IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 317 OF 2020

VIDA MWASALA .....APPELLANT

VERSUS

GIZ DEUSTSCHE GESEUSCHFT INTERNATIONALE ZUSAMMENABLE (GIZ) GMBH .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Wambura, J.)

dated the 17th day of July, 2020
in
Land Case No. 85 of 2016
.....

JUDGMENT OF THE COURT

2nd & 14th June, 2023

KITUSI, J.A.:

The appellant was serving a fixed term contract of employment with the respondent organization. There is no dispute that the respondent's predecessor was the appellant's employer from 1/7/2004 under a two year contract which it kept on renewing. Even when the present respondent succeeded the previous employer the terms of the employment remained the same.

On the basis of those terms of the contract, the employment came to an end on 31/3/2016. However, the appellant lodged an unfair

termination complaint at the Commission for Mediation and Arbitration (CMA) on the ground that she had legitimate expectation of renewal of that contract. She won the case at the CMA and was awarded monetary reliefs.

On revision that was preferred by the respondent, the High Court concluded that the appellant had prior notice that there was not going to be any further renewal, so it allowed the application, quashed the award and set aside the orders of compensation. That decision has aggrieved the appellant hence this appeal.

Most of the facts forming the background of this case are, fortunately undisputed. That is that the appellant worked with the respondent's predecessor from 1/7/2004 in a fixed contract of two years that was being renewed after every two years. When the present respondent succeeded the former employer she inherited the appellant's services in a contract with similar terms as the previous.

The respondent maintained that the appellant had no basis for expecting a further renewal of the contract because she was given notice that there was not going to be any more renewals. It also argued and produced evidence that there was change of organizational structure and the appellant's position was abolished in the new structure.

The CMA found for the appellant holding that the termination of the employment proceeded without notice of the intention to do so. As alluded to earlier, it awarded the appellant monetary reliefs details of which are not, at the moment, of relevance.

It is also not disputed that the appellant started off as a technical person in the ICT department. She cited the fact that she gave her employer everything in terms of hard work and that this paid dividend because she finally got elevated to the position of Knowledge Manager. The fact that the appellant's monthly salary was initially Tshs 3,380,000/= (in 2004) and that at the time of the alleged termination it had been increased to Tshs. 7,240,260/= is also not disputed.

The appellant also was candid that she had prior knowledge that there was going to be no renewal after the end of contract on 31/3/2016. She referred to a contract which the respondent and her signed on 23/10/2015 which assigned her additional duties as Human Resource person.

The appellant's contention is that the respondent did not communicate any further notice to her before 31/3/2016. Further that by giving her employer the best for 12 years she earned an entitlement to a further renewal considering that her duties were consistently the same even in the new structure. She stated when cross examined that

her position is no longer maintained in the new structure but her duties are still there and being discharged by a Senior Program Advisor.

On the other hand Gwamtwa Cheyo (PW1) the respondent's human resource officer testified that the nature of the respondent's activities in Tanzania made it necessary for it to engage workers on fixed term contracts. This is because as a Germany based organization working with the government of Tanzania its activities were in a form of projects that had specific durations.

As the respondent was providing financial and technical support to the government of Tanzania, he said, it operated according to priorities of programs as agreed upon by the relevant Ministry. He gave an example of the 2015 structure which had the position of Knowledge Management that was being held by the appellant. He said that that position was no longer there in the 2016 structure because collection and dissemination of information (which was the duty under that position) was no longer a priority. In 2016 the priority of the Ministry of Health which the appellant was working with, was Mother to Child support.

PW1 pointed out that excellence in performance, and salary increment would not form a basis for renewal if one's position is no longer in the new structure. After all, he said, it is normal for the

respondent organization to review salaries for all employees. He referred to the contract dated 23/10/2015 which specified 31/3/2016 as the last date of engagement and wondered why would a party to that contract harbour expectations not provided in it.

PW1 was subjected to a lengthy cross-examination in the course of which he admitted that a number of duties that were being performed by the appellant are still in the new structure being performed by other officials who are handling other core functions. He insisted that the appellant's post was no longer a priority so duties under that portfolio were less important

The reason for the CMA entering the award in favour of the appellant is contained in the following excerpt:-

> *"Kitendo cha mlalamikiwa kutoa taarifa kwa mlalamikaji kwamba hatahuisha mkataba wa mlalamikaji mnamo tarehe 18/2/2016 kupitia kilelezo R6 Tume inaona kwamba ile haikuwa taarifa kwa mlalamikaji isipokuwa ulikuwa ni ujumbe unaotumwa kwa Anna Gwamtwa.*
>
> *Makubaliano ambayo yalirejewa katika kielelezo hicho R6 yalieleza tarehe ya kuisha kwa mkataba si kutohuisha mkataba wa mlalamikaji. Mlalamikaji alitakiwa apatiwe taarifa kamili ya kuisha mkataba wake."*

The above finding means that the purported notice in exhibit R6 could not constitute notice of termination because it was addressed to Anna Gwamtwa. Besides, according to the learned CMA Chairman, that notice transmitted information of end of contract as opposed to notice of non-renewal.

As earlier intimated, the High Court reversed that decision in a finding that reads:-

> *"I would conclude by saying that the contract automatically came to an end on 31/03/2016. The respondent was fully aware of the said fact. It can thus not be said that the respondent holds legitimate expectations of renewal of the contract. The email dated 10/03/2016 is proof that the respondent was aware and ready to hand over her duties by 31/03/2016."*

The learned judge proceeded to set aside the award of compensation for twelve (12) months' salary, one month salary in lieu of notice and severance pay. There are two grounds of appeal to challenge that decision:-

1. *That the Honourable Judge erred in law and fact in holding that the Appellant had no legitimate expectation to have the contract renewed.*

2. *That the learned Judge erred in law and fact for failure to analyse properly the evidence before her hence occasioned injustice to the Appellant*

Before Mr. Anthony Arbogast Mseke, learned advocate for the appellant and Messrs. Evold Mushi and Godfrey Ngassa, learned advocates for the respondent appeared to address us on the appeal, they had filed written submissions which we shall treat as part of their address.

In our view, despite the fine arguments made by counsel, the issue for our determination is whether the appellant's expectation for a renewal was rational so as to render the termination unfair. It is, fortunately, an area we have dealt with in our previous decisions as it shall be demonstrated in due course. In addition, it must be noted that this is a kind of termination that places a duty on the employee to prove not only that he had expectation of renewal but that such expectation was reasonable.

Mr. Mseke argued that the consistent renewals of the contract for 12 years of employment and the fact that the assignments that the appellant was performing were retained in the new structure, are proof that the appellant was still needed in the organisation and so there was need to explain reasons for the termination of her employment. In response, Mr. Mushi submitted that the appellant's post was abolished and she had prior notice of the intended termination.

In **Asanterabi Mkonyi v. TANESCO**, Civil Appeal No. 53 of 2019 (unreported) we held that unfair termination of employment as defined under section 37 of Employment and Labour Relations Act (ELRA) does not apply to fixed term contracts unless the employee establishes existence of reasonable expectation for renewal under section 36 (a) (ii) the ELRA read together with Rule 4 (4) of the Code of Good Practice, GN No. 42 of 2007. Reasonable expectation of renewal is, in our view, situational in that it depends on the circumstances of each case. However, some common considerations have been developed to help standardize the factors. In **Asanterabi Mkonyi** (supra) and **Ibrahim Mgunga & 3 Others v. African Muslim Agency,** Civil Appeal No. 476 of 2020 (unreported) we adopted the following factors from South Africa in the case of **Dierks v. University of South Africa** (1999) 20ILJ 1227:-

"A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeals Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice and nature of the employer's business".

The first ground of appeal faults the learned Judge for taking the view that the appellant had no legitimate expectation of a renewal. Referring to another decision from South Africa in the case of **King Sabata Dalindyebo Municipality v. Commission for Mediation and Arbitration & 2 Others,** Case No. P437/03 (unreported), Mr. Mseke argued that apart from the previous renewals, the conduct of the respondent towards the appellant raised expectation of renewal on her part. The conduct in question includes salary increment five months prior to end of term, and assignment of additional duties just 2 months prior to end document. On the other hand, Mr. Mushi submitted that the

appellant was aware of the contract coming to an end because she had prior notice.

Was the learned Judge's finding that the appellant had notice of termination not consistent with the evidence on record? During cross examinations, the appellant admitted that the respondent's nature of business necessitated running projects in phases. She conceded that sometimes there was need to change structures in order to align with new priorities. According to Gwantwa, the new phase downgraded the duties that were formerly being performed by the appellant as they were no longer a priority.

In our determination of this matter, we take note of the nature of the respondent's business making it necessary for it to operate in phases and hold that the appellant had no justification for expecting a further renewal upon becoming aware of the new structure. We agree with Mr. Mseke that the conduct of the employer is relevant. But how the learned counsel is selective in his interpretation of the conducts, beats us. While it can be said that assignment of additional duties to the appellant would have raised expectations of a renewal on her, there are three other conducts which show the respondent's determination to bring the employment to an end. The first is in the contract dated 23/10/2015, signed by the appellant and the respondent. The fourth item in that

contract clearly states that : *"Vida's contract will end 31.3.2016"*. The second instance is a letter dated 18/2/2016 addressed to Gwantwa and copied to the appellant. It says:

> *"Please be informed that due to change of programme priorities during the new phase of TGPSH beginning on 01.04.2016, Vida Mwasalla has been informed already on 23.10.2015 that her contract will not be extended beyond 31.03.2016".*

The letter further required Gwantwa to prepare payment of bonus to Vida ahead of others because she would not be around in April. The third is a letter dated 23/2/2016 addressed to the appellant part of which reads :-

> *"This letter serves to inform you that the contract of employment between Deutsche Geseilschaft fuer Internationale Zusammenarbeit (GIZ) GmbH and yourself ending on 31.03.2016 will not be extended.*
>
> *Reason: Because of structural changes in the new programme phase the position is no longer required".*

Mr. Mushi's submissions made reference to all these instances and urged us to conclude that they constituted sufficient notice. We agree

with the learned counsel and the learned High Court Judge on this. The respondent not only gave the appellant sufficient notice and reason, but when looked at from another perspective, the employers constant reference to the date of the end of contract was conduct which defined its intention to end the contract. The alleged salary increment was not, as Mr. Mseke would like us to hold, a unique gesture nodding approval of the appellant's performance. There is evidence, and the appellant did not challenge it, that the respondent had that culture of reviewing salaries for all employees. Therefore given the respondent's nature of business, and the express notices that were given to the appellant we find no fault in the decision that was arrived at by the learned Judge.

We feel obliged to observe that fixed term contracts of employment would cease to serve their intended purpose if an employer as in the instant case would be stuck with an employee whose services are no longer needed under the new scheme. As we intimated earlier, it is the employee's duty to prove that the expectation of a renewal was reasonable. That duty, we are afraid, has not been discharged by the appellant in this case, thus the first ground of appeal has no merit, and we dismiss it.

The second ground of appeal faults the learned Judge's evaluation of evidence. This ground not only offends section 57 of the Labour

Institutions Act which requires this Court to only deal with matters of law, but in dealing with the first ground of appeal, we have demonstrated why we agree with the learned Judge on both factual and legal analysis and conclusions. This ground is therefore devoid of merit and stands dismissed.

In the end we dismiss this appeal in its entirety with no costs as this appeal arises from an employment dispute.

DATED at **DAR ES SALAAM** this 13th day of June, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2023 in the presence of Mr. Elipidius Philemon, learned counsel for the Appellant and Mr. Evold Mushi, learned counsel for the Respondent is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL