IN THE HIGH COURT OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

APPLICATION FOR LABOUR REVISION NO.5 OF 2020

EZEKIA MACHUMU.....APPLICANT

VERSUS

REGISTERED TRUSTEES OF ELCT
NORTH WESTERN DIOCESE .....RESPONDENT
(Application from the original award No. CMA/BUK/60 OF 2019)

JUDGMENT

19 & 23 July, 2021

MGETTA, J:

Dissatisfied with the decision of the Commission for Mediation and Arbitration at Bukoba (henceforth the CMA) in complaint No. CMA/BUK/60 of 2019, one Ezekia Machumu, the applicant has filed this application under the provision of **rules 24 (3) (a)(b)(c) & (d)** and **28 (1)(a)(c)(e) & (2) of the Labour Court Rules, GN No. 106 of 2007** and **Section 91(1)(a) (b) & (2)(a) & (b) of the Employment and Labour Relations Act, No. 6 of 2004.**

In this application, the applicant prays the following remedies:

(1) *The Court be pleased to call for the record of the Commission for Mediation and Arbitration (CMA), revise the said record and set*

aside the Award dated 27.03.2020 in MGOGORO WA KIKAZI NA CMA/BUK/60/2019 between the parties.

(2) The Court be pleased to order retrial of the Labour dispute in MGOGORO WA KAZI NA. CMA/BUK/60/2019 because the whole proceedings in CMA and subsequent Award are tainted with material illegalities and irregularities.

(3) The court be pleased to grant any other reliefs it may deem fit and just to grant the Applicant.

The Application was supported by the applicant's sworn affidavit and it is opposed by counter affidavit of Aristides Musheshe, the Principal Officer of the respondent. The applicant enjoyed legal service of Pauline Michael Rwechungura, the learned advocate; while the respondent was represented by Lameck John Erasto, the learned advocate.

The brief material facts which this application for revision originates can be recapitulated as follows; the applicant was the employee of the respondent in a post of driver in 1990. In 2001 he was shifted to Bukoba E.L.C.T Hotel, respondent's branch. He started working as a storekeeper. Record has it that in 2016 following to economic constraints suffered by the respondent, the employer and employees agreed to conclude the permanent contract including the applicant and entered into a new

specified contract of one year and paid the severance pay of Tzs 900,000/= to applicant. The one year specified contract was to start on 01/03/2018 and end on 28/2/2019 where the applicant was employed as a store keeper.

After implementing and finalization of one year specified contract therefore came at end, the applicant was aggrieved and approached the CMA with the complaint of unfair termination.

The CMA heard parties and finally arrived at the conclusion that there was no unfair termination as the first contract had ended by agreement and through consultation and meeting where the applicant agreed to have attended and voluntarily entered into the specified contract of one year which also ended after the specified time to elapse. The CMA found that in the first contract, the applicant agreed to have been paid severance pay and therefore there was no unfair termination neither to the first agreement nor the second specified contract. The applicant still undaunted has now filed the current revision.

Invited to amplify the adopted applicant affidavit through oral submission, Advocate Rwechungura submitted that there were no minute sheets which reveal the meeting for termination of the Applicant.

Concerning Tzs 900,000/= paid as severance pay that it was not known who paid it whether it was the respondent or E.L.C.T. Bukoba Hotel and what was paid for as that amount does not show whether the severance pay was from 1990 to 2001 or onwards to the second contract. He further submitted that Tzs 900,000/= payment was controversial as the exhibit D2 which was a letter dated 5/10/2016 stated that all employees who had worked for 20 years should be given "Kipangusa Jasho." That it was a resolution which was reached at by E.L.C.T Bukoba Hotel and not E.L.C.T Western Diocese (the respondent) that when it came to implementation *Kifuta jasho* was Interpreted to mean severance pay.

Applicant's counsel further submitted that the irregularity referred is that there is no any evidence to show that Aristides Musheshe, the Director of E.L.C.T. Bukoba Hotel had the power to terminate the fellow employee. At the CMA, PW2 said he had assigned him such power. The learned applicant's counsel argued that the assignment should not be verbal rather should be in writing to show such power and limitation of it. Even the applicant did not know if the said Aristides Musheshe had such power, hence the termination is therefore faulted.

With regard to the second issue of unfair termination, applicant's counsel submitted that termination was unfair and did not follow procedure

stipulated under **Regulation 23(3) and 23(4)(c) of ELRA (Code of Good practices) Rules, GN 42 of 2007** on retrenchment due to economic needs of the enterprise that the reason was not proved by the employer to discharge his burden in terms of **rule 9(3) of GN 42 of 2007** and procedure for consultation was not followed. The economic constraint of the company cannot affect one employee only. Therefore, the termination was not done in transparent manner.

Replying to the applicant's advocate submission, Mr. Lameck Erasto submitted that the submission of the applicant's advocate did not confine on what he had filed in CMF1 on unfair termination and where he said that the dispute arose on 1/3/2019 and on that date was when the fixed one-year contract elapsed and not otherwise. He further contended that there was prior consultation between the employer and employees in accordance with **Section 38 of ELRA Cap. 366**. DW2, the branch Manager at Bukoba Hotel testified before the CMA that there was consultation. That is reflected in pages 12 and 15 onwards of the proceedings and that the exhibit was tendered on prior notice and consultation. The applicant agreed to have attended the said meeting and that one of the representations from a trade union of the employee attended in the said meeting. In the said meeting, it

was resolved that those who had unspecified contract should finish it with their rights being taken care of.

He further elaborated that it was on that note the applicant was paid Tzs 900,000/= and that the new contract of specified one year was in Kiswahili a well understood language to him and he signed it (exhibit P5) which was starting on 1/3/2018 and ending on 28/2/2019 according to the economic needs communicated in the meeting and hence known to the applicant and other employees. Through exhibit P6, the applicant was also notified that there will be no subsequent contract.

According to Mr. Lameck, it is not true that termination did not follow procedure as that termination was reached through agreement between both parties and under **rule 4(2) GN. No. 42 of 2007** which allows termination by agreement. Likewise, termination procedure depends on the circumstance of termination that even if there could be no notice it could be ended by agreement.

Concerning the issue of powers of Director of E.L.C.T. Bukoba Hotel, he replied that E.L.C.T North Western Diocese has its own constitution where Director can enter into agreement on behalf of the respondent in his respective department. Therefore, he had his conviction that Mr. Aristides Musheshe had authority to enter into agreement. That's why the applicant

signed by indicating that he recognized the Director Musheshe. if he had refused to sign perhaps, he could be having a point.

Responding on the issue of claiming termination of the first contract, Mr. Lameck concurred with the CMA that if the applicant claims termination of the first contract is therefore time barred under **rule 10(1) of Labour institutions (Mediation and Arbitration Rules) GN 64/2007**. He finally prayed this application for revision to be dismissed.

In rejoinder the applicant's advocate submitted that the letter of termination is one of 21/11/2018, that there is no other letter for termination of first contract and therefore time barred cannot arise under **rule 10 of GN 64/2007**. He reiterated that Mr. Aristides Musheshe had no such power to terminate the applicant. He further added that exhibits D2 does not show economic needs as the reason for termination. It refers the meeting of the branch of Bukoba hotel only where the applicant was not a board member to attend such meeting. He dismissed the reason that the applicant was shifted to Bukoba Hotel due to illness reason. The applicant had shifted 16 years back before he felt sick through the letter dated 30/3/3001, that the letter talks no illness of the applicant at the time he was shifted. He also disagreed that there was no agreement to end the first agreement and start the second, hence **Rule 4 (1) at GN 42/2007**

which recognizes the end of contract by agreement cannot apply in the circumstance where there was no transparency. He contended that it is not right to use the second contract of Bukoba Hotel as the contract which was ending the former. He argued that even if there could be agreement, they could not offset the laws on retrenchment and its procedure thereon.

As it is on the record, the issues between parties framed and agreed at the CMA were:

1. *Whether the Applicant was notified on the change of terms of contract from the unspecified or permanent to specified or fixed term contract.*
2. *Whether the employment of the employee was terminated by unfair procedure or by end of agreement to have come to an end.*
3. *What are rights of parties.*

I have considered parties' arguments and the entire record of this revision application. I will confine with arguments which were touching on issues which were framed before the CMA. After hearing parties' arguments and perusing the record, I believe the issues before the trial CMA appear to be the same issues confronting the parties which need to be answered before this court on this revision.

I start with the first issue. The applicant's advocate had a conviction that the applicant was not notified about putting an end of the first contract and putting in motion of the second one. The respondent's advocate had a conviction that there was consultation of the employees on the meeting to the extent that the applicant himself attended together with representative from a trade union.

having heard the parties, the CMA came to the conclusion that there was enough disclosure on the reason for ending the contract terms through a meeting which the applicant himself agreed to have attended during cross examination. The MCA reasoned further that exhibits D2 which was a letter dated on 5/10/2016 informed the applicant what was agreed on the meeting on 29/6/2016. I have keenly perused exhibits D2 and found that there was a paragraph with a wording which is hereunder quoted:

"Mapatano haya tulishayaeleza pia kwenye kikao cha wafanyakazi wote tarehe 29/6/2016"

This exhibits that on the 29/6/2016 there was a meeting already conveyed and discussed the agreement. As the applicant agreed to have attended the said meeting the issue of absence of minute sheet of the said meeting as raised by applicant's advocate does not hold water because if

there was no any meeting conveyed, the applicant wouldn't have agreed to have attended as the CMA rightly reasoned.

To support his stand that the first contract never came to an end by agreement, the applicant's advocate advanced his argument on the paid Tzs 900,000/= as severance pay that it was not known for which purpose the said money was paid for and who was paying it between the respondent and Bukoba Hotel E.L.C.T. Pertaining to this issue, it was also a finding of the CMA that it was clear on the payment sheet exhibit "D3" as it is written "*malipo ya kiinua mgongo*". It was paid after the meeting was conveyed on 29/6/2016 as it is crystal clear showing to have been paid on 26/2/2018 as severance pay.

According to CMA's finding is that the applicant was paid and he received money by signing the payment sheet and continued to work for the new fixed contract. I shake hands with the CMA to have arrived at its right reasoning of which I cannot disturb. I say so because when the applicant was paid Tzs 900,000/= on 26/2/2018, the new specified contact of one year was still in force as it is not in dispute that the one-year fixed contract ended on 28/2/2018 in terms of the exhibit D5 which was a new contract. This is logically interpreted to mean the one who paid severance pay was the one whose contract had come to an end and not the new

contract which was still in force. Hence, E.L.C.T Bukoba Hotel there is no way could have paid severance pay of Tzs 900,000/= while the contract was still in force.

Therefore, exhibit D3 a payment voucher and exhibit D5 a new fixed term contract negates the applicant advocate's proposition that he didn't know who paid him between the applicant and E.L.C.T Bukoba Hotel and the purpose of payment. There was another argument from applicant's advocate that through exhibit D5, the respondent promised to pay *kifuta jasho* for employees who had worked for 20 years, but later they interpreted to pay *kiinua mgongo* (severance pay). Sincerely, I failed to comprehend what was meant for the term *kifuta jasho* even the applicant's advocate admitted to have failed to comprehend what it meant but these terms should not detain me. Be as it may what the respondent paid the applicant is what they meant taking into account that the applicant's advocate himself did neither interpret it nor claimed it to be something different from what the respondent paid.

There was another argument advanced by the applicant's advocate that on exhibit "D2" that Mr. Aristides Musheshe, the Director of E.L.C.T Bukoba Hotel had no power to terminate the applicant. With due respect to the applicant's advocate, in exhibit "D2" there is nowhere is titled as

termination letter. I have read the said exhibit and found that it was a letter informing the applicant on what they had earlier agreed to abide in the meeting. It was not termination letter. Hence the issue of lack of power to terminate cannot arise with due respect.

The evidence that the applicant received the money of Tzs 900,000/= and signed and he agreed at the CMA to have received it and the available exhibit D3 that it was paid for *Kiinua Mgongo* which is severance pay after the respondent and applicant had contemplated retrenchment which was disclosed in the meeting which applicant agreed to have attended puts this issue to rest. That he was notified the change at his contract terms from the former to come to an end and therefore entered the new one. Hence the first issue is answered in affirmative.

As regard to unfairly termination of employment, the applicant proposes that he was terminated unfairly while the respondent oppose that the contract came to an end by agreement. The respondent's advocate while replying to the submission of the applicant's advocate took a view that the reason and circumstances leading to termination of the employees is what reflects what should the procedure to be followed be. He was of the view that the employment after the employer had contemplated retrenchment on operational requirement, he convened a meeting to

disclose the reason and employees agreed to execute on what they both agreed. That since disclosure and consultation under **section 38 of ELRA** were compiled there is no way it can be said that procedure for retrenchment was not followed.

I am alive that **section 38 of ELRA** and **rule 23 (3) (4) of GN 42 of 2007** puts procedure to follow before retrenchment, but it should not be applied in check list fashion and ever since it is not in dispute that the applicant appeared in a meeting where the reason was disclosed and consulted. Thereby, he agreed for the resolution and agreed the implementation in the new fixed contract without any objection. In my view it suffices to have complied with the provision of **section 38 of ELRA** of retracement.

Since exhibits P5 was a new contract signed by the applicant which shows that the new contract was to start from 1/3/2018 and to end 28/2/2019. I am respectively constrained to hold that the said contract cannot be said to have been terminated. I entirely and respectfully consider the second contract to have come to an end after the elapse of specific time to come to an end. **Rule 4 (1) of GN 42 of 2007** as rightly referred by the respondent's advocate is of great assistance that the contract ended by agreement on the specified date that was agreed to end

and because there was no evidence raised as if there was an expectation to renew it. It therefore ended on that final date. I entirely agree with the CMA that if the applicant claims termination on the first contract, he will be time barred under **rule 10 GN 64 of 2007**.

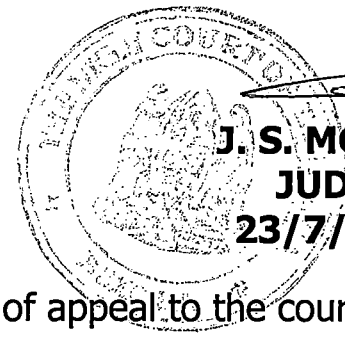
Under the above explained circumstances the employer cannot be condemned that he acted in bad faith. There is no way this court can fault with the finding of the CMA. Hence the second issue is answered that there was no unfair termination in either two contracts and a new term fixed contract came to an end.

Lastly but not least, I am in line with the CMA that what the applicant is entitled is the certificate under **section 44 (2) of ELRA Act No. 6 of 2004**.

In the event, I dismiss this application with no order as to costs. Order accordingly.

J. S. MGETTA
JUDGE
23/7/2021

COURT: This judgment is delivered today this 23rd July, 2021 in the presence of the applicant in person and in the presence of Ms. Erieth Barnabas, the learned advocate for the respondent.



J. S. MGETTA
JUDGE
23/7/2021

COURT: Right of appeal to the court of Appeal is fully explained.

J. S. MGETTA
JUDGE
23/7/2021