IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT KIGOMA

LABOUR DIVISION

(APPELLATE JURISDICTION)

CONSOLIDATED LABOUR REVISIONS NO. 12 & NO. 13 OF 2020

(Arising from Labour Dispute No. CMA/KIG/154/2019 and CMA/KIG/155/2019 at the Commission for Mediation and Arbitration (CMA) at Kigoma

KARIM S/O BABU BABLIA..... APPLICANT

VERSUS

TANZANIA TELECOMUNICATION CORPORATION LTD.....RESPONDENT

JUDGMENT

23rd March, 2021 & 11th May, 2021

A. MATUMA, J.

The Applicant Karim Babu Bablia was an employee of the defunct **Tanzania Telecommunication Company Limited** since 1995 and undergone various positions within the Company to the highest position of Head of Business Unit under which he earned a monthly salary of **Tshs. 4,631,431/=.**

In the year 2017, with the enactment of ***The Tanzania Telecommunications Corporation Act No. 12 of 2017,*** the Company (TTCL) became defunct and in its place came a Corporation now the respondent herein. That led to change of the Scheme of Service or structure of the respondent. The employees and all staffs of the defunct Company including the applicant did not however loose their respective

jobs as they were automatically transferred into the new Corporation (Respondent) by virtue of section 29(1) of Act No. 12 of 2017 supra which provides;

> *'Subject to the provisions of the Tanzania Telecommunications Company Incorporations Act, the Public Officers and employees who, immediately before the effective date, are serving under the defunct company shall, with effect from the date of coming into operation of the Tanzania Telecommunications Corporation Act be transferred to the Corporation'.*

In the circumstances, the applicant and the respondent entered into another agreement which the applicant termed as a new contract of service in the new Corporation i.e new recruitment with a new employer but the respondent maintained that it was a mere **addendum** to the previous contract entered by the defunct Company.

The applicant worked with the new corporation just for hardly two months when he wrote a **notice of voluntary retirement** at the age of 55 in the next two months to come. He thus worked with the new corporation for four months when he voluntarily retired and paid all dues for his retirement i.e retirement benefits.

It is from this historical background; the applicant rose with two claims against the respondent. First that; his contract with the defunct Company

which was for a specified time had to expire on 14/04/2021. That such contract was so clear under clause five that in case the defunct Company (TTCL) implements Organizational structure establishing different positions thereby leading to some staffs losing their positions, that would amount to an automatic termination of the contract to a party losing the position, hence terminal benefits. That prior to the expiry date of the Contract in question on 14/04/2021, the respondent on 01/07/2019 implemented changes of staff positions which led to the Applicant losing his position as Head of Business Unit.

As such the contract was automatically terminated as per clause five supra and the respondent ought to have brought the contract to an end by paying to the applicant terminal benefits but she did not do so, hence a breach of contract. This is actually the first set of the complaint of the Applicant which was the subject matter in **CMA dispute No. 155 of 2019** now **Labour Revision No. 13 of 2020** before this court.

Second; that, the applicant having been given another job with a new title into the new Corporation (the Respondent herein), according to him; his new job with the new employer under a new recruitment, was subjected to unfavorable conditions of work which necessitated and or forced him to voluntarily retire which hence a **constructive termination.** He thus

claim for re-instatement and or consequences against the respondent for unfair termination under the doctrine of constructive termination. That constituted **CMA dispute No. 154 of 2019** now **Labour Revision No. 12 of 2020** before this Court.

On the other hand, the respondent disputing both claims maintained that there was no Organizational Structure within the meaning of clause five of the contract but implementation of the Law in which the Applicant was automatically transferred into the new Corporation with the same benefits, that by operations of the law supra the Applicant worked with the new corporation as a transferred staff from the defunct Company until when he personally decided to voluntarily retire. Hence there was neither breach of contract nor Constructive termination.

The Commission for Mediation and Arbitration Hon. Kiangi (Arbitrator) in CMA dispute No. 154 of 2019 and Hon. Mwakisopile (Arbitrator) in CMA dispute No. 155 of 2019 having heard the parties for and against the claims in their respective suits as herein above, dismissed the claims in its entirety hence the Current Labour Revision No. 12 of 2020 and Labour Revision No. 13 of 2020 respectively.

At the hearing of the two Revision Applications I wanted the parties to address me as to why should the two Labour Revision Applications not

Consolidated and determined together. They accordingly addressed me and I finally made the decision Consolidating the two applications hence this **Consolidated Labour Revisions No. 12 and 13 of 2020.**

Having Consolidated the two applications, I directed the parties to draw the issues for determination which would determine conclusively the complaints in both Applications. They agreed that the following issues suffices for the purpose;

i. *Whether the Respondent breached the contract with the Applicant.*

ii. *Whether the Respondent's conducts amounted to Constructive termination of the Applicant's employment.*

iii. *To what reliefs each party is entitled.*

At the hearing of this application, Mr. Michael Mwangati learned advocate represented the applicant while the respondent was represented by Mr. Ayoub Sanga learned State Attorney. The Applicant was also present in person supporting his advocate in the legal battle before me.

Mr. Mwangati learned advocate submitting on the first issue or ground of complaint argued that the applicant and the respondent had a contract of service for a specified period which had to expire on 14/04/2021 within which clause five states specifically that in the event the Respondent

implements organizational structure leading to lose of position, the contract would be automatically terminated and the applicant be entitled to terminal benefits in accordance to clause six of the contract thereof.

He further submitted that on 01/07/2019 prior to the expiration of the contract, the respondent implemented organizational structure doing away the position held by the Applicant which was the Head of Business Unit. That in the circumstances, the respondent should have brought their relation to an end within the meaning of clause five and pay the applicant terminal benefits but that was not done hence a breach of contract. The learned advocate was thus of the view that this court finds out that there was a breach of contract and the Respondent be forced to pay the Applicant the terminal benefits as per Human Resource Policies for Managers, Guidelines and Regulations for Managers of July, 2006 in which clause 29 (d) (iii) thereof provides that the manager (referring to the applicant), who shall lose his position due to restructuring shall be terminated and he shall be entitled to ex-gratia payment of 12 months' salary which is equivalent to **Tshs 55,577,172/=.**

The learned advocate further claims for the Applicant one-month salary in lieu of notice Tshs 4,631,431/=, Severance pay Tshs. 13,894,293, repatriation pay Tshs 1,160,000/=, Transport of luggage Tshs

4,800,000/=, subsistence allowance from 01/07/2019 to date and general damages.

Mr. Ayoub Sanga learned State Attorney responding on the first issue or ground of complaint argued that clause five in the contract has been wrongly relied by the applicant's advocate as the same is in respect of termination of the contract by either party but in the instant matter neither party terminated the contract. He referred this court to the proviso of the said clause five to the effect that the organizational structure referred thereat are the organizational changes within internal arrangement by the Company itself but that in the instant matter what happened was just implementation of the law which repealed the TTCL Act and in its place establishing a new Law Tanzania Telecommunications Corporation Act No. 12 of 2017 restructuring TTCL from a Company into a Corporation.

The learned State Attorney argued that the new law under section 29 mandated an automatic transfer of staffs of the defunct company into the newly established corporation under favorable conditions not less than what they earned within the defunct Company.

The learned State Attorney further argued that in the circumstances herein above, the applicant was automatically transferred into the Respondent corporation with the same title he had in the defunct company until when

the new scheme of service was put in place and that all these were operations of the law as per section 29 (3) of Act No. 12 of 2017 supra. He was of the further argument that even though the government had a collective bargaining with the staffs of the defunct Company to see the better way of implementing section 29 supra and that the applicant being dully represented by his Workers Union (TEWUTA) agreed that no staff should be terminated but all be transferred as required by law. That, from the agreement reached on the collective Bargaining, on 15/07/2019 the Respondent issued **Addendum** to all staffs transferring them to it with same personal File numbers commonly known as **PF No.** The Applicant thus worked with his same **PF No. 23232** and rescheduled as the **Principal Sales Office 1,** which was the highest position in the Public Service for none appointment positions and that it was not only the highest position within the Corporation but in the Public Service generally. The learned State Attorney further submitted that the applicant on 17/07/2019 signed the addendum to affirm his new position and changes thereof and thus estopped from denying such a truth because had he not signed the addendum, his contract would have been terminated and his dues paid.

The honourable arbitrator in resolving this complaint held that there was no breach of contract as what the respondent did was just to implement the law;

'Kwa Ushahidi uliopo ni Dhahiri mlalamikiwa alibadili mfumo wa uendeshaji wa TTCL kutoka Kampuni kuwa Shirika la Umma kwa mujibu wa Sheria No. 12 ya 2017 ambapo Kifungu cha 29 kimesema wazi wazi kuwa wafanyakazi wote wa Kampuni watahamishiwa katika Shirika la umma.

Hivyo basi, kwa kuwa yalikuwa ni matakwa ya Sheria iliyopitishwa na Bunge la Jamhuri ya Muungano wa Tanzania, mlalamikiwa hakutakiwa kumwachisha kazi mlalalmikaji na alifuata Sheria hiyo kwa kutofanya hivyo kwani hamna Ushahidi unaoonyesha vinginevyo kwani mlalamikaji aliendelea na utumishi mpaka alipostaafu...

Mlalamikaji alitolewa katika nafasi ya umeneja na kuwa na cheo kilichoitwa 'Principal Sales Officer I' bila kuathiri maslahi yake ya ujira kwa mujibu wa Ushahidi wa pande zote...

Kwa hiyo mlalamikiwa hakuvunja mkataba wa ajira ya mlalamikaji ila alitekeleza sheria ya Nchi'.

On my party, I agree with both; the learned State Attorney and the Hon. Arbitrator on their respective observations on the issue. This is because it is not in dispute that the Applicant Worked with the defunct Company as Head of Business Unit until when Act No. 12 of 2017 supra was enacted defuncting TTCL Company and re-establishing it as a Corporation. That was to change the Company from being Privately Organized into being a Public Corporation. It is further not in dispute that section 29 (1) of the said law clearly stated that all staffs of the defunct company shall be

transferred into the new established corporation. In that regard the applicant was transferred into the newly established Corporation with the same personal file number and salary although on a different tittle due to the new scheme in the Public Service within the Corporation.

I agree with the learned State Attorney Mr. Ayoub Sanga that the proviso to clause five of the contract in dispute did not mean that the contract of service between the parties would be automatically terminated in the event there is frustration of contract by operation of the law as it happened in this case. Rather it related to the situation in which the company itself restructure its operational organizations leading to some positions lost thereby making some staffs position-less by resolution of the Board of Directors. It had nothing to do with operation of the law as none of the parties had in mind that coming the year 2017, there would be a law enacted to defunct the Company as such. The Applicant was thus duty bound to establish by evidence that the proviso to clause five of his contract was anticipating the new law supra which was yet in place at the time the parties executed the contract between them.

But again, it is clear to the Addendum to employment Contract dated 29th July, 2017 that the same was not a new contract of service but an addendum to the previous contract of Employment between the parties

meaning that the applicant agreed to continue with his service with the respondent in the newly established Corporation by way of transfer. He cannot thus claim that he ought to have been terminated and paid terminal benefits. His claims are nothing but after thoughts as he continued receiving salary in the new established Corporation under the Contract entered with the defunct Company.

He ought to have not received and consumed the salary from the newly established corporation under the contract of the defunct company. That would have alerted the respondent that the Applicant is not willing to work with her under the same contract and no doubt their labour relations would have come to an end at the right moment.

I am aware that the applicant has tried to justify his receiving of the salary in the newly established corporation by stating that, that was a new service under the new contract of employment.

The Applicant has no any sort of evidence of a new contract but it is the said addendum which he maliciously calls it a new contract of employment with the respondent. If I had to agree with him then such purported contract would be found to be awkward as it does not have any stated salary or position of work. To the contrary, it is the learned State Attorney who is right. The same is merely an addendum to the Employment

contract meaning that the employment services by the applicant continued with the respondent on the same contract previously entered by the defunct company in implementation of the law herein above stated.

Not only that but also, if we have to agree with the Applicant that the TTCL Company and TCCL Corporation were two different employers of the Applicant at different times, then why should he have dragged in court the respondent herein, who was not party to the contract with TTCL company which is the subject matter of the alleged breach of contract. What is the rationale behind for him to sue the current respondent, his new employer (is so agreed) for the tort committed by a different employer altogether?

No doubt that, the Applicant finds the basis of his claims under the contract with TTCL Company against the current respondent TTCL Corporation from the law Act no. 12 of 2017 supra, if that is the case, then the applicant is acknowledging the operations of such law including its mandatory provision for the transfer of staffs from the defunct company to the Respondent corporation. If the said law is not the basis of the applicant's claim against the respondent, then the respondent is not liable to a strange contract not executed by her.

I may add that there was frustration of contract between the parties and not breach of contract, and it was the newly enacted law which frustrated

the contract. Even though the frustration thereof did not affect the applicant anyhow as he continued enjoying all his employment benefits under the contract with the defunct company. The frustration only led to the applicant losing his title as the Head of Business Unit into a new title of Principle Sales Officer. The new title under the new scheme of service had the salary of **Tshs 3,020,000/=** but the applicant continued to be paid the salary of **Tshs 4,631,431/=** as per his previous pay in the defunct Company in accordance to the requirements of section 29 (2) of Act No. 12 of 2017 supra that;

> *'With effect from the date of coming into operation of this Act a Public Officer or employee of the defunct Company shall be transferred to the Corporation* ***on terms not less favourable*** *than those applicable to him before his transfer'.*

Therefore, the applicant enjoyed payments and other benefits in the new corporation who is the Respondent so to speak, under the same very Contract entered with the defunct Company. His enjoyment as herein above stated was a clear protection by the law supra which foreseen the minimal wages in the Public Service the respondent being the Public Corporation as against the defunct company which was privately operated.

In the case of ***M/S Kanyarwe Building Contractor v. The Attorney General and Another*** *[1985] TLR 161,* this Court Mwalusanya, J. held that;

> *'The doctrine of frustration may be invoked where events occur that make the performance of the contract impossible and these frustrating events are not the fault of either party'.*

In the instant matter as I have said, with the enactment of the Law Act No. 12 of 2017 defuncting TTCL company and establishing TTCL Corporation made it impossible for the parties to execute their contract particularly on the applicant's title of work (Head of Business Unit) as the newly established Corporation being a Public entity had to put in place its own scheme of services with prescribed title positions. Even though the applicant did not suffer anything in terms of benefits and has stated nothing as to whether the change of title affected him anyhow. I therefore dismiss the first ground of complaint and or answer the first issue in the negative.

About the second ground of complaint or the second issue as to whether the Respondent had conducts which amounted to constructive termination of the Applicant's employment, the parties bitterly contested.

Mr. Michael Mwangati learned advocate for the Applicant submitted on the issue that the applicant was given a new post of Principal Sales Officer

which was a none managerial post nor was existing in the structure of TTCL. He was not given job descriptions or targets nor he knew to whom he ought to have been reporting. That under the new title, the applicant was not in a position to grow up as none was to make appraisal of him. With all these he was forced to terminate his service. He thus claims payment of severance allowance for ten years equal to Tshs. 15,438,103.33, general damages Tshs 100,000,000/=, statutory compensation of Tshs 55,577,172 and any other reliefs.

The learned State Attorney on his party responding to the second issue submitted that there were no any conduct amounting to constructive termination. He was of the further argument that job descriptions were clearly stated in the addendum. The learned State Attorney further argued that if we have to agree with the applicant that the addendum was just a new contract under the new employment with the respondent then he received **Tshs 4,631,431/=** as a monthly salary unlawful because the new job he had, had its prescribed salary scale below what he was receiving. Also, that if we have to agree that this was a new recruitment then severance pay cannot be paid as in law the same is paid to an employee who has worked for 12 months. (Section 42 (2) (a)) of the Employment and Labour Relations Act, while the applicant worked for only four months in the new job.

The learned State Attorney further argued that if we have to agree that the applicant's service with the respondent was a new recruitment then he could have not been paid **Tshs. 41,682,879/=** a nine months salary on his retirement because that amount is paid to a retired employee who has been recruited on competition basis and the applicant could have not been recruited by reason of age.

On the complaints that the applicant was put to a position where he could have not benefit with the appraisal system, the learned State Attorney argued that the applicant worked below six months the period within which appraisal is to be made in accordance to the open performance Review Appraisal System (OPRAS) as he wrote the notice of retirement just in two months of his new service. He further argued that the complaint in his retirement notice that he was intending to voluntarily retire due to the prevailing circumstances was pre-mature as it is only the period of two months within the newly established corporation which was a very short period to have such complaint and that under section 35 of the Employment and Labour Relations Act supra, constructive termination cannot be alleged by an employee who has worked on less than six months if we have to agree with the applicant that his employment with the respondent was a new recruitment.

The honourable arbitrator on this found that the applicant voluntarily retired and paid all retirement benefits and thus cannot be entitled to terminal benefits for constructive termination.

I fully agree with the honourable arbitrator as well as the learned State Attorney. The applicant voluntarily retired by his own letter exhibit D7;

> *'YAH: KUSTAAFU KAZI KWA MUJIBU WA SHERIA IFIKAPO TAREHE 01/12/2019 KUTOKANA NA UMRI MKUBWA'.*

That letter is self-explanatory that the applicant notified his employer that he was to voluntarily retire in two months to come by reason of age.

Even the contents of the letter reflected the contents of the title;

> *'Tafadhali rejea somo lililotajwa hapo juu.*
>
> *Hii ni kukutaarifu nia yangu ya kustaafu kazi katika utumishi wa shirika (TTCL Corp.) kwa mujibu wa kifungu cha 21 cha sera, mwongozo na kanuni za utumishi za shirika kwa wafanyakazi (2014) ifikapo tarehe 1/12/2019'.*

The said kifungu cha 21 supra provides that;

> *'Mfanyakazi anaweza kustaafu kazi kwa hiyari kutoka katika utumishi wa Kampuni anapofikisha umri wa miaka 55 na kuendelea, na atalazimika kustaafu kwa lazima anapofikisha umri wa miaka 60 kwa mujibu wa sheria'.*

In the circumstances, the applicant willfully and with clear mind on the relevant provisions of the laws, Rules and Regulations expressed his intention to retire at the age of 55 years. The respondent honoured the wish of the applicant and allowed him to retire voluntarily at the age of 55 years old. She then paid him all his dues as rightly observed by the trial Commission;

> *'Mlalamikaji alishapewa repatriation na bus fare kutoka Kigoma kwenda Kyaka Bukoba jumla ya Tshs 1,877,000/=, pia mlalamikaji alipewa Tshs 30,239,115.30 kama mishahara ya miezi 9 (retirement) kwa mujibu wa kielelezo D10 na mlalamikaji alikiri kupokea hii hela katika Ushahidi wake na pia alipewa cheti cha utumishi kielelezo D11 na alisaini kukipokea tarehe 26 Novemba, 2019'.*

In the circumstances it would be unlawful to allow the applicant's claims that he was unlawfully terminated (constructive termination) and award him terminal benefits on top of the retirement benefits he has already taken. It would be setting a bad precedent that an employee who has retired voluntarily and dully paid the retirement benefits can successfully claim in addition to the retirement benefits, terminal benefits. It is from this observation I agree with the honourable arbitrator when held on the last page of the Award;

'Mlalamikaji huyu alishachuma mafao ya kustaafu kazi hivyo hawezi tena kuchuma stahiki za kuacha kazi kutokana na mazingira magumu'.

It is my firm observation that had the applicant intended to sue on constructive termination, ought to have;

i. *not voluntarily retired but terminate his employment by reason of hard or unfavourable conditions of work.*

ii. *not received retirement benefits to give a lee way and justification for the claims of terminal benefits.*

It is my firm finding that an employee cannot enjoy both retirement benefits and terminal benefit at per or on the same time. One extinguishes the other. The two are water and fuel. They cannot settle into the same container. So long as the pocket of the applicant was filled with retirement benefits, there cannot be a space for terminal benefits. Even if I would have to agree with the applicant that there was constructive termination, I would have ordered him to surrender all the retirement benefits for him to be entitled with terminal benefits.

The applicant's notice for the retirement cannot be said to have disclosed that his intended retirement was a forced one due to difficulties surrounding his services. He merely stated in the notice;

'Nimelazimika kustaafu kutokana na ukweli kuwa, mazingira ya sasa ya kazi hayanipi nafasi ya kutosha kutoa mchango wangu kikamilifu katika kuchangia maendeleo ya Shirika wala yangu binafsi'.

This clause is not open, it is a closed phrase and thus subject to diverse interpretations and it does not necessarily mean that the respondent has created difficulties for the applicant to perform well his employment duties. It might be that he was not pleased with his new station of work at Kigoma as he used to work at Dar es Salaam and Mwanza or that '*mazingira ya sasa'* place of the current work has put him far from other personal gains for his further development e.t.c. He ought to have put it clear in the said notice that he was being forced to retire on the so and so reasons. That would assist the employer/Respondent to realize the situation and take the necessary steps to preserve the service of the applicant and or terminate him from employment in accordance to the law. Instead, the applicant according to his notice exhibit D7 pressed for his retirement,

'Natanguliza shukrani zangu kwako nikitegemea kukubaliwa kwa ombi langu'

I thus find the second issue in the negative as well. In other word, the second ground of complaint is as well dismissed.

Having dismissed the two grounds of complaint or issues, then the third issue in relation to what reliefs are the parties entitled to, is resolved in that the Applicant is entitled to nothing for there was no wrong committed by the respondent against him. On the other hand, the respondent is entitled to costs incurred in her defence both at the CMA and in this Court. This is because under rule 3 (1) of the Labour Court Rules, 2007 G.N. 106/2007, this Court (the Labour Court) is defined as the court of law and Equity. The term '*Equity*' has been defined by various dictionaries including the Oxford English Dictionary II Edition and the Blacks Law Dictionary to mean **fairness** or **justice**.

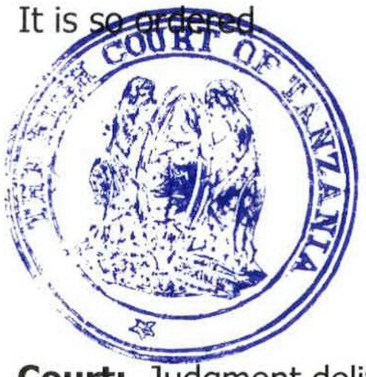
In that respect parties to a suit in the Labour Court must be guided with such rule and bring only those litigations aiming at achieving justice. The applicant having been paid fully the retirement benefits could in no way claim again terminal benefits particularly when he had legal service of learned advocate at all times. His suits at CMA and applications before this court aimed to gain what is not gainable i.e. two antagonistic benefits, retirement benefits versus terminal benefits. He thus aimed either to trouble the respondent by unnecessarily dragging her into court corridors or to trigger the court so that he would earn unlawful benefits. In that respect I find this matter fitting into rule 51 (2) of the Labour Court Rules

supra to condemn the applicant costs for his deliberate unjust action against the respondent, for I find not only this consolidated Applications frivolous and vexations, but also the two CMA disputes supra.

With the herein observations, this Consolidated Applications No. 12 & 13 of 2020 are dismissed in their entirety with costs. Costs at both the CMA and in this Court.

Right of further appeal to the Court of Appeal subject to the guiding laws and Rules thereat is fully explained to both parties.

It is so ordered



A. Matuma

Judge

11/05/2021

Court: Judgment delivered this 11th day of May, 2021 in the presence of Mr. Allan Shija learned State Attorney for the Respondent who also hold brief of Advocate Michael Mwangati for the Applicant.

Sgd: A. Matuma

Judge

11/05/2021