IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 63 OF 2019

(Originating from CMA/MZ/NYAM/37/2014 by Hon. Lucia Chrisantus, Arbitrator)

PETER NG'HOMANGO ..... APPLICANT

VERSUS

MESSA SECONDARY SCHOOL ..... RESPONDENT

JUDGMENT

10th September, & 22nd December, 2020

TIGANGA, J

This case has a chequered history, it started way back in the year 2014 as Labour Dispute No. CMA/MZ/NYAM/37/2014 which was filed before the Commission for Mediation and Arbitration herein refered to as the CMA, for Mwanza in which the the applicant was complaining against the decicion of the respondent which in effect terminated his employment. In that dispute, the CMA found for and awarded the respondent and against the applicant.

That award was appealed against to the High Court in Revision No. 101 of 2017. In that revision, my senior brother, Hon. Matupa, J, by the

consent of the parties, revised and quashed the award and consequently set it aside and ordered the matter to start afresh before another arbitrator.

Following that order, the matter started afresh before the CMA presided over by another arbitrator, but it was with the same registration number. Before it proceeded for hearing, the arbitrator framed four issues, namely;

1. Whether there was an employment contract,
2. Whether the employer hed valid reasons to end the employment contract,
3. Whether the employer followed the valid procedures to terminate the contract, and,
4. To what relief are the parties enitled.

After hearing of parties, the arbitrator concluded the first issue that there was a fixed term contract between the parties.

Resolving the second issue, the arbitrator held that as the contract was a fixed term contract, then it ended after its term was over, as there was no expectation for renewal of the contract and the same was not

renewed, therefore at the time when the same was alleged to have been terminated, there was no contract between the parties. Having resolved that there was no contract between the parties then the rest of the issues died naturally. The dispute was dismissed for want of merit and each party had to bear its costs.

The applicant was aggrieved by the award, he decided to file this application for revision, by filing a notice of application for revision, a chamber summons moving this Court under sections 91(1) (a) and (b), 91(2)(a)(b) and (c), 91(4) (a)(b) 94(1)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, No.6 of 2004, read together with Rule 24(1), 24(2)(a)(b)(c)(d)(e)&(f), section 24(3)(a)(b)(c)&(d) and Rule 28(1)(a)(b)(c)(d)&(e) of the Labour Court Rules 2007 G.N. 106 of 2007.

The same was supported by the affidavit with a total of 22 pagraphs sworn and filed by the applicant himself in which the reasons for the application were given.

In this application, the applicant is asking this Court to call for and examine the record of the Commission for Mediation and Arbitration for Mwanza in Labour Dispute No. CMA/MZ/NYAM/37/2014, in order to satisfy

itself as to the correctness, legality, or propriety, of the Award/decision passed on 31/05/2019 by the Arbitrator in CMA/MZ/NYAM/37/2014.

The Court is also asked to revise and quash the whole award/decision given by the Arbitrator in the above referred dispute and determine the dispute and give its own award as it deem fit.

The main ground of the application are as follows:-

(a) There was a misconduct on the part of the arbitrator,

(b) The complained award/decision was improperly procured,

(c) The complained award/decision is unlawful, illogical, and irrational,

(d) The commission exercised jurisdiction which is not vested in it by law,

(e) The commission failed to exercise jurisdiction which is vested in it by law,

(f) The commission acted in the exercise of its jurisdiction illegally and with material irregularities, and

(g) There are several errors by the commission on the face of the record which are material to the dispute and which have resulted into injustice on the part of the applicant.

In the affidavit filed in support of the application, the applicant deposed the facts constituting the background information of the dispute, telling how he was employed by the respondent, how the dispute between them arose, how was it resolved and the fault done by the Arbitrator in resolving the dispute before the CMA.

He also complained that, the award contains a number of irregularities and apparent errors material to the merits of the case which have resulted into injustice on his part. He mentioned the said irregularities to be:-

(a) The Arbitrator erred in law and in fact to hold that the contract of employment in exhibit P1 was a fixed term contract and that the same had expired by 06/01/2014

(b) The Arbitration was legally wrong when she held that the item of Gratuity is only available in fixed term contracts

(c) The Arbitrator erred in law and fact when she omitted to hold that the applicant's letter dated 06/01/2014 which is exhibit P4 applying for renewal of contract, was obtained by respondent through fraud, intimidation and coercion.

(d) The Arbitrator erred in law and fact when she held that the applicant refused to surrender the contract of service to the respondent and that the applicant is not faithful.

(e) That the Arbitrator erred in law and facts when she decided the dispute on the basis of the respondent's evidence only without considering the applicants evidence contrary to the proof on the balance of probabilities.

(f) The arbitrator erred in law when she determined the 1st issue in the negative

(g) The Arbitrator erred in law when he omitted to observe rule 27(3)(c)(d) and (e) of the Labour Institution (Mediation and Arbitration Guidelines), Rules, GN.67 of 2007

(h) The Arbitrator wrongly left issues No. 2, 3, and 4 undecided, and,

(i) The arbitrator wrongly dismissed the Labour Dispute between the parties.

He pointed out the main legal issue arising from all the material facts of this matter are as follows;

First, whether the CMA award/decision delivered on 31/05/2019 deprives the applicant of his substantive justice and occasion injustice to the applicant, and,

Second, whether the award/decision of the Commission delivered on 31/05/2019 can legally be sustained in the name of justice.

In the further effort to impeach the award passed by the CMA, the applicant also filed supplementary affidavit in which he raised the complaint that, the trial arbitrator tempered with the proceedings as the same has a lot of ommissions and fabrication which were deliberately commited in order to damage his case in favour of the respondent.

He also deposed that the CMA Arbitration proceedings, annexure P23 ommitted a number of question and answers in respect of the evidence of DW1, in which about 26 questions with their corresponding answers were omitted. In respect of DW2, about 44 questions with their respective

answers were left out, and in respect of PW1 about 24 questions with their corresponding answers were omitted in the examination in chief, cross examination and re-examination.

With regard to the fabricated facts in respect of DW1, about 7 questions and their corresponding answers, in respect of DW2, 10 questions and their answers, in respect of PW1 about 19 question and their corresponding answers were fabricated.

The application was countered by the notice of opposition, filed by the applicant and the counter affidavit sworn and filed by one Godfrey Messanga who introduced himself as the Director of the respondent. In that counter affidavit, the respondent disputed almost every fact in the affidavit and demanded the strictest proof from the applicant.

That was followed by the reply to the counter affidavit, which was filed by the applicant, in which he also disputed all the facts which disputed his affidavit and supplementary affidavit.

The hearing of this application was conducted orally, while the applicant appeared in person and un represented, the respondent was

represented by Mr. Benard Mkungu the personal representative of own choice of the respondent.

In his submission in support of the application, the applicant adopted the affidavit and the supplementary affidavit filed in support of the application, and in essence informed the court that, the pplication is for revision of the award of CMA, in labour dispute No. CMA/MZ/NYAM/37/2014, in which three orders are sought as follows;

i) The court be pleased to call for the record of the CMA Mwanza in that labour dispute in order to satisfy itself on the correctness, legality and propriety of the award,

ii) The court be pleased to revise, quash and set aside the award mentioned above,

iii) The court be pleased to determine the dispute and give its own award or decision.

He submitted that the affidavit filed in support of the application is with 22 paragraph, as to per page 8 - 15, of the record of application, and the annextures are at pages 16 - 319 of the record of the appeal. The counter affidavit file by the respondent was replied to by himself the reply to the counter affidavit, and he filed the supplementary affidavit to tell the

court the new facts. The said supplementary affidavit has not been countered by filing the counter affidavit.

He submitted that 70% of his ffidavit has been admitted by the respondent, and where the same has been denied then the denial has been general and evasive. He also submitted that the said counter affidavit has its seven paragraph defectives on the ground that paragraphs 3rd, 5th, 7th and 9th are defective for containing claw back statement which put the applicant to strick proof of the matter sworn in the affidavit while paragraphs 3rd, 5th, and 11th are hearsay evidence and that 12th paragraph of the counter affidavit contains a submission which is a prayers.

He submitted that in law, the statement which put a party to the strict proof are found in the Written Statement of Defence as the challenge to the plaint, he said in the counter affidavit they are misplaced.

To support his contention, he cited the authority in the case of **Ibora Timber supply (T) Vs Benjamini Mahuma and Another,** Misc. Civil Application. No. 16/2006, at page 4 in which it was held that, hearsay evidence are strictly prohibited in affidavit, and the court is strictly prohibited to act on them. They should be expunged or ignored, on this he

relied on the case of **NBC 1997 Limited vs Thomas Chacha**, Misc. Civil Appeal No. 171 of 2000, also the case of Ibora at page 4. He submitted that when all these defective paragraph are expunged, the remaining paragraph remain supportive to the application. Regarding the contents of the supplementary affidavit, he submitted that all the paragraphs are not opposed.

Submitting on the merit of the application, the applicant said that, paragraph 20 of the affidavit filed in support of the application shows errors committed by the Commission for Mediation and Arbitration. The first error is under paragraph 20 (a), and exhibit P1 at page 152 - 153 of the record of application, paragraph (9) shows that in the second term, the applicant was employed to serve a minimum term of 2 years, but the maximum period was not mentioned. He submitted that the minimum period should not be enterpreted to mean maximum, he attached letters at page 57 and 128 of the record of application, which talk about the minimum period. These letters are not in any way related to the dispute at hand, they are neither the decision of the court nor the law, however, the legal relevance of these letters will be discussed later.

He also submitted that looking at page 152 of the record of application; the contract was permanent as opposed to a fixed term contract. He support his argument by the reason that, contract started on 02/05/2011 and the termination was made in 2014. The other base was that exhibit P5 as attached as at page 154 - 159, of the record of application, show that he served so many posts, to wit, the appointment in the School Board, Sports Coordinator, Assistant Discipline Master etc, and according to him all these show that, his employment was permanent.

He also asked the court to have a look on his closing arguments before the Commission for Mediation and Arbitration as reflected at pages 188 – 191 of the record of the application and take it as part of his submission.

Further to that, he submitted that, the second error, is found at paragraph 20(b), of the affidavit in support of the application that the arbitrator was wrong when he held that the gratuity is on the fixed term contract as reflected at page 315 of the record of application.

He submitted that the word gratuity does not determine the period of contract, its meaning according to the legal dictionary, it is a kind of gift,

so the Arbitrator was wrong when she restricted the term gratuity to a fixed term contract.

Further more, he submitted that the third error was at paragraph 20(c) which shows the other error in the decision of Arbitrator, at page 315 of the record of application, he referred at exhibit P4 at page 183 of the record. According to him, those words are not true as at page 20 of the CMA proceedings, there is evidence that the first contract was ongoing.

Annexture 20 of the supplementary affidavit, the new form which was not filed in, it is found at page 160 of the record of application, exhibit P3. At page 22 of the CMA proceedings, there is exhibit P5 which was given together with the cheque. However annexture 20 to the supplementary affidavit is the proceedings recorded and certified by the applicant purporting them to be the correct version of the proceedings of the CMA. The issue of its authenticity and whether it may be used to impeach the proceeding of the CMA will be discussed later.

He submitted that the leter to ask for renew of the contract was not written at will, he was forced to do so while the contract was subsisting. On that, he submitted that, exhibit P4 was obtained from him by

respondent by fraud and coercion. In dealing with that, he prayed to rely on section 10, 13, 14, 15, 16, 17, 18 and 19 of the Law of Contract Act. He further more prayed for the court to refer to the documents on records on closing arguments, exhibits P3 and P5, and the termination letter of the applicant.

He also prayed this court to make reference to exhibit D3 of the record of the application and find that the same was falsely endorsed by the respondent. Also at page 193 of the record of the application the closing arguments at paragraph 2 where it was insisted that, the applicant was forced to write a letter exhibit D3 by DW2.

On the 4th error which is as reflected on paragraph 20 (d), page 315 of the record of application. The applicant submitted that, the complaint against him was a mischief, as reflected at page 9 - 10 of the proceedings of the CMA, under which the court will find the truth. Had the applicant hidden the contract he would have been disciplined. He prayed the court to refer at page 119 - 121 of the record of the application.

The 5th error, as reflected at paragraph 20(e) that the applicant evidence was not considered, but that of the respondent was considered

that of the respondent was considered. He also insisted that the closing arguments were not considered as well as to per 184 - 310.

He relied on two authorities, that is Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which provides for the right to be heard, and consider the arguments of the Court in the case of **Ligwa Kusanja vs The Republic,** Criminal Appeal No. 113 of 1999 at page 8 paragraph 2, he also relied on **Hamis Rajabu Dibangula vs The Republic, [2004]** TLR 181, at page 198, and **Julius Ishengoma Ndyanabo vs Attorney General, [2004]** TLR 14.

The 6th error as to paragraph 20(f) is that the Arbitrator erred in law when he determined the 1st issue in negative. At page 216 Paragraph 2, he prayed the court to find that there was a constructive renewed contract.

The 7th errors as reflected in paragraph 20(g) is that the arbitrator erred in law when he omitted to observe Rule 27 (3) (c) (d) (e) of the Labour Instructions Rules GN 67/2007. The provision provide the guidance on how the award should be. According to him, the evidence was not summarized; the reasons are incomplete and inadequate. This leads to injustice to the parties which is the reason to allow the application at hand.

The 8th error, as reflected in paragraph 20(h) of the affidavit which is that, issue No. 2, 3, & 4 were left undecided. According to the applicant, the judgment should touch on every issue. On that, he relied on the case of **Stanslaus Rugaba Kasusura vs Phares Kashemeza Kabuye** [1982] TLR 340.

The 9th error as reflected in paragraph 20(i) of the affidavit in support of the application, raises the complaint that the Arbitrator erred in law to dismiss the labour disputes between the parties.

He also prayed the court to find that the Arbitrator tempered with the CMA proceedings at the hearing stage. The tempering was on the cross examination asked, by the applicant, as so many questions and their corresponding answers were omitted. He asked the arbitrator to be condemned for what he did.

He prayed the court to allow the prayers which are in the notice of application and the chamber summons, having so allowed, it be pleased to to evaluate evidence as it is the 1st appellate court, as held in the case of **Martha Weja** (1982) TLR 11, and **Ally Abdallah Amoul vs Al Hussein** (2003) TLR 313.

He also prayed to refer you at page 43 - 45 the decision of my senior brother Hon. Matupa, J and he prays this court to make sure that, the matter comes to an end. He referred to the authority in the case of **Remidius E. Kissasi vs Christopher J. Makaki**, Civil Appeal No. 64/2005 where the Court of Appeal held that this court may, under section 95 of the Civil Procedure Code step into shoes of the CMA. He also cited the case of **John Magesa vs TBL,** Revision No. 60/2013 at page 5 where my senior sister Hon. Rweyemamu, J did that.

He also cited the decision of **Katibu Bundala Mihambo vs Hall Core Driling**, Revision No. 22 of 2015 paragraph 2 of page 2 where the High Court did the same. Insistingly, also cited the case of **Isack C. Kanela vs Amani Girls House,** Rev. No. 24 of 2012, in which Hon. Wambura, J, quashed the decision of the Arbitrator and re heard the matter. In so doing, he asked the court to be guided by documentary evidence and the written submission as reflected in evidence. He also cited the case of **Gasper Peter vs MTUWASA,** Civil Appeal No. 35 of 2017 at page 13. He submitted that the record of appeal is sufficient.

In his reply submission, Mr. Benard Nkungu, the representative of the respondent's own choice submitted that, the applicant was employed under

a two years contract which started on 02/05/2011 and which was ending on 02/05/2013. He submitted that, it was a fixed term contract, and the applicant was given a copy of the contract so that he can read it and fill in it. He went with it on the agreement that, he sign after reading it and thereafter return it to the employer, however he did not return the same until his contract was over.

The Director of the respondent tried his best to pursuade him to submit the contract after signing it, but he did not do so. The headmaster wrote him a letter on 09/09/2013, requiring him to return the contract and gave him the condition, that if he would fail to return the said contract, he would not be paid salary. Following that condition, the applicant complied, and submitted the said contract to the headmaster.

Since the term of the contract was over, it was the duty of the respondent to pay him all his dues. The applicant was told by the director that if he wanted to proceed, he was required to apply a fresh, asking for a new contract.

Since the Director was no longer having faith in the applicant, the applicant was not given a new contract following the misconduct of not showing or returning the contract to the employer. After being paid, the

applicant filed the labour dispute, where mediation failed then, the dispute went to arbitration.

In the CMA – Form No.I, the applicant had claims which were about Tshs. 15,799,600/= which were leave Tshs. 460,000/=, salaries for eight days, Notice Terminal benefit 32, which is Tshs. 408,890/= housing allowance 32 months Tshs. 1,472,000/=, and compensation which is a salary of 18 years, which is Tshs. 12,880,000/=. He also demanded certificate of service.

He sumitted that after the contract had reached to an end, the applicant was paid all his dues which included leave Tshs. 461,000/= which was equivalent to one month salary therefore there is no any arrears of leave.

Regarding the salary of January of 8 days that is Tshs. 118,720/=, the applicant has no right to claim because he did not do the job, because he had already handed over his job, since May 2013.

Regarding the notice of one month, he has no right because he had no contract so was for the terminal benefit "Mkono wa heri" for the whole period of 32 months, as he has no right to demand because he had already

been paid all his dues. The "mkono wa heri" is the clemency of the employer, it is not a must.

Regarding the claim of the housing allowance, which was when the applicant was given. He told the employer when he was informed of the right, that he would not like to be paid housing allowance because he had this home and that he had never demanded to be paid that amount during the subsistence of the contract. The compensation needs not to be granted because there was nothing to compensate.

Regarding the demand of a clean certificate of service, he submitted that the same was prepared on 14/02/2014 but the applicant refused to take it, because he was continuing with arbitration, I pray that he be given as it is his right.

Submitting on the amended claim, he prayed to answer the same that, three months leave Tshs. 1,380,000/= there is not leave claimed during the subsistence of the contract and the arrears is not allowed. The eight days salaries of January 2014, Tshs. 118,710/=. That amount is not entitled to him because he did not work for that month.

Regarding the salary in liue of Notice, he submitted that the applicant is not entitled to that amount, neither is he entitled to the gratuity of Tshs.

215,000/= as claimed, for he has no right to be so paid and the gratuity which is commonly known as "Mkono wa heri" is a discretion of employer.

Regarding the housing allowance for 32 months, he submitted that the applicant does not deserve to be paid because he himself told the employer that he did not want to be paid.

Regarding the eight days salary, he submitted that the applicant does not deserve because he had already handed over the office therefore he did not work and so is the claimed compensation of 28 months which all totals Ths. 12,880,000/= and the claimed terminal benefits of Tshs. 1,932,000/= should not be paid to him because he had already received the same in accordance with the fair procedure.

He prayed for the application to be dismissed, as the raised issues were all not proved. Starting with the first issue as to whether there was a contract between the parties, he submitted that, it was proved and resolved that the applicant had employment contract of two years which had already expired at the time of the alleged termination.

Second, regarding the issues whether the employer followed procedure of termination of employment of the applicant, it was resolved that the termination was not done but the contract reached to an end.

According to him, this is evidenced by the application by the applicant to renew the contract, which was at the discretion of the employer.

Thirdly, was the issue as to whether the employer followed the fair procedures in termination of employment, according to him, as there was no existing contract, the whole period of eight month, the applicant was paid his dues, there was no procedure to be followed because there was no contract.

On the fourth, issues of what are the remedy which the parties are entitled. The commission dismissed the claim by finding that it has no merit. The CMA did justice basing on the law, on the ground that the contract had already expired.

He submitted that all unreported cases, relied upon by the applicant are distinguishable as all these authorities do not negate the fact that there was no contract. If the applicant has another contract, he was supposed to prove the new contract. He at the end prayed the court to find that there was no evidence to convince the CMA and there is no argument to convince this court to decide in the favour of the applicant and proceeds to dismiss the application ad hand.

In rejoinder, the applicant submitted that the reply has not managed to shake his submission in chief made in support of the application. He further submitted that the submission made by the respondent representative was supposed to be made before the CMA. He reiterated that his employment was ended, as to per exhibit P1 at page 51 and page 52 of the record of application.

He submitted that most of his evidence are documentary which can not be shaken by oral testimony in terms of section 101 of Evidence Act [Cap 6 R.E 2019].

He prayed that, exhibit D2 and D3 which are in his opinion cooked by being backdated to read on the letter exhibit D3 was written on 06/01/2014, and was forwarded on 07/01/2014 and reached the Director on 08/01/2014. He submitted further that the contract does not show expiry date. There after the termination letter it was on 06/01/2014.

Second, exhibit D2 deals with the date of the contract which is not in a contract, last, that is the reason that at pages 160 - 162, when he was given a sample of the new contract. He said that the gratuity is paid even the government employee.

He prayed the court to refer to sections 6, 7 and 16 the Public Retirement Benefit Act, No. 2/2016, which provides that gratuity is payable to even government employee on permanent term. It is his opinion that the Arbitrator was wrong to fix gratuity to only a fixed term contract.

According to the applicant, as said earlier on pointed out the supplementary affidavit filed show how the arbitrator tempered with the evidence and prayed the court to be guided by section 89 of the Evidence Act [Cap 6 R.E 2019] the court is entitled to presume the genuiness of the record in support of the supplementary affidavit. In support of that contention, the applicant asked this court to refer the case of **Khalfani Sudi Vs Abieza Chichili** (1998) TLR 526 at 529, and section 5 of the Evidence Act (supra).

According to the applicant, in this case when the applicant filed the supplementary affidavit, the respondent did not file the counter affidavit to contradict it. He thus asked the same to be taken to be proved for not being contradicted.

Further to that, he cited the case of **Cheng Sing vs The Republic** (1956) Vol - EACA, 459 at 466 which provides the principle that, this court

has powers to impeach the proceedings and let the omission and fabrication to be noted and rectified immediately.

The applicant alerted this court that, this is a second revision to be brought to the High Court, in the first one the Judge held that the proceedings were tainted, revised them and ordered the same to be tried denovo. He submitted that, in his opinion, the new proceedings were deliberately tempered with by the arbitrator, it is on the basis of these facts he pray this court to step into shoes of the CMA and decide on merits of the case because CMA is no longer a fair play ground. He prayed this court to evaluate full evidence basing on documents as follow:-

1. The CMA record of evidence as supplemented once rectified by the applicants record in annexture P20 to the supplementary affidavit.
2. The Respondents closing argument of the CMA at page.
3. The applicant closing argument at CMA as at page 184 - 217 of the record of application together with ten authorities attached thereto.

He submitted that had the contract been ending in two years, they should not be on a ground of termination of employment. The facts were that had the contract been ending on 31/05/2013, they could not have allowed him to work as an employee for the subsequent period.

He prayed for orders to be paid his housing allowance, which he was not paid. He also ask to be given certificate of service which he was not given to date. He also asked the court to make an order for payment of salary up to when they will pay him, and an order allowing revision and that he be paid all his dues.

That being the summary of the record and the submission made by the parties in this case, in the course of the submissions there are a number of legal issues which have been raised, in my opinion they should be dealt with first before going to the merits of the application. These issues are not new, they were raised by the parties during the pendency and the hearing of this application; therefore parties had suffient opportunity to deliberate on them.

First, is the content of the supplementary affidavit and the record attached to it, whether the record attached to it, can supplement the record of the CMA, or rather the attached record may be used to impeach the genuineness of the record certified by the Commission for Mediation and Arbitration and sent to the High court forming the record of the CMA?.

Second, that whether the two letters attached at page 57 and 128 of the record of application, can be used as the tool for interpretation, of the term minimum period.

Starting with the first issue, regarding to the content of the supplementary affidavit, and the annexture thereto, whether the same can be used either to supplement record of the CMA, or to impeach the genuineness of the record certified by the CMA. The applicant asked the court to rely on section 89 and 5 of the he Evidence Act, and find that the two documents are presumed to be genuine. For easy reference the content of these provisions are hereby reproduced;

Section 89

(1) When a document is produced before a court, purporting to be a record or memorandum of the evidence, or of any part of the record of the evidence given by a witness in judicial proceedings or before any officer authorised by law to take that evidence, and purporting to be signed by a judge or a magistrate, or by any such other officer, the court shall presume:-

(a) that the document is genuine;

(b) that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and

(c) that such evidence was duly taken.

(2) N/A

Section 5 of the same law which I have also been asked to rely on provides as follows;

> *"Wherever it is provided by this Act or any other written law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved".*

Reading between lines the provisions of section 89(1) of the Evidence Act, properly interpreted, presumes a document to genuine if;

i) It is proved that it is the record or memorandum of the evidence, or

ii) of any **part of the record of the evidence given by a witness in judicial proceedings or**

iii) **given before any officer authorised by law to take that evidence,** and

iv) purporting to **be signed by a judge or a magistrate, or by any such other officer.**

It is only if the document meets the said criteria when it can be presumed to be genuine, and that any statements as to the circumstances

in which it was taken, purporting to be made by the person signing it, are true; and that such evidence was duly taken.

Now the issue is whether, the said documents attached to the supplementary affidavit neets these criterias, in my considered view, it does not.

First, it was recorded by the applicant himself when the witnesses were giving evidence in court proceedings; they are therefore a mere notice recorded by him whom this court can not guarantee its authenticity, genuiness and correctness.

Secondly, the same was not given before and recorded by a judge, or Magistrates or an officer authorised by law to take that evidence and has not been purported to be signed by a judge or a magistrate, or by any such other officer.

Lacking these qualities, the document can not be used to compare with the court proceedings which was recorded and certified by the CMA. It is important here to point out that, judicial proceedings are sacred, they cannot be easily impeached and if need be the impeachment need concrete evidence.

I am aware that, section 88 of the Evidence Act (supra) allows the court to presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact, or purports to be duly certified by a public officer in the United Republic; and is substantially in the form and purports to be executed in the manner directed by law in that behalf. The court may also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official capacity which he claims in such paper.

However, in my considered view, the presumption intended here was not meant to be against the court proceedings or records. In the case of **Khalfani Sudi vs Abieza Chichili** [1998] T.L.R 526 at 529. Rightly cited by the applicant; the Court of Appeal held *inter alia* that;

> *"We entirely agree with our learned brother, MNZAVAS, J.A. and the authorities he relied on which are loud and clear that, 'a court record is a serious document. It should not be lightly impeached' **Shabir F.A. Jessa v. Rajkumar Deogra** and that 'There is always the presumption that a court record accurately represents what happened":*

In that case the Court of Appeal while relying on **Paulo Osinya v. R.** [1959] E.A 353. Held *inter alia* that;

> *"In this matter, we are of the opinion that the evidence placed before us has not rebutted this presumption".*

Likewise in this case, there is no eveidence concrete enough produced to warrant a rebuttal to that presumption. For that reason although the supplementary affidavit has not been countered, by the respondent, the evidence in it and which is introduced by it can not be proved against the record of the court rightly certified by the CMA and transmitted to this court as the correct version of the proceedings.

On the second, that whether the two letters attached at page 57 and 128 of the record of the application, can be used as the tool of interpretation, of the term minimum period. As earlier on pointed out, these letters are not in any way related to the dispute at hand; they were issued to the applicant by his former employer in his former employment. I understand that it is good to take inspiration of other decision making bodies, or legislatures on matters not provided for in our laws or provided but not yet interpreted by our court on a particular issue. However letters in annexure at page 57 and 128 of the record of application are not law or

decision of the court. They are mere letters and the meanings accorded to the words used in those letters are personal interpretation of the applicant himself. For that matter, these two letters cannot be used by this court as interpretation tool to enterpretain the contract of the applicant.

Now having resolved these two legal issues, let me go to the merit of the application. The first complaint in this application is that the arbitrator erred in law and in fact to hold that the contract of employment in exhibit P1 was a fixed term contract and that the same had expired by 06/01/2014

Although a lot has been submitted in support and against that issue, but as the issue relates to the interpretation of the document, then the same can be enterpreted in its context looking at the phraseology, and possibly the intention of the parties when they were concluding the contract. I hold so because in law, the contract is formed by the *consensus ad idem* (the meeting of the minds) which the parties had when concluding the contract between them.

In the contract which was admitted at the trial as exhibit P1, and which is annexture P1 found at page 16 of the record of application, in its paragraph 3, the same provides as follows,

*"You are bonded to **serve the Board of Management for a minimum period of two years consecutive from the date of first appointment**. In the event you elect to resign from the school before serving for **the above specified period, you will be subject to surrender and lose some or all of your benefits and to pay your employer a specified sum of money equivalent to your one month salary in lieu of notice** as specified in the terms of employment stated in section B paragraph 7 of this letter of agreement." Emphasis added.*

From the above quotation, the catch phrase is to "*serve the Board of Management for a minimum period of two years consecutive from the date of first appointment*"

It is true as stated by the applicant that, the word used is ***minimum of two years***, if plainely interpreted, may mean that is not the maximum period to be reserved. It may mean in that context that, the contract is permanent as opposed to the fixed term contract.

However, purposively interpreted, especially while guided by the *consensus ide idem* of the parties to the contract, it seems the contract itself put the period of two years as both, the maximum before which any attempt to put the contract to an end has consequences. That means, after

the expiry of two years, there is no condition attached. That by necessary implication means that, parties intended the contract to end on two years and the term minimum as used in the contract meant that it can be renewed.

This fact is what actually parties understood their contract as well. This is also signified by the fact that being aware that the contract was of a fixed term, the applicant wrote a letter dated 06/01/2014 that is exhibit P4 asking for renewal of the contract, as reflected at page 50 of the record of application. The letter was directed to the Director of the respondent, and in that letter the applicant categorically enformed the respondent that the contract had expired and he asked to be given another period of two years as from January 2014.

The applicant does not dispute to write this letter exhibit P4, what he alleges is that the same was not written on his free will, but it was obtained by respondent through fraud, intimidation and coercion. He however did not say that it was written by him under gun point or did not say the type of threat, fraud and intimidation used against him.

It is a principle of law that the content of any document, are proved by primary evidence, see section 66 of the Evidence Act (supra), however under section 63, 64, and 67 secondary eveidence may also be used in exception circumstances to prove the documents. Moreover they may be used to prove the document, not to disprove the content of the document. What the applicant is trying to do is to disprove the content of the document by disowning the letter, something which is procedurally and substantively illegal and unacceptable.

That being the case, it was proved that the contract between the parties was a fixed term contract which was fixed to end for two years, therefore the the arbitrator was justified to find that the contract was of fixed term limited to two years.

Now, how does that kind of employment contract reach to an end? Generally this kind of contract of employment terminates automatically after the expiry of the fixed period set by it. That is what is called automatic termination as provided by rule 4(2) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007

Moreover, Rule 3 (1) of the same Rules that is, G.N. No. 42 of 2007 provides as follows;

> *"3(1) For the purposes of these Rules, the termination of employment shall include-*
>
> (a),N/A
>
> (b), N/A
>
> (c) *failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal of the contract;*
>
> (d) N/A"

In this case there is no evidence shown that there was any reasonable expectation of renewal of the said contract shown by the applicant in his evidence and submission.

These findings have specifically resolved the complaints raised in paragraphs 20 (a), and (c), the rest of the issues complained of in paragraphs 20(b), (d), (e), (f), (g), (h) and (i) of the affidavit filled in support of the application, depend wholly on the findings in the first issue

in paragraph 20(a) and (c) of the affidavit, they therefore automatically suffers natural death.

That said, it is instructive to find that the application fails, for want of merits, it is consequently dismissed as such.

It is so ordered

DATED at **MWANZA** this 22nd day of December, 2020

J. C. Tiganga
Judge
22/12/2020

Judgment delivered in open chambers in the presence of the presence of the applicant in person and Mr. Bernard Mkungu, personal representative of the respondent's own choice. Right of Appeal explained and fully guaranteed.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. Tiganga
Judge
22/12/2020