

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LABOUR REVISION NO.3 OF 2020

(Arising from Labour Dispute No. CMA/MZ/NYAM/197/2019/76/2019)

JONAS OSWADY APPLICANT

VERSUS

COST DATA CONSULTATION LIMITED RESPONDENT

JUDGMENT

Last Order: 5th June, 2020

Judgment Date: 12th June, 2020

A.Z MMGEYEKWA, J

The applicant filed the instant revision in this Court against the award of the Commission of Mediation and Arbitration which dismissed the application of the respondent, Adrian Leonard Kaozya without loss of remuneration during the period that the employee was absent from work due to unfair termination.

The respondents challenged the application by filing a Joint Counter-Affidavit and a Notice of Opposition.

The applicant in his chamber summons prayed for the following orders:-

1. *That this Honourable Court be pleased to exercise its revision jurisdiction, call for and examine the records of proceedings before the Commission for Mediation in Labour Dispute No. CMA/MZ/NYAM/197/2019/76/2019 for the purpose of satisfying itself as to correctness, legality, and/or propriety of the award made by the Arbitrator [Hon. Msuwakolo] dated 30.12.2019.*
2. *If the Court finds the incorrectness, illegality, and impropriety go further to evaluate the evidence in case file records and grant the prayers sought in CMA- F1.*
3. *Any other reliefs as this Honourable Court may deem fit and just to grant under the circumstances.*

The hearing was done by way of written submission whereas, the applicants filed the written submission as early as 25th May, 2020 and the respondents filed a reply as soon as 1st June, 2020 and a rejoinder if any was to be filed on 5th June, 2020.

Before going into the merits of the revision, it is important to comprehend what transpired at the Commission for Mediation and Arbitration which cropped the present revision, in a nutshell, the facts may be summarized as follows:-

The applicant and the respondent had an employment relationship whereas the applicant was employed as an Electrician by the respondent under a fixed term contract of employment for one year. The applicant claimed that his contract started to run on 1st March, 2018 and had to end on 28th February, 2019 with an option for renewal as per Exh. EF – 1. On 31st March, 2019 the applicant was orally informed by his employer to stop working and henceforth resulted in the breach of the complaint employment contract. Dissatisfied by the employer's termination he decided to file a claim before the CMA. The CMA determined the dispute and the CMA ended up dismissing the applicant's application.

Supporting this application, the learned counsel for the applicant submitted that the application seeks to impugn the award given in favour of the respondent by the Commission for Mediation and Arbitration, Mwanza in Labour Dispute No. MZ / NYAM/ 197/ 2019/ 76/ 2019 which was delivered on the 30th December, 2019.

The learned counsel for the applicant submitted that the applicant was employed by the respondent as an electrician the way back in 2014. He submitted that on 1st March, 2018 the parties concluded a fixed term contract of one year, without indicating the last date of a contract he added that logically the contract had to end on 28th February, 2019 with an option for renewal. To support his submission he referred this court to exhibit EF-1. He valiantly argued that the last date was due on 28th February, 2019 but the respondent continued to assign the appellant with usual daily duties as per job descriptions until 30th April, 2019 when the applicant was orally informed to stop working hence the breach of the applicant's contract.

The applicant's Advocate invited this court to go through the Rule 4 (2), (3) and (4) of the **Employment and Labor Relations (Code of Good Practice) Rules, 2007, G.N No.42 of 2007** which state that:-

" Rule 4 (2) where the contract is fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

(3) Subject to sub-rule (2), **a fixed term contract may renew by default if an employee continues to work after the expiry of the fixed contract term and contract circumstances warrant it.**

(4) Subject to sub-rule (3), the failure to renew a fixed term contract in a circumstance where the employee reasonably expects a renewal of the contract may be considered to be unfair termination."

The learned counsel for the applicant went on to argue that it is undisputed that the contract conducted by both parties was a one year contract and logically had to come to an end on the 28th of February 2019 but the respondent HR testified before the commission that the

applicant continued to work until 30th April 2019 and was accordingly paid his monthly that salary. He further argued in law is called renewal by default as the employee continued to work after expirations of the employment contract at the very instructions of the employer.

He faulted the Arbitrator's findings that the mistake done by the respondent to let the applicant work until 30th April 2019 while his contract was ended was a human error that cannot be used to punish the respondent. He continued to add that if the employee continues to work after the expiration of the contract then it is termed as a renewal by default hence it was unfair termination to terminate the employee from working without any reason.

He continued to argue that the respondent had issued and served the applicant with Exhibit EF-2 (notice of the end of contract) on 28th February 2019 and had the following to submit. Firstly, the notice was prepared and purported to inform the applicant the end of the already expired contract; secondly, the said notice was not served to the applicant. He insisted that it is undisturbed that the respondent breached his new employment contract shortly at the beginning of two months and therefore made him lose the remaining employment

period and other employment benefits which under the circumstances all these benefits should be calculated and till to date the applicant has not secured new employment. The breached contract was for the fixed term contract and therefore they invite the court to subscribe to the decision of **Good Samaritan vs. John Robert Savari Munthu, labor revision No.165 of 2011, LLCD No.9 of 2013, which** held that:-

“ Unlawful termination contract of employment is termination contrary to an agreement without reason stated differently that termination amounts to a breach of contract. In law premature termination of fixed term contract, without consent of the employee is wrong and unlawful, unless lawfully done according to an agreement.”

The learned counsel for the applicant continued to submit that when an employer terminates a fixed term contract the loss of salary by the employee of the remaining period-unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action.

In conclusion, the learned counsel for the applicant prays for this court to find that the respondent breached the employment contract with the applicant and thus the applicant is entitled what he has indicated in the CMA-F1, the notice of 28 days under section 41 (1) (b) (3) of the Employment and Labour Relations Act, 2004 and certificate of service for appreciation as stipulated under section 44 (2) of the Employment and Labour Relations Act, 2004.

In reply, the learned counsel for the respondent replied submitting that the employment contract between the applicant and respondent was of fixed term to the duration of one year as per Exhibit EF-1. The learned counsel argued that there was no any circumstance that indicated that the parties to the contract should resume or continue with the relationship that was created. He referred this court to Rule 4 (2) of the `Employment and Labor Relations (Code of Good Practice) Rules, G.N/2007, which is to affect that the contract shall terminate automatically when the time agreed upon expires and as such, in the case at hand the contract was supposed to be terminated automatically. To support his position he cited the case of

2011, it was held that:-

"...if the contract had indeed been for a fixed specific period, there would have been no need for notice of termination..."

The learned counsel for the respondent further argued that although the respondent chose to issue a notice of termination of one month that was a clear indication that the respondent had no intention to continue employing the applicant.

In conclusion, he urged this court to dismiss the applicant's application and uphold the decision of the Commission for Mediation and Arbitration for Mwanza.

I have gone through the record of the CMA and this Court duly considered the submissions of both parties with eyes of caution. The issue for determination is *whether the application is meritorious*.

The renewal of contract depends on a type of contract, in the instant application the contract was a fixed contract thus the renewal depends on various factors which include the contract clauses. In the

record it shows that the 6.1 clause on the contract is about a renewal of the contract, which reads that:

" An employer can terminate a contract at any time by issuing a one month notice or to pay you a one month salary ahead instead of issuing a notice."

The records reveal that the main reason for the applicant's revision is that he claims that the employer breached the contract, the employee and employer had a fixed term contract. Under the Act, which rules apply in respect of the termination of an employment contract depends on the duration of such contract and duration is determined by what the type the parties have. In the instant case, parties entered into a fixed term contract. A contract is considered to be of fixed term when "*an agreement to work is in respect of a fixed time or upon completion of a task*". Under a fixed term contract the principle applicable is under conditions specified under section 36 (a) (iii) which reads together with Rule 4 (4) of GN.42 such conditions are said to exist where an employee reasonably expects a renewal.

In the record, the applicant's fixed contract was ending on 28th February, 2019 however, the applicant continued to work until 30th

April, 2019. The employer continued to assign the applicant. It is trite law that a notice is required to be issued to an employee even in a fixed contract. In case the employer will allow the employee to continue working and the employer assigned the applicant work to do it is renewal by default. In the instant application, the employee was working and he was assigned duties until a month later the employer terminated him without stating any good reason. In my view the same amount to a renewal of contract by default as stipulated under Rule 4 (2), (3) and (4) of the Employment and Labor Relations (Code of Good Practice) Rules, 2007, G.N No.42 of 2007 which state that:-

“ Rule 4 (2) where the contract is fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

(3) Subject to sub-rule (2), **a fixed term contract may renew by default if an employee continues to work after the expiry of the fixed contract term and contract circumstances warrant it.**

(4) Subject to sub-rule (3), the failure to renew a fixed term contract in a circumstance where the employee reasonably

expects a renewal of the contract may be considered to be unfair termination.” [Emphasis added].

Based on the above provision of law, the applicant’s fixed contract was supposed to be expired on 28th February, 2019 but the respondent assigned the applicant on staff duty for a month after the expiration of the fixed contract. Therefore, I am in accord with the applicant’s view that it was a renewal by default because the applicant continued to work after the expiration of the fixed contract term.

In determining the reliefs claimed by the applicant, I had to go through the CMA F1, and I found that the applicant prayed for the Tshs. 4,950,000 for 11 months' salaries, Notice of 28 days, leave allowance, and severance pay of five years. Guided by the above analysis I have to say that the applicant is entitled to the loss of salary by the employee of the remaining period of the unexpired term. Salary in lieu of notice and certificate of service.

It is trite law that when the employer terminates a fixed term contract, the loss of salary by the employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence

of the employer's wrongful action. As it was held in the case of **Good Samaritan v Joseph Robert Savari Munthu** (supra). Therefore, in this case, feasible consequence of the applicant's action was a loss of salary for the period of the employment contract which was 11 months in a tune of Tshs. 4,950,000/=. In accordance with Section 42 of the Employment and Labour Relations Act, 2004 as amended by the Written Laws (Miscellaneous Amendments) Act No.2 of 2010 the applicant is not entitled to severance pay. Section 42 of the Act provides that:-

"13. The principal Act is amended in section 42 by deleting immediately after paragraph (b) of subsection (3) the following subparagraph:

*(c) to an employee who attains the age of retirement or employee whose **contract of service has been expired or ended by reason of time.** [Emphasis added].*

Guided by the above provision of law, the applicant's time of employment ended, therefore, severance payment cannot be affected.

In the final result of all the above. I quash and set aside the arbitrator award and I proceed to grant the prayer to the extent that

the applicant is entitled to a salary of /€u of notice as stipulated under section 41 (1) (b) (3) of the Employment Labour Relations Act, No.6 of 2004, Tshs. 4,950,000/= being a payment of 11 months' salary and certificate of service as stipulated under section 44 (2) of the Employment Labour Relations Act, No.6 of 2004.

Order accordingly.

Dated at Mwanza this date 15th day of August, 2019.


A.Z.MGEYEKWA

JUDGE

15.08.2019

Judgment delivered on 15th day of August, 2019, and both parties were remotely present.


A.Z.MGEYEKWA

JUDGE

15.08.2019

The right to appeal fully explained.