IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

LABOUR REVISION NO. 18 OF 2020

(Arising from Labour Dispute No. MOS/CMA/ARB/28/2017)

MAMA CLEMENTINA FOUNDATION..... APPLICANT

VERSUS

FILEMON E. MACHA ..... RESPONDENT

JUDGMENT

16/02/2021 & 14/4/2021

MWENEMPAZI, J:

This is an application for revision in which the applicant seeks for an order revising and setting aside an arbitration award dated 1st July, 2020 issued by the Commission for Mediation and Arbitration of Moshi in Kilimanjaro region ("CMA") in Labour Dispute No. MOS/CMA/ARB/28/2017. The CMA found that the respondent's employment with the applicant was unfairly terminated. It therefore granted him compensation and terminal benefits of a total sum of Tshs 13,690,500/=. It is that decision which the applicant, Mama Clementina Foundation (MCF), is challenging in this case, on a number of grounds as set out in the affidavit of Mary Ntandu, its principal officer.

At the hearing of the application, there was a prayer by the respondent to dispose the matter by way of written submission. The applicant did not object the prayer and this court granted the same. The applicant was represented by Mr. David Shilatu, learned advocate, while the applicant appeared in person and unrepresented.

In support of the application, the applicant's counsel submitted that this case was not of unfair termination as found by the Arbitrator in the award but it was a case of a specific contract that was automatically terminated after expiration of the specific time prescribed in the contract. To justify his argument the learned counsel explained that the respondent signed a two-year fixed term contract that commenced on the 5th of January 2015 and expired on the 4th January 2017. He added that upon expiration of the contract the respondent was paid his terminal dues which marked the end of employer/employee relationship.

Furthering his argument, the learned counsel contended that through DW2, a Human Resource Manager for the applicant, it was proved before the CMA that since expiry of the contract on 04th January 2017 the respondent stopped going to work. This contention was supported by the school attendance register book which was produced and admitted in evidence as exhibit D5 to prove that the respondent was never at the applicant's premises from 4th January 2017. The learned counsel further stated that it was proved before the CMA by DW2 that teachers who were on duty from the 4th January 2017 signed teacher on duty book which the

respondent never signed. The teacher on duty book was also tendered in evidence as exhibit D6.

The learned counsel also submitted that, the learned arbitrator misdirected herself from the point she framed the issues for determination by stating that, "whether it was lawful to terminate the contract without prior notice and whether the applicant's termination was fair". He contended that it is trite law that the principle of unfair termination does not apply to fixed term contracts unless the employee establishes a reasonable expectation of renewal as provided under section 36 (a) (iii) of the Employment and Labour Relations Act No. 6 of 2004. He further referred this court to the case of **Dar es Salaam Baptist Sec School vs. Enock Ogala Revision No.53 of 2009 HC Labour Division at Dar es Salaam** (Unreported).

The learned advocate submitted further that the honorable Arbitrator misdirected herself when analyzing the evidence before her by stating that the contract provided to each party a burden to issue three months' notice of intention to renew or not to renew before expiration of agreed contract. He noted that while the applicant issued three months intention to renew the respondent never replied. He argued that the analysis was wrong because the principles of law of contract apply in the employment contract like any other contract where it demands for a contract to be established there must be offer and acceptance. In the present case, the learned counsel said the respondent gave an offer to renew the contract while the applicant never accepted the same. Hence, in counsel's view, the contract was never renewed by default as alleged.

Further, the learned counsel submitted that the contention by the Arbitrator that, the respondent continued to work after expiry of contract period was also wrong because under normal context if he was the teacher on duty, he should have signed the attendance register of the school. He noted further that there was proof that the respondent did not sign the attendance register of the school from 4th January 2017 and the same was tendered in evidence as exhibit D5.

In conclusion, the applicant's counsel submitted that inasmuch as this was a fixed term contract the Arbitrator for reasons unknown decided to apply principles of unfair termination where they don't apply. He therefore prayed for the CMA decision to be quashed and set aside.

In his response, the respondent submitted that failure by the applicant to renew the fixed term contract on similar terms when it ended while the respondent created reasonable expectation of renewal, did result into unfair termination of the respondent's employment in terms of the law. He submitted that under clause 4 item 5 of the employment contract, it is clearly stated that the employer undertakes to renew a fixed term contract when it comes to an end. He contended that the contract burdened the parties to furnish 3 months written notice before expiry of the signed contract of the intention to renew or not to renew the same when it comes to an end and that to him created a forum of reasonable expectation of renewal.

Still on the same point the Respondent submitted that, according to clause 4 item 5 of the employment contract the Applicant was bound to notify the Respondent in writing 3 months before the expiry of the signed contract that the contract will not be renewed when it expires. Failure to do so it resulted into unfair termination of the contract. It was also the respondent's view that due to the renewable nature of the contract of employment between parties for any reason if the applicant was not interested with the renewal of the contract, then he was obliged by the law to issue a written non-renewal intention notice to the respondent of not less than 28 days as per requirement of the law under section 41(1)(b)(ii)(3)(i)(ii) of the Employment and Labour Relations Act, No. 6 of 2004.

The Respondent also submitted that it was proved before the CMA that the reason for termination was not fair and the procedure for termination including the issue of written notice was not followed by the Applicant. The Respondent also added that the contract of employment did mot terminate automatically as clause 4 item 5 of the contract explicitly elaborate the intention of he employer to renew the fixed term contract when it expires by each party giving a 3 months written notice before it expired.

It was also the respondent's submission that if the contract ended automatically then the applicant should have explained as to why he gave a termination letter to the respondent on 9th January 2017. He argued that the principles of unfair termination do apply to a fixed term contract when the employee establishes reasonable expectation of renewal as provided under section 36(a)(iii) of the Employment and Labour Relations Act, No. 6

of 2004. He contended that in the present case reasonable expectation is created under clause 4 item 5 of the employment contract between the applicant and the respondent.

On another point the respondent submitted that his contract of employment renewed itself automatically by default from 5th January 2017, as the Respondent continued working with the applicant after expiry of the contract on 4th January 2017. He argued that this was proved through exhibit D6 a school weekly duty roaster tendered before the CMA. He explained that his name was included in the roaster that he was to be on duty on 7th January 2017, on 18th March 2017 and on 27th May 2017 all these dates being beyond contract expiry date.

In his conclusion the respondent submitted that it was irrelevant whether he continued working with the applicant or not but if the applicant was not interested with the renewal, then he was obliged to notify the respondent in writing 3 months before the expiration of the contract on 4th January 2017 that the contract of employment would not be renewed as provided for under clause 4 item 5 of the employment contract.

Based on both party's submission and the CMA records, the issue for determination is whether the arbitrator's decision that the respondent was unfairly terminated and thus entitled to be paid Tshs. 13,690,500/= as terminal benefits and compensation was properly reached on the facts and evidence on the record.

I have considered the parties' arguments in light of the facts on the record and the law. Both parties agree that the contract of employment between them was of a fixed term of two years. Unlike permanent contracts, a fixed term contract normally has a specific end date and in the present case the end date was 4th January 2017. According to the respondent although the term agreed had expired the contract created reasonable expectation for renewal so he contended that the applicant ought to have given him prior notice of the intention not to renew otherwise the termination was unfair. Looking at the law under the provision of **section 36(a)(iii)** of the **Employment and Labour Relations Act, [CAP 336 R.E. 2019]** termination of a fixed term contract becomes unfair if it is established that there was a reasonable expectation of renewal when the contract comes to an end. At this juncture the issue is whether the contract between parties in this case provided for a reasonable expectation of renewal when it ends.

The respective clause in the contract that the respondent relied upon in his argument is clause 4 item 5 of their respective employment contract which provides that: -

> *"three months before the expiry of the signed contract you shall be obliged to notify the employer in writing on renewal or non-renewal of the contract."*

As it can be clearly seen this particular clause in the contract only requires the employee to notify the employer his intention to renew or not three months before the expiry date. It is evident that no burden is placed upon

the employer to do the same to the respondent in this case and the honorable Arbitrator misdirected themselves into thinking that this clause did place an obligation upon the applicant to give notice of intention to renew or not. It was therefore a wrong interpretation of this term of the contract which led the honorable Arbitrator to arrive at a wrong decision.

The law is very clear that a fixed term contract will automatically terminate when the agreed time expires. This is provided for under **Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007** which says:

> "*where a contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise*".

According to the above provision, in fixed term contracts unlike permanent contracts, there is no need to specifically give notice for termination. I have gone through the parties' contract in the present case and I found no provision that required the employer to give notice. Therefore, the submission by the respondent that applicant was obliged to notify the respondent in writing 3 months before the expiration of the contract if he was not interested with the renewal is untenable. The applicant was right that, the termination of this type of contract was automatic upon reaching the set date.

Another issue is the holding by the honorable arbitrator that the Respondent's employment had been automatically renewed by default from

5th January 2017 as he continued to work was also unjustified. There was no proof that the respondent continued working after the expiry of the contract period. It was wrong to rely on evidence of a duty roaster because it does not show that the respondent was actually present in school and performed his duties. The duty roaster is a schedule which is prepared in advance so it does not reflect the actual presence or performance of duty of the one allocated. In fact, the applicant disputed the allegation by submitting that the respondent never stepped in the school premises as he never signed the attendance register which was tendered as exhibit D5 before the CMA. There was also evidence that the teacher who was on duty the day the respondent claimed to have been on duty was one known as Mr. Bruno Innocent. This was proved by an exhibit D6 which is a report prepared by a teacher who was on duty.

Furthermore, the law on unfair termination on fixed term contracts requires for proof of circumstances creating reasonable expectation of renewal as provided for under **Rule 4(4) of the Employment and Labour Relations (Code of Good Practices) GN. No. 42 of 2007**. The law also imposes a duty to an employee claiming for reasonable expectation of renewal to demonstrate reasons for such expectation. This is provided under **Rule 4 (5) of the Employment and Labour Relations (Code of Good Practices) GN. No. 42 of 2007.** In the present case, I am of the view that the respondent failed to prove the reasons for his expectation. This is so because after expiry of the contract on the 4th January 2017 the following day the respondent was paid his dues that is gratuity amounting

Tshs. 3,409,200/= which was proved in evidence by exhibit D3. The applicant who is the employer did not offer a new contract but wished the respondent well and requested him to submit in writing any other claims if he had. The evidence relied on by the respondent was a duty roaster where he claimed that he was included in the duty roaster which covered dates beyond the termination date. However as discussed above this was not good enough evidence to prove the claim as it was successfully disproved by the applicant through the evidence that the respondent never went to work after termination date. This being the only evidence by the respondent I am contented that there was no proof that the employer made representations that provided for circumstance of reasonable expectation of renewal of the contract.

On the terminal benefits, the CMA awarded Tshs. 13, 690,500/= to cover terminal benefits and compensation for unfair termination. However, the evidence which the CMA believed was that the respondent was recruited from Dar es Salaam therefore since this was not a matter of unfair termination the respondent was not entitled to any compensation. Thus, after termination the respondent had to be paid repatriation expenses for him to return back to his hometown Dar es Salaam. The evidence of the fact that the respondent was recruited from Dar es Salaam was not seriously disputed by the applicant. I thus agree with the CMA award regarding terminal benefit with an exception to an order for compensation.

In view of the foregoing, I find merit in the application and proceed to allow it with no orders as to cost. The CMA award is hereby quashed and

set aside to the extent explained above, that is, the payment the applicant is entitled does not include compensation due to unfair termination.

It is so ordered.

T.Mwenempazi

Judge

14/04/2021.