IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

APPLICATION FO REVISION NO 2 OF 2020

(Arising from the decision of the Commission for Mediation & Arbitration of Shinyanga by Margreth A.D.Kiwara. (Arbitrator) dated on 10th December,2019 in Labour Dispute No. CMA/SHY/35/2016.)

KUZENZA WILLIAM GWANTEMI..... .....APPLICANT

VERSUS

BYNECUT OFFSHORE TANZANIA LTD..... ...RESPONDENT

JUDGEMENT

Date of the last Order: - 3rd March,2020
Date of the Ruling: -17th April, 2020

MKWIZU,J:

This is a decision in respect of the revision application by the applicant. The application was brought by way of a Chamber Summons and supported by an affidavit deponed by the applicant himself under Section 91(1) (a) (b), section 91 (2) (a) (b) and(c), 94 (1) (b) (i) of the Employment and Labour Relations Act, No.6 of ,2004 as amended by section 14 (b) of the written laws (Miscellaneous Amendment) Act No. 3

/2010,Rules 24 (1),24 (2) (a), (b), (c), (d),(e),(f) , 24(3) (a), (b), (c), (d) and 28 (1) (c), (d) (e) of the Labour Court Rules,2007.

The application is essentially for this court to call for, and examine the proceedings, revise and set aside the ruling/award issued by the Commission for Mediation and Arbitration delivered on 10th December,2019 by Hon. Margreth A.D. Kiwara (Arbitrator) in Labour Dispute No CMA/SHY/35/2016. In paragraph xxii of the supporting affidavit, the following issues were set forth for discussion by the court: -

a) Whether it was proper and fair for Hon. Kiwara (Mediator) to turn into Arbitrator without any jurisdiction to do so.

b) Whether it was proper and fair for the Arbitrator to hold that the applicant's contract of employment was terminated unfairly(*sic*)

c) Whether it was proper and fair for the Arbitrator to allow the respondent's advocate to turn into witness.

d) Whether is fair and proper for the Arbitrator to neglect and fail to award any entitled reliefs to the applicant.

The background of the mater as can be gathered from the records and the affidavits by the parties are thus: the appellant was employed by the respondent on 5th February,2015 at North Mara Gold Mine as an underground miner. His contract was for a fixed term contract,12 months in this matter. He, while on duty on 12th October,2015 sustained injury, hospitalized and allowed later to go on working. On 6th February,2016 his contract was terminated and as such was required to hand over all the company properties. He was dissatisfied with the employer's decision. He therefrom on 9th February,2016 referred the matter to the Commission for Mediation and Arbitration.

Applicant averred further that, on 2nd December 2016 the matter proceeded for mediation before Hon.Margreth Kiwara. After she had failed to mediate the parties and after she had issued a certificate of Non settlement, Mediator turned herself into an Arbitrator and proceeded to determine the matter. She on the same date, called upon parties to give evidence. The CMA concluded that applicant's employment was fairly

terminated. Aggrieved, the applicant has come to this court challenging that decision.

At the hearing, applicant had the services of Mr Benjami Dotto learned counsel whereas the respondent was represented by her Human Resource Manager, Mr Nole Shillatu.

Submitting in support of the revision, Mr Benjamin Dotto counsel for the applicant adopted the applicant's affidavit in support of the application to be part of his submission. He further to that submitted that, the award was improperly procured by the Arbitrator. According to the Non settlement certificate dated 2nd day of December,2019, Hon. Margreth Kiwala was the Mediator. She unfortunately converted herself into an Arbitrator and proceeded to determine the dispute contrary to the Rule 18(1) of the Labour Institution (Mediation and Arbitration) Rules, GN No. 64 of 2007 which provides that where there is a combined procedure (Mediation and Arbitration) the notice should so specify. Mr Dotto stated that, the notice in this matter was not to that effect and therefore the Arbitrator failed to

consider the requirement of section 86 (3) and 88 (2) of the Employment and Labour Relation Act, No 6 of 2004.On this, Mr Dotto refereed the court to the case of **MS Metro Plastic Industries LTD V. Abuu Mkubwa and Another**, Labour Revision No. 62 of 2009 page 2.

On the second issue which was argued in the alternative, Mr Dotto contended that the CMA erred in holding that the appellant's contract of employment was fairly terminated. On this, he said, rule 8 (1) of the Employment and Labour Relation (code of Good Practice) GN. No. 42 of 2007 provides conditions for termination of an employee. He argued further that, employment contract by the applicant was for a Fixed Term Contract which under paragraph 11 (a) of his contract of employment, termination was to be effected by a notice. He explained that in Exhibit K2, which is a the End of Fixed Term Contract Payment Advice, served on the applicant on 6th February,2016 applicant is said to have been paid all his dues but not payment in lieu of notice of termination and that exhibit K2 was not a notice of termination that is why applicant is avowing unfair termination.

On how the termination was effected. Mr.Dotto argued that, the Fixed Term Contract was to end on 5th February,2016,however, it was not until 6th February,2016 when the applicant was served with the notice of the end of fixed term payment advice without a notice. He expounded that, working for an extra day after the end of the contract had given the applicant expectation for renewal under rule 4 (4) of GN No. 42 of 2007.

In another sphere of argument, the learned counsel asserted that, the applicant was laid down for medical incapacitation from 4th February, 2016 to 25th February,2016 via a notice called suitable Duties Plan, signed by the occupational health and Medical Doctor of North Mara Mining Clinic. Still, he was terminated before the expiry of that sick leave contrary to s. 37 (3) (a) of the ELRA of 2004 which forbids termination on sick leave. He faulted the arbitrator for her failure to consider the above explained facts.

In his third issue, the learned counsel complained of the arbitrator's decision in favour of the respondent. He said, the applicant's contract was

renewed by default on 6th February,2016 and the records are to the effect that respondent's service were to end on 17th July, 2017 and therefore the applicant should be awarded his salaries from 6th February,2016 to 17th July,2017 when the respondent's operation came to an end. He cited the case of **Good Samaritan V. Joseph Robert Savai Munthu,** Revision No. 165 of 2011.He finally requested the court to grant the prayers and reverse the CMA's award.

In response to the submission by the counsel for the applicant,Mr Nole submitted that, parties had agreed before the mediator that the same Mediator should proceed with the arbitration. The combined Mediation and Arbitration was initiated by the applicant on the reason that respondent was leaving the country on December, 2017.Respondent had no objection that is why the Mediator had converted herself to Arbitrator of the same proceedings. The award was therefore properly procured stated Mr Nole.

On whether the contract was fairly terminated, Mr Nole submitted that the applicant's contract was for a specific time entered into between the parties on 5th February,2015 and was supposed to end on 5th

February,2016 and therefore the contract was not terminated but rather came to an end.

Making reference to paragraph 11 (a) of the contract of employment (exhibit K1) Mr Nolle stated that the paragraph provides for an early termination and not the procedure at the end of the contract. Answering on the contents of the document served on the applicant on 6th February,2016, Mr. Nole said that the document referees to the terminal benefits applicant was supposed to receive at the end of the contract on 5th day of February,2016 and it has nothing to do with the renewal of the contract. Mr Nole referred the court to paragraph 3 of the applicant contract of employment that, it provides specifically that the contract had no expectation for renewal.

On the argument by the applicant's counsel that applicant's employment was terminated while on sick leave, Mr Nole stated that, Exhibit K 4 titled Suitable Duties Plan is issued where an employee is to be given lighter duties and that he was to go back to his normal duties after the time

specified therein and therefore it was not true that applicant was on the sick leave

On his short rejoinder, Mr Dotto conceded on the fact that they both signed an agreement agreeing to proceed with arbitration before the same Mediator. He, however, was quick to add that, the agreement does not in itself validate the procedure adopted. He reiterated his submission in chief on the rest of his grounds.

Having heard the rival submissions and having perused the proceedings leading to the filing of this revision, the court is called upon to determine **first**, whether the award was improperly procured, **second**, whether the applicant's contract of employment was terminated and if so, whether there was fair termination, and **three,** what reliefs parties are entitled to.

On whether the award was improperly procured the applicant is faulting the combine procedure (Mediation and Arbitration) on the ground that it was not proper for the mediator to sit on arbitration proceedings without a prior notice to parties. Mr Doto submitted that, though they had agreed on

such a procedure, that alone do not validate the option taken by the Mediator.

Rule 18 of GN No. 64 of 2007 provides for a combined mediation and arbitration before the same person. There are a number of decisions of this court to the effect that where a mediator converts himself into the arbitrator without an appointment, vitiates the proceedings, however, where parties to the dispute consent in writing to allow the mediator to be their arbitrator, the proceedings are deemed as valid. See the case of the **Project Manager Barrick gold Mine (Bulyanhulu Vs Adriano O. Odhiambo,** Revision 290/2008; **Buzwagi Project Vs Antony Lameck** Revision No. 297 of 2008; **TBL Vs Charles Malabona** Revision No. 24 of 2007 and **Bulyanhulu Gold Mines Ltd Vs James Bichuka** Labour Revision No. 313 of 2008 (All unreported).

Parties in our case are in agreement that the applicant requested for a combined procedure which required the Mediator to sit into the arbitration proceedings on the matter she had conducted mediation between the

parties on the ground that the respondent was about to leave the country. The applicant's prayer was permitted by the Mediator after receiving no objection from the respondent. In this case therefore it is without doubt that the mediator of the dispute proceeded to arbitrate it, after the parties had chosen that procedure. In the case of **Tanzania Coffee Board V. Killian M. Massawe**, Labour revision No. 21 of 2010 (unreported) it was stated that proceedings where the same person acted in both capacities, that is Mediator and Arbitrator would not be vitiated if parties had a choice in the matter. This position was elaborated in another case of **Blue Financial Services V. Vestina Masaga,** Labour Revision No.35 of 2013 (unreported)

In **Blue Financial Services'** case the mediator consulted parties on whether he should proceed with the arbitration of the dispute in which he mediated. Parties consented to.The applicant raised on revision a complaint that by converting himself to an Arbitrator, Mediator contravened the provision of section 88 of the ELRA.Aboud J had this to say in her decision:

"...the arbitrator did not contravene section 88 (2) of the ELRA bacause the parties had given their choice to proceed with the same person who was a mediator in arbitration proceedings."

I have also considered the position of the decision in the case of **Metro Plastic Industries Ltd** (Supra), cited by the counsel for the applicant in this revision.In that case the CMA award was procured exparte then on revision Rweyemamu J (as she then was) in quashing the proceedings and the award held that section 88 (2) and 86 (3) of the ELRA were contravened as the mediator converted himself into an arbitrator. The facts of this case are different from our case because in the present case parties had agreed to proceed with the arbitration before the person who had conducted mediation

Applicant's third ground for the revision is an inquiry on whether it was proper and fair for the Arbitrator to allow the respondent's advocate to turn into witness. My perusal of the CMA's records reveals that, the respondent was represented by Mr Nole Shillatu who was the Human Resource Manager of the respondent who gave evidence on oath before the Commission. Going by his evidence, he was a person knowledgeable

with the facts of the case and who was transacting the respondent's human resource affairs including the applicant's affair. So I find no harm for Mr Nole Shilatu to give evidence for the respondent.

For the reasons given above and guided by the case laws cited, I find no material irregularity sufficient to vitiate the proceedings. Applicants complaints on this point is baseless.

The next issue for consideration is whether the applicant's contract of employment was terminated and if so, whether there was fair termination. While the applicant asserts that his contract of employment was terminated, the respondent (employer) maintains that there was no termination but rather the contract came to an end.

Rule 4 (2) of of the Employment and labour relations (code of Good practice) GN No. 42 of 2007 provides that:-

"Where the contract is a fixed term contract,the contract shall terminate automatically when the agreed period expires unless the contract provide otherwise"

Incidentally, the parties had a written contract (Exhibit K1) which was signed by the parties on 5th February,2015. Paragraph 3 of the said contracts provides for the Employment Terms. The paragraph reads: -

"Subject to the termination provisions of this contract, the appointment is for;

a) A fixed term of 12 months,

b) Begins on 5th (day) February (month), 2015 (year),(Commencement Date) and

c) Ends on 05th (day) February (Month) 2016 (year) (Completion date)

This ***is a fixed term contract*** *and will continue until Completion Date or until the Company determines that the assignment is over.* ***The assignment will not result in a permanent employment*** *and* ***no expectation of renewal can be expected. The end of***

the assignment will not constitute termination, but rather the expiry of the contract."

It is expressly stated in the contract between the parties herein that the contract is for a fixed term of twelve months from 5th February, 2015 to 5th February, 2016.It was also expressly stated in paragraph 3 of the said contract quoted above that the contract raises no expectation for renewal and further that the end of the contract will not constitute termination.

Mr Dotto does not dispute the above express terms of the contract. He contended however, that the applicant's contract was renewed by default on 6th February,2016 .He explained that his contract ended on 5th February,2016 and he was served with the End of Fixed Term Contact Advise Payment Advice (exhibit k2) on 6th February, 2016.He claimed that,by 6th February, 2016 he had worked one day extra after the end of the fixed term contract. In addition, Mr Doto clarified that, on 4th February,2016 applicant was issued with Suitable Duties Plan (exhibit K4) indicating that he was laid down for medical incapacitation to 25th

February,2016 which, all together, created an expectation for renewal under rule 4 (3) of GN No 42 of 2007.

It is the position of the law under Rule 4(5) of the GN No. 42 of 2007 that where a fixed term contract is not renewed and employee claims a reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals and employer's undertakings to renew.

I have carefully gone through the applicant's reasons for his expectation for renewal .The reasons adduced in my view, are out of context of the provisions of rule 4(5) of GN No. 42 of 2007 .As demonstrated above, apart from the express term of the contract to the effect that there should be no expectation for renewal, applicant was served with the End of a fixed term Contract payment advice(Exhibit K2) just a day after the end of the contract. The respondent Human Resourse Manager,Mr Nole submitted that, exhibit K2 indicated the applicant's entitlement after the end of the contract.

In arriving into its decision, the CMA relied on exhibit K1, the employment contract and Ehibit K2 which was the End of a Fixed Term payment Advice and concluded that the employment contract between the parties rightly came to an end.

In view of what I have discussed above it is clear that the applicants contract was not terminated but came to an end. And that, the facts of the case on the conduct of the parties herein at the end of the fixed term contract raised no any reasonable expectation for renewal to the applicant. This point of complaint is unmerited.

Applicant raised another argument that under paragraph 11 (a) of the contract, the respondent ought to have issued a one month written notice before termination. The paragraph reads: -

> "***After the expiration of the probationary period, either Party may terminate this agreement by giving one (1) month's written Notice thereof or payment of a month's salary in lieu of notice.*** *The Notice given shall include the day on which the notice*

is given but shall not include the period of the employee's outstanding leave at the time of termination." (Emphasis is mine)

As indicated from the above part of the applicant's contract, the termination envisaged is an early termination before the contract came to an end. To say that the respondent was supposed to issue a one months notice at the end of the contract is a total misconstruction of the terms of the contract on the part of the applicant. As stated earlier on in this decion, the terms of employment under paragraph 3 of exhibit K1 which is the applicant's employment contract state specifically that the contract is one of a fixed period of time. Termination under paragraph 11(a) presupposes an early ending of the contract. Again,this argument is also baseless.

The above being the position, the second part of the second issue and the third issue which was tasking this court to see whether the termination was unfair and make consideration of the reliefs the parties were entitled to crumbles.

In final result, the CMA's award is confirmed and the application is dismissed in its entirety.

Order accordingly.

DATED at **Shinyanga** this 17th day of **April,** 2020.

E.Y. MKWIZU

JUDGE

17/4/2020

Court : Right of appeal explained

E.Y. MKWIZU

JUDGE

17/4/2020