

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 186 OF 2014

BETWEEN

JACOB MASSAWE..... APPLICANT

VERSUS

THOMAS SECONDARY SCHOOL.....RESPONDENT

(ORIGINAL RECORD CMA/DSM/KIN-ILA/R.185/13/223)

JUDGMENT OF THE COURT

28/07/2015 & 14/12/2015

Mipawa, J.

This is a judgment in respect of the application for revision filed by the applicant Jacob Massawe against the award issued by the CMA.¹ In that award, the CMA ruled out that there was valid reason for termination and that the procedures were adhered to by the employer Thomas Secondary School.²

Before going into the merits of the application, this Court finds it legally logical to prefix this judgment with brief historical facts surrounding this application and the labour dispute between the parties.

¹ CMA refers to the Commission for Mediation and Arbitration established under section 12 of the Labour Institutions Act No. 7/2004

² See Labour Dispute in CMA/DSM/KIN-ILA/R.185/13/223

The applicant Jacob Massawe was employed by the respondent Thomas Secondary School as a teacher on a fixed term contract starting from 19/03/2012 till 19/03/2013 and was terminated thereon on the expiry of the contract. That decision of the employer made the applicant Jacob Massawe to file a dispute to the CMA in CMA Form No. 1 on 14/03/2014³ in that labour dispute mediation went futile and arbitration had to proceed.

During the arbitration hearing at the CMA the applicant submitted that he was employed by the respondent on 18/03/2012 on a one year contract as ordinary teacher for teaching history and civic subjects in form one and form six and later made a class teacher for form four. That he proceeded well in performing his duties and when the probation period ended 01/11/2011 to 19/03/2013 he was promised to be given a two years contract after the expiration of the first one. But after that he was never added another contract rather he was terminated despite the fact that he had been performing well his duties which made him to be on national level for National Examination of Tanzania. He submitted exhibit AY 4 to support that.

He further argued that he was never given time to be heard despite all the allegations posed unto him, instead he was given a letter for termination, and throughout his service he had never been warned on his performance. Due to that above he had expectations of getting the new contract. He therefore prayed to the CMA to be awarded salary for the month of March; salary arrears for the month of April in 2012; annual leave

³ In Labour Dispute CMA/DSM/ILA/R.183/13/223

of 2013 at Tshs 300,000/=; and compensation of twelve months' salary; benefits arising from termination of contract; any employment benefits; certificate of employment; and costs for the advocate at Tshs. 750,000/=.

On the side of the respondent employer being represented by Upendo Mkuza while under oath submitted that they employed the applicant as a teacher with a one year fixed contract from 19/03/2012 and on 18/03/2013 the applicant was informed that his contract was coming to an end. She submitted exhibit AP1 and AP2 to substantiate the argument above. That had the respondent wanted to proceed working with them he ought to have informed the respondent in writing earlier as per clause 7 of the employment contract. She further argued in examination in chief that they had no intention of extending another contract with the applicant due to the reason that the contract was coming to an end and that even his performance was also not that much of assistance.

After hearing the parties the arbitrator drew three issues, namely whether there was good reason for termination; whether procedures were followed and what were reliefs to the parties.⁴

On the first issue the arbitrator ruled out that the employer had valid reasons for not extending the contract of employment as per clause 7 and 11 of the contract of employment after the expiry of one year contract as each party had the right to inform the other party of the intention not to proceed with another contract of employment hence even the procedures

⁴ See p 6 of the CMA award

were followed as there was no need for calling a disciplinary hearing on the same thus procedures were followed too.

On the relief the arbitrator ordered that the respondent Thomas Secondary School to issue a certificate of service to the employee Jacob Massawe, payment of any employment contract benefits if there, salary arrears of April 2012 if deserving. Costs for the Advocate were not ordered to be paid.

That decision of the arbitrator pierced the applicant Jacob Massawe hence knocked at the doors of this court under the ambit of section 91 (1) (a) and (b) of the Employment and Labour Relations Act No. 6/2004, knowing that ***Ubi jus ibi remedium*** [where there is a right there you will also find a remedy, this implies that where a right is violated, a remedy must be sought], and filed an application for revision of that award.

The hearing of the application went on by written submissions, the applicant being represented by Mr. George Mwalali from Desk Law Advocates, while the respondent had the legal service from Mr. Gasper Tluway Advocate from Dynamics Attorneys.

The applicant advance almost six grounds to be determined by this Court on revision and were argued in the written submission as put in the supporting affidavit.

For clarity and appreciation of the logical sequence of this judgment, this Court will deal with each issue and parties' submissions and give a

ruling there to, despite the fact that the applicant in his written submissions are not in sequential arrangement as elaborated above as filed by the applicant in the supporting affidavit, also numerated in the applicant's submission on though the submission, rather mixed up the same. The legal issues were:-

- (i) ***THAT, the Commission erred in law and fact by failure to decided according to the recorded issue.***
- (ii) ***THAT, the Commission erred in law and fact by issuing a controversial AWARD that I be paid terminal benefits as per contract without stating clearly what amount of money to be paid.***
- (iii) ***THAT, the Commission erred in law and fact by issuing such AWARD without finding whether there was unfair termination, whether there was reasons for termination and whether procedure was properly followed during termination.***
- (iv) ***THAT, the Commission erred in law and fact by failing to give reason to justify its decision.***
- (v) ***THAT, the Commission erred in law and fact by failing to hold that the reason for the Employer's failure/refusal to award a second contract were misconduct and poor performance contrary to the evidence on record.***
- (vi) ***THAT, the Commission erred in law and fact by failing to evaluate as well as to act on evidence on record.***

Arguing for the application Mr. Mwalali for the applicant started submitting on ground six of the application, that the arbitrator failed to properly evaluate the evidence tendered before the Commission as well as

what was submitted by the witnesses who had testified to the commission. That the documentary evidence tendered were recorded as AP1, AP2, AP3 clearly showing that the employer failed to award the second contract to the employee due to misconduct and poor performance in his teaching carrier while the employee had reasonable expectation of renewal as per item 11 of the employment contract.

Mr. Mwalali further argued that had the arbitrator evaluated the evidence on record he would have found that the termination of the applicant was unfair hence ordered payment of statutory benefits as per section 40 of the Act.⁵

In response to the six ground for revision the respondent submitted that the Commission properly evaluated the evidence tendered before it to wit AP1, AP2, AP3 which later on help the Commission to decide that the applicant had affixed term contract and that he had no nay expectation of renewal of the said fixed term contract. That the applicant had failed to honour the requirement enshrined in the employment contract of the first contract which could warrant the grant of the second contract.

The respondent further submitted that as per clause seven of the employment contract made it clear that had the applicant wished to continue with the second contract of employment he ought to have informed the employer respondent on the same within six month, and upon such agreement there to be mutual agreement between the parties.

⁵ The Employment and Labour Relations Act No. 6/2004

Failure of that above, the employment contract expired no sooner had the applicant purported to have expectation of renewal of the second contract.

In rejoinder to this legal issue Mr. Mwalali insisted that there was expectation of renewal of the second contract and that since the contract of employment was of one year then there was no requirement of six months' notice for the second contract of employment rather the applicant was terminated due to misconduct and poor performance. That there was ample evidence adduced at the CMA to wit AP1, AP2 and AP3 which spoke on reasonable expectation of renewal of the second contract with 10% of basic salary upon completion of the contract as terminal benefits [**10% x basic salary x 24 months**], as per clause 11 of the Employment Contract, contract to which there was unfair termination.

Mr. Mwalali further argued that at page seven of the award the arbitrator spoke of clause seven and eleven jointly but did not speak broadly on clause eleven but only said that the employee was to inform the employer of the expectation of renewing the contract.

He concluded on this ground that had the arbitrator properly evaluated the evidence he would have made a finding of unfair termination as prayed for by the applicant.

On this issue as whether the CMA evaluated evidence properly and arrived to the proper decision, this court is of firm decision that the Arbitrator properly evaluated the evidence tendered before it and that even the decision thereto was as per the evidence tendered, thus the applicant

was not terminated on ground of poor performance or misconduct rather his fixed term contract of one year had met an escapable natural death and there was no any circumstantial environment created by the employer to justify expectation of renewal of the contract.

It is from the CMA records that on 7th of March, 2013 the employer informed the employee that on 18th March 2013 the contract of employment will be coming to an end.⁶ And it is from the record that item seven of the contract of employment between the two, had given a room to the employee before six months of the expiry of the contract to notify the employee on renewing the contract. That notification was not done.

For easy of reference i reproduce that portion of item seven of the contract.

....If the employee desires to be engaged for another period of service following the completion has her engagement under this agreement may less than six months before the expiration of the period of the engagement give the employer a notice in writing of his her intention to be so engaged for another term of service and the employer shall upon receipt of this notice decide to engage the employee for a further period of service the employer shall make offer of employment to the employee. The employee may be engaged for another period of service of such duration and upon the terms and conditions as may be mutually agreed in writing between the employer and the employee...⁷

⁶ See a letter with reference No. TSS/0015/2013, issued by U. Makuza, Meneja

⁷ See contract of employment between Thomas Secondary School and Jacob Massawe

Form that above it is with great weight that the six grounds for revision that the Commission erred in law and fact by failing to evaluate as well as to act on evidence on record fails from its roots and it is hereby dismissed.

On the first issue **that the Commission erred in law and fact by failure to decide according to the recorded issue**, and the third issue that **the Commission erred in law and fact by issuing such award without finding whether there was unfair termination, whether there was reasons for termination and whether procedure was properly followed during termination** were argued jointly.

Mr. Mwalali Advocate for the applicant argued that the CMA was to determine every issue framed but the arbitrator only mentioned them without deciding on the same and did not make specific finding on the issues.

He further argued that the arbitrator granted terminal benefits to the employee as per contract of employment without stating clearly the amount of money to be paid, hence a naked, uncertain award. That the arbitrator had to make it clear the amount to be paid.

In response the employer argued that the first and third ground for revision was illogical because the award was issued as per drawn issues and that the finding was proper according to the evidence tendered that the termination was due to expiry of fixed term contract and not others.

On the certainty of the award in regard to the amount to be paid on terminal benefits, Mr. Tluway Counsel for the respondent employer argued that following the evidence tendered to the CMA, the employee did make it clearly is any amount to be paid on terminal benefits was at what tune, hence difficult for the Arbitrator to specify the amount.

In rejoinder Mr. Mwalali submitted and insisted that the arbitrator did not decide on the drawn issue rather simply mentioned them at page six of the award.

The decision of this Court on the first issue and second issue is that those grounds for revision do not hold water and are hereby dismissed. The reason for that decision is that the arbitrator drew three issues at page six of the award to wit, whether there were valid reason for terminating the contract; whether procedures were followed and what were the reliefs to the parties.

The arbitrator rightly found that the applicant's employment contract had expired since it was a fixed term contract and reasons were given for not renewing that contract. The arbitrator also upheld the procedures used in informing the employee on the expiry of that contract as required under the law.⁸

On reliefs the Arbitrator was right to order payment of terminal benefits if any, without specifying the same following the nature of a one

⁸ See p 7 of the arbitral award issued in labour dispute No CMA/DSM/ILA/R.185/13/223 before Fungo, Arbitrator.

year fixed term contract which was either to be in the employment contract or be made clear by the employee during the hearing. The arbitrator cannot be faulted on that.

Conclusive the above grounds for revision are dismissed. After going through the submissions of the parties and particularly the six grounds for revision, this court finds that the grounds for revision are inter related so much that the decision in one ground makes the other ground be answered.

Par Exemplar, ground one which starts that ***the Commission erred in law and fact by failure to decide according to the recorded issue***; is the same as ground six which is ***the Commission erred in law and fact by failing to evaluate as well as to act on evidence on record***; also the same to ground two which is that ***the Commission erred in law and fact by issuing a controversial AWARD that I be paid terminal benefits as per contract without stating clearly what exact amount of money to be paid***.

Also ground five which is ***the Commission erred in law and fact by failing to hold that the reason for the Employer's failure/refusal to award a second contract were misconduct and poor performance contrary to the evidence on record***; is more less the same to the third ground which is ***that , the Commission erred in law and fact by issuing such AWARD without finding whether there was unfair termination, whether there was reasons for termination and whether procedure was properly followed during termination***; as well as ground four ***which is***

that the Commission erred in law and fact by failing to give reason to justify its decision.

Since all the grounds for revision do not hold water it is the decision of this Court that the Arbitrator as per evidence adduced at the CMA was right in law and fact in deciding that the termination of the applicant's employment was neither on poor performance nor misconduct rather on expiry of a one year fixed contract between the parties and that there was no any circumstantial environment created by the employer for there to be reasonable expectation of renewal of the contract.

The arbitrator's finding and award is hereby confirmed. This present revision application is hereby dismissed for lack of merit.

It so ordered.



I.S. Mipawa


JUDGE

14/12/2015

Appearance:-

1. Applicant: Absent
2. Respondent: Absent

Court: Judgment has been delivered today in the absence of both parties the Deputy Registrar of this Court to serve the parties with the copies of Judgment.



I.S. Mipawa

JUDGE

14/12/2015