted it. The CMA said that the award was a necessary consequence. The words used by the High Court were that, it was done in the interest of justice.

Counsel for the appellant have tried to convince us that, based on decisions of the Court cited above, what was done by the CMA and upheld by the High Court was wrong for they had no power to award what was not prayed for. To the contrast, we are invited by counsel for the respondent to take inspiration from decisions of the High Court which have laid the principle that a court can grant a remedy not prayed for because parties are bound by their pleadings not reliefs.

We have taken the trouble to read the decisions cited to us and considered the submissions of the learned counsel on whether the CMA can grant a relief which was not prayed for. We think that, so long as there is a position set by the Court on the matter, we cannot seek an inspiration from decisions of the High Court which go against the position of the Court. We will rather proceed to stress that parties are bound by

their pleadings (reliefs inclusive). And, whoever wants to get a relief from a court of law, he must establish its base from the pleadings and nothing more. Doing otherwise will make the suit uncertain and or give a room for inviting extraneous matters. That means that, if there was no specific prayer in CMA Form No. 1, there was no room for making the award for payment of 25 months' salary.

That said, we will now move to CMA Form No. 1 to see whether there was no prayer for what was awarded. With respect to the counsel, we have noted that their submissions were made without a close look to CMA Form No. 1 for it appears that it has that prayer. We will try to demonstrate.

CMA Form No. 1 at page 20 of the records of appeal reads in part as under:

> *"What outcome do you seek? **COMPENSATION FOR UNLAWFUL TERMINATION** AND PAYMENT OF TERMINAL BENEFITS (ONE MONTH'S SALARY IN LIEU OF NOTICE, LEAVE, GRATUITY AND UNREMITTED NSSF CONTRIBUTIONS, SUBSISTANCE ALLOWANCE" (Emphasis Supplied).*

We understand from the above that the respondent was praying for two things: **one,** Compensation for unfair termination and **two,** payment

of terminal benefits which he specified to be one month's salary in lieu of notice, leave, gratuity, unremitted NSSF contributions, repatriation expenses and subsistence allowance. Compensation for unfair termination was prayed without mention of 25 months' salary but it was there. We think that so long as it was there as a prayer, the CMA had a base to make the award if it had a look on it. We see no base for disturbing the award for what was given is exactly what could have been awarded.

With this finding, we find no merit in ground one and two save that there is an error on the calculations of the salary which we need to correct. The third contact of employment under which the claim was based, did not carry the salary of TZS 1,300,000.00 but TZS 1,151,837.00 The salary of TZS 1,300,000.00 came from the respondent in the course of giving evidence at the CMA as intimated above. He said his salary was TZS 1,300,000.00 without tendering any salary slip or document to verify it. The only document showing the last salary was the 3rd employment agreement executed on 26th November, 2015. Clause 6 therein, carry the salary of TZS 1,151,837.00. It was thus wrong to base the calculations on the salary of TZS 1,300,000.00 and neglect what is provided in documentary evidence. Our calculations will thus be; 25 x 1,151,837 = TZS 28,795,925.00.

Our discussion on ground three will be short for it does not appear to be involving much. Parties are in agreement that the employment agreements were executed in Morogoro and carry the Morogoro address. Now if there is a letter written in 2016 or a CV carrying the Iringa address, much as what they contain may be correct as we are invited to hold, but these documents cannot override the employment agreement which is the basis of the relationships between them. Clause 21(2) of the Employment Agreement provides clearly as follows:

> *"For the purpose of this contract of employment my place of recruitment is Morogoro (M)".*

We find this as a clear provision which need no interpretation.

That beside, if the respondent applied for the job and attended the interview in Morogoro where the college is situated, it defeats logic to say that the place of recruitment was Iringa. We don't think so. JUCO did not send its staff to Iringa to recruit him. The obvious thing is that he came himself to JUCO, applied for the job, attended and passed the interview and signed the employment agreement in Morogoro. In the absence of personal particulars forms showing that his home place is Iringa, in which the employer could be obliged to take him back to Iringa by reason this disclosure, this claim cannot be sustained. It is thus clear that the award for repatriation expenses was erroneously made which we vacate.

In view of what we have endeavoured to demontrastrate, the appeal is allowed to the extent indicated above. This being an employment matter, we make no order as to costs.

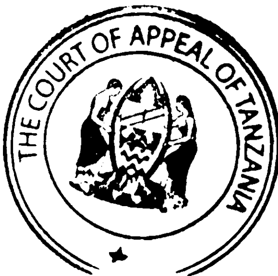
DATED at **MOROGORO** this 10th day of June, 2024.

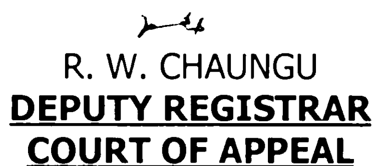
R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of June, 2024 in the presence of Mr. Jackson Liwewa, learned counsel for the Appellant and also holding brief for Mr. Geofrey Geay Paul, learned counsel for the respondent, is hereby certified as a true copy of the original.





R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL