IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CONSOLIDATED LABOUR REVISION NO. 44 AND 45 OF 2020

(Originating from the decision of the Commission for Mediation and Arbitration in CMA/MZ/MZ/ILEM/123/2019)

BAHATI SHABANI JUMA.....APPLICANT

VERSUS

ISLAMIC PROPEGATION CENTER..... RESPONDENT

JUDGEMENT

Last order: 19/11/2021

Judgement delivered on 15/03/2022

F. K. MANYANDA, J.

In this cross application, this Court is being moved to invoke its revisional jurisdiction to call for and examine the proceedings and decision of the Commission for Mediation and Arbitration, hereafter referred to as "the CMA"

in CMA/MZ/MZ/ILEM/123/2019) by Hon. K. Nnembuka, Arbitrator, dated 09/04/2020.

The application by Bahati Shaban Juma is made by way of a chamber summons supported by an affidavit sworn by Innocent Bernard Kamugisha and that of Islamic Propagation Center (IPC) is also made by way of chamber summons supported by an affidavit affirmed by Said Rajabu Mangi, a principal officer of IPC.

The background of this matter as gleaned from the affidavits accompanying the chamber summonses and other records is that Bahati Shaban Juma, whom in this judgement shall sometimes be referred to as **"the Applicant"**, was employed by Islamic Propagation Center (IPC) whom in this judgement shall sometimes be referred to as **"the Respondent"**, as a teacher under a fixed term renewable contract of two years commencing from 01/09/2015 and came to an end on 31/08/2017. Then the contract was renewed for another period of two years to come to an end on 31/08/2019 with option for further renewal. However, this time Islamic Propagation Center, refrained from renewing the same. Bahati Shaban Juma contended that she had expected renewal of her contract with her employer but her expectation was curtailed, an act which prompted her to refer the dispute to the Commission for Mediation and Arbitration (CMA) for unfair termination claiming for leave

pay, repatriation allowance to her home Moshi and other entitlements. Islamic Propagation Center contends that termination was fair because the contract came to an end.

The CMA decided in disfavour of Bahati Shabani Juma in that it found termination of the contract was by expiration of time as agreed between them, therefore it was fair termination. However, it ordered Islamic Propagation Center to pay her repatriation costs and subsistence allowance for the whole period of 8 months she had not been repatriated.

The decision of the CMA aggrieved both parties, Bahati Shabani Juma complains on issues as follows: -

a) *that whether the award dated 09/04/2020 was properly procured and tinted (sic) with illegality;*
b) *whether the Applicant employment contract was breached by the Respondent;*
c) *whether the facts warranted the Applicant to have legitimate expectation of the renewal of the employment contract; and*
d) *whether the Arbitrator was right to base the calculations of subsistence allowances at the tune of Tshs. 227,322.19 while the monthly salary at the time of termination was Tshs. 405,000/=.*

On the other hand, Islamic Propagation Center complains that the Applicant, Bahati Shabani Juma, was paid fare for travelling back to her place of recruitment at Moshi on the termination date, therefore she was not entitled to any subsistence allowance.

Hearing of the revision was, by leave of this Court, argued by way of written submissions. The submissions for Bahati Shabani Juma were drawn and filed by Mr. Innocent Bernard, learned Advocate, and those for Islamic Propagation Center were drawn and filed by Mr. Deya Paul Outa, learned Advocate.

In his submissions Mr. Bernard combined issues number one, two and three then he argued issue number four separately. Supporting the three issues, Mr. Bernard argued that the CMA was wrong in finding that the evidence on record failed to establish legitimate expectation for renewal of employment contract because the evidence is vivid that the two parties had excavated custom of renewing employment contract upon one coming to an end. That the evidence shows that before expiration of the last contract, the Applicant was issued with a Contract Renewal Form (Exhibit C7) which she dully filled and submitted to the Respondent who refused without assigning any reasons despite existence of that requirement. The Counsel argued further that

Exhibit C8 also shows that no reasons were assigned for refusal to renew the contract while their working relationship was good all the time of service.

The Counsel was of the views that the continued renewal of previous contracts, the good working relations between them, salary increments and absence of employment termination notice proves existence of a legitimate expectation of renewal of the employment contract, the Arbitrator ought to apply Rule 4(2), (3), (4) and (5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007.

In respect of the issue number (d) the Counsel submitted that it was correct for the CMA to order payment of repatriation allowances to Moshi a place of recruitment; and since the same was delayed, payment of subsistence allowance was also rightly ordered. However, the Counsel argued that the salary on which the allowance was calculated was not Tshs. 227,322.19 but Tshs. 405,000/= as evidenced by Exhibit C6, a Bank Statement. The Counsel maintained that this piece of evidence was not contested by the Respondent.

The Counsel conceded on the fact that the Respondent paid the Applicant leave allowances and observed that leave payment been a statutory entitlement was well paid accordingly and it is not an issue in this matter. He prayed for award of prayers in Form CMA-1.

On his side, Mr. Outa submitted in support of the Application by Islamic Propagation Center, the Respondent, and at the same time reacting against the submissions by Mr. Bernard for Bahati Shabani Juma, the Applicant. He argued that the first contract term from 01/09/2015 to 31/08/2017 was for discharging of sponsorship terms agreed upon by the Respondent sponsoring the Applicant for her Diploma Studies at Ubungo/Kirinjiko Islamic Teachers College. The Counsel meant that the employment contract started from 01/09/2017 and ended on 31/08/2019 and that it was terminated on expiry, therefore termination of the employment contract was lawful. The Counsel argued further that according to Rule 4(5) of GN No. 42 of 2007, the Applicant was supposed to lead evidence that there was objective basis for expectation of renewal. The Counsel was of the views that the contract expired hence, automatically came to an end, there were no "otherwise provisions" as stipulated by Rule 4(2) of GN No. 42 of 2007.

As regard to failure to give reasons for the employment termination, the Counsel argued that there was no requirement for giving reasons because both parties were aware that the same would automatically come to end on 31/08/2019. He cited the case of **Joseph M. Mutashobya vs. M/S Kibo Match Group Ltd** [2004] TLR 242.

As regard to the complaint on subsistence entitlement, Mr. Outa submitted that the Applicant was not entitled because, per Exhibit D1, she was paid Tshs. 200,000/= which was sufficient fare to take her back to Moshi. The Counsel was of the views that the entitlements under Section 43(1) of the Employment and Labour Relations Act (ELRA), [Cap. 366 R. E. 2019] are in alternative not cumulative.

Therefore, payment of one disentitles the other, the Applicant was paid fare, she cannot claim for subsistence allowance. He prayed for the application to be dismissed.

By way of reply to the submissions by Mr. Outa, the Counsel for the Respondent, and at the same time rejoining, Mr. Bernard submitted reiterating his submissions in chief and insisted that the evidence established that the Applicant worked under two fixed terms which were renewed one after another. The Counsel contended that there is no evidence that the Applicant worked for sponsorship. He was of the views that parties are bound by the terms of their contract, hence had the Respondent intended the Applicant to work for sponsorship would have made it explicit in the first contract, Exhibit C3, and lead evidence at the CMA to that effect.

As regard to repatriation allowance, the Counsel submitted in rejoinder that the payment of Tshs. 200,000/= was a mere refund of her annual leave fare as provided under Section 44(1) of the ELRA, which was not repatriation within the law. The Counsel concluded that the Applicant is entitled to repatriation allowance as ordered by the CMA.

Then, Mr. Outa enjoyed his rejoining right on those issues Mr. Bernard had raised as reply to the Respondent's submissions by reiterating his earlier submissions that the first term contract of employment was attached to the sponsorship terms. He cited the case of **Hotel Sultan Palace Zanzibar vs. Daniel Leizer and Another**, Civil Application No. 104 of 2004 (unreported) where it was stated that employers and employees must be guided by agreed terms governing employment. The Counsel insisted that the Applicant and the Respondent are bound by their agreement.

As regard to repatriation allowance, again the Counsel reiterated his earlier submissions that the payment of Tshs. 200,000/= was for fare after termination of her employment.

Those were the submissions by the Counsel for both sides. I am thankful to to both Counsel, with the usual zeal and eloquence argued their positions

well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

The issues in this matter are whether the CMA finding that termination of the employment contract was fair is supported by evidence, and whether the CMA finding that the Applicant is entitled to payment of repatriation and subsistence allowance is supported by the evidence.

I will start with the first issue which, in order to address the same, I find it expedient to reappraise the evidence whereas I may come up with not necessarily with the same conclusion.

PW1, Bahati Shabani Juma, testified that she was employed as a teacher by the Respondent in 2015 after completing her studies at the ITC and worked as such until 2019 when her employment was terminated after been denied of renewal. She tendered eight exhibits namely: -

a) Exhibit C1, letter with reference number IPC/POST/015/01 dated 16/05/2015 headed "Kupangiwa Kituo cha Kazi" which concerned with appointment of the Applicant as a teacher according to conditions of the IPC Ubungo/Kirinjiko.
b) Exhibit C2, a letter of acceptance of appoint as a teacher dated 21/05/2015

c) Exhibit C3, Employment Contract between Islamic Propagation Center and Bahati Shabani Juma dated 01/09/2015. It shows the life span of two years from 01/09/2015 to 31/08/2017 with salary of Tshs. 179,746.84 with an increment of 5%.

d) Exhibit C4 Collectively, a letter of assignment to the Applicant for attending exercise of supervising and marking Form II and IV Mock Examinations for 2015, 2017 and 2018.

e) Exhibit C5, Employment Contract between Islamic Propagation Center and Bahati Shabani Juma dated 01/09/2017. It shows the life span of two years from 01/09/2017 to 31/08/2019 with salary of Tshs. 227,322.19 with an increment depending on the economic situation.

f) Exhibit C6, the bank account statement of the Applicant printed on 02/11/2019 covering a period between 01/07/2019 and 31/08/2019 showing: -

   i. credit of Tshs. 405,445.37 on 11/07/2019 being salary transfer for May, 2019;

   ii. credit of Tshs. 608,168.06 on 29/07/2019 being salary transfer for April Half and June, 2019;

   iii. credit of Tshs. 810,890.74 on 30/08/2019 being salary transfer for July, 2019;

g) Exhibit C7, a form for employment contract renewal (ombi la kuanza mkataba mwingine wa ajira) dated 10/08/2019 indicating that renewal was rejected without reasons.

h) Exhibit C8, a letter by the Respondent to the Applicant informing about rejection of renewal of contract of employment no reasons were assigned.

The Respondent's testimony through DW1 Said Rajabu Mangi was short as follows: -

> *"Vielelezo alivyotoa ni sawa naongeza cha nauli ya likizo 2018/2019 kielelezo D-1."*

Literally means that the exhibits tendered by the Applicant were correct and he added a paylist for leave allowance for 2018/2019.

In cross examination DW1 stated that he was absent during the Applicant's employment and that he was the one who handled employment contract renewal request, which request was just rejected for reasons that the contract came to an end by expiration.

As it can be seen the evidence adduced before the CMA is straight forward that the Applicant was employed by the Respondent as a teacher according to "conditions" of the IPC Ubungo/Kirinjiko after completion of her Diploma

studies at the said IPC Ubungo/Kirinjiko College. However, my perusal of the evidence on record I could not find the said "conditions".

The Applicant accepted the employment offer through Exhibit C2, the same don't indicate any "conditions". Consequently, she signed a contract of employment Exhibit C3 on 01/09/2015 of which life span was two years from 01/09/2015 to 31/08/2017 for salary of Tshs. 179,746.84 with an increment of 5%, the same does not contain the alleged "conditions".

After expiry of that contract, the Applicant signed another employment contract on 01/09/2017 which had a life span of two years from 01/09/2017 to 31/08/2019 for salary of Tshs. 227,322.19 with an increment *"depending on the economic situation"* also there are no "conditions" as alleged.

The Applicant led evidence, which was uncontroverted by the Respondent, that she worked diligently to the satisfaction, being assigned various official duties including participation in supervision and marking of various Form II and IV mock examinations.

The evidence shows that a dispute arose when the application for renewal of the employment contract was rejected by the Respondent; the Applicant filled a "Form for Renewal Request" (Exhibit C7) in which a part providing for renewal was cancelled by DW1, meaning that her application was

rejected. It was followed by a formal letter which made it explicit that her request for renewal of the employment contract was rejected.

What is common from these pieces of evidence is that no reason is indicated for the rejection.

The Applicant contends that the continued renewal of previous contracts, the good working relations between them, salary increments and absence of employment termination notice proves existence of a legitimate expectation of renewal of the employment contract, short of which she was entitled at least to know the reasons for termination of her employment contract.

The Respondent argued quiet differently. It was argued that the first contract was for fulfilment of sponsorship of study expenses at ITC Ubungo/Kirinjiko College. The Counsel for the Respondent stated that it was a condition for the Applicant to work for the Respondent for two years, therefore Exhibit C3 is not an employment contract but "conditions" which the Applicant was obliged to implement. The Counsel was of the views that there was only one contract of employment which came to expiry on 31/08/2019, since there are no previous contracts, then there cannot be any expectation for renewal from previous contracts due to absence of such contracts.

With due respect, I have navigated through all the evidence and have been unable to find any "conditions" purportedly mentioned in Exhibit C1, the offer for employment. Neither the acceptance letter (Exhibit C2) nor the first employment contract (Exhibit C3) creates or indicates any "conditions" between the Applicant and the IPC Ubungo/Kirinjiko. If at all there were "conditions" then, the same might be in a quite different forum or document, which as far as the employment contracts which governed the employer-employee relationship of the parties in this matter are concerned, it is not part.

The case of **Hotel Sultan Palace Zanzibar vs. Daniel Leizer and Another** (supra) is very relevant that employers and employees must be guided by agreed terms governing employment.

This Court finds that the first employment contract (exhibit C3) was a valid contract of employment without any conditions from ITC Ubungo/Kirinjiko because the said employment contract does not bear the same. The Applicant could not be bound by conditions which are not contained in the contract. The CMA was correct in finding that there were two contracts of employment which succeeded one after another following successful renewals.

The next question is whether the Applicant established existence of a legitimate expectation of renewal of the employment contract. As it can be seen from the evidence summarized above, the Applicant worked for the Respondent in the two consecutive employment contracts diligently to the satisfaction and without fault. She filled a form applying for next employment contract, but suddenly it was turned down without assigning any reason or explanation.

The act of rejecting her contract was made known to her just 16 days before expiration of the existing contract.

In order for one to find whether or not there was legitimate expectation of employment one has to move through the evidence in the like as done in a slow-moving video picture. Starting from the existence of the working relationship through up to the fourth year. A look of the evidence in that style shows that the Applicant was trusted by the Respondent to the extent of been assigned various tasks including supervision and marking of Mock Examinations for Form II and VI. Next, the salary increments per Exhibit C6 from 179,746.84 in 2015 to Tshs. 405,445.37 in May 2019 and Tshs. 810,890.74 in July 2019. All these are indication of good relationship and trust by the Respondent. In such sound, calm and good working environment one would at least reasonably expect continuation of the same.

Rule 4 of the **Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007,** provides for automatic termination of fixed term contracts "unless provided otherwise" and the same may be renewed by default if the employee continues to work after such expiry. In case it is terminated while the employee expects a renewal of the contract, the termination amounts to unfair-termination. Sub rule (5) of Rule 4 puts a burden of proof to the employee to establish that there is an objective basis for the expectation, such as previous renewals, employees undertaking to renew etc.

In this matter as explained above, the Applicant had expected continuation of her contract by filling form for Application of Extension (exhibit C7). The same was rejected without any reason at least to let the Applicant know the cause of her employment termination. The authority in the case of **Joseph M. Mutashobya vs. M/S Kibo Match Group Ltd (supra)** is not applicable in the circumstances of this case because that case was decided before the ELRA came into force which under section 37(1)(a) put obligation of giving reasons in termination of employment; it reads: -

> *"37(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove- (a) that the reason for the termination is valid."*

It follows therefore that under sub rule (4) of Rule 4 of GN No. 42 of 2007, the termination was un-fair. I find that the CMA did not well scrutinize the evidence exhaustively, had it analyzed the same as demonstrated above, it would have arrived at a different conclusion. The first issue is answered affirmatively.

The next issue is whether the CMA finding that the Applicant is entitled to payment of repatriation and subsistence allowance is supported by the evidence.

The uncontroverted evidence by Bahati Shabani Juma is that she was employed by the Respondent Islamic Propagation Center as a teacher, that she was recruited from Moshi, and that her employment was terminated while in Mwanza, then she was entitled to repatriation. The controversy is that while the Respondent claims that she was paid the same, the Applicant on her side denies.

The evidence adduced by the Respondent through DW1 is to the effect that the Applicant was paid repatriation allowance, per Exhibit D1, a pay list. The Applicant does not dispute the payment of Tshs. 200,000/=; however, she contends that she received the same as a refund to unpaid leave allowances. The Counsel for Applicant argued that it was her annual leave fare been her

entitlements as provided under Section 44(1) of the ELRA, it was not repatriation under Section 43 of the same law.

The Counsel for the Respondent (IPC) argued that the Applicant was not entitled because the payment of Tshs. 200,000/= sufficed for fare to take her back to Moshi. Moreover, the entitlements under Section 43(1) of the Employment and Labour Relations Act (ELRA), [Cap. 366 R. E. 2019] are in alternative not cumulative, payment of one disentitles the other, the Applicant was paid fare, she cannot claim for subsistence allowance.

My reading of section 43 of the ELRA makes it explicit that it applies to payment of transport to place of recruitment, or repatriation. It reads as follows: -

> *"43(1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-*
>
> *(a) transport the employee and his personal effects to the place of recruitment;*
> *(b) pay for the transportation of the employee to the place of recruitment; or*
> *(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract*

and the date of transporting the employee and his family to the place of recruitment.

2) An allowance prescribed under subsection (1)(c) shall be equal to at least a bus fare to the bus station nearest to the place of recruitment."

As it can be seen, the use of the word "either" in this provision makes the entitlement alternative to one another, but all concern repatriation payments. On the other hand, section 44 of the ELRA provides for terminal entitlements which include due leave pay. It reads: -

"44.-(1) On termination of employment, an employer shall pay an employee –

a) any remuneration for work done before the termination;

b) any annual leave pay due to an employee under section 31 for leave that the employee has not taken;

c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31(1);

d) any notice pay due under section 41(5); and

e) any severance pay due under section 42;

f) any transport allowance that may be due under section 43.

(2) On termination, the employer shall issue to an employee a prescribed certificate of service." (emphasis added)

As it be gleaned from the provisions above, the two sections have different purposes. While the payments under section 43 are intended to return the employee to his place of recruitment after termination of his employment, the provisions under section 44 intended to ensure payments of due entitlements during subsistence of the employment.

My look at Exhibit D1 shows that it is titled "Safari on Leave Allowance" and the payments of Tshs. 200,000/= were made on 31/08/2019 for leave-cycle of 01/092017-01/09/2019, a period in which the Applicant was working for the Respondent. It is my strong conviction that the payment of Tshs 200,000/= was for untaken leave allowance hence, it was among the payments envisaged under section 44 of the ELRA as explained above, not repatriation payments under section 43 of the same law.

To this end, I find the second issue also answered in affirmative. The CMA as far as the issue of repatriation costs is concerned, rightly analyzed the law and rightly applied the same to the evidence before it and rightly found that the Respondent, IPC, was liable to pay repatriation allowances to the Applicant.

Having found so, then, the last issue here is about the quantum of subsistence allowance. The Counsel for the Applicant supports the finding of

the CMA save for the amount. His views are that the salary used to base the subsistence is not Tshs. 227,322.19 but it is the salary which prevailed at the time of termination which was Tshs. 405,445.37.

The Counsel for the Respondent argues that the Applicant is not entitled to any subsistence allowance because she was paid her leave pay which she could have used for fare back to her place of recruitment, Moshi. I have already ruled that the payment was not repatriation but for untaken leave pay entitlement.

Moreover, in his conclusion, the Counsel for the Applicant prayed for the reliefs in Form CMA-1. My examination of Form CMA-1 reveals the following reliefs were asked by the Applicant: -

> *Notice; Repatriation costs from Mwanza to Moshi; Subsistence Allowance; the payment of expected contract and certificate of service.*

The CMA awarded repatriation allowances, subsistence allowance and denied the rest because it found the termination of the employment contract to be fair. Now this Court has found that the termination was unfair, I do hereby find that the Applicant is entitled to all the reliefs the Applicant, Bahati Shabani Juma, prayed in Form CAM-1 save for the payment of expected

contract which is vague and no submission was made in respect of it. The next issue here is what amount.

My examination of Exhibit C6, the bank account statement of the Applicant, Bahati Shabani Juma, printed on 02/11/2019 covering a period between 01/07/2019 and 31/08/2019 shows that there are some deposits which were credited into the bank account of the Applicant.

The first credit made on 11/07/2019 was of Tshs. 405,445.37, it is explained as *"salary transfer Nyasaka Salary May, 2019".* The second credit made on 29/07/2019 was Tshs. 608,168.06, is explained as *"salary transfer Nyasaka Salary April half and June 2019."* The third credit was made on 30/08/2019, it is explained as *"salary transfer Nyasaka Salary July, 2019".*

As it can be seen, the purposes of the deposit payments were explained as "salary transfer" for the respective month and in some other transactions "for April half and June". Moreover, the amounts vary radically from one another though made in a short span of two months only.

I fail to agree with the Counsel for the Applicant that the figure of the credits in the bank statement represent a salary for the respective months. Although the record shows that this evidence was accepted wholesomely by DW1, that alone is not a guarantee that the credits represent actual salaries.

The CMA based its order for subsistence allowance on a starting salary in the second contract for 2017 to 2019 which was Tshs. 227,322.19. In my firm opinion, I agree with the CMA findings. Although clause 5.2.2(a) provides for salary increment according to increase of the economy. It reads as follows:

> *"(a) nyongeza ya mshahara wake wa mwezi kila baada ya mwaka kwa kuzingatia hali ya uchumi iliyopo..."*

The Applicant ought to lead evidence proving that her salary was so increased to Tshs. 405,445.37. This Court finds that the proper salary on which subsistence allowance is to be calculated from is the said amount of Tshs. 227,322.19.

It follows therefore, in exercise of revisional powers vested in this Court, I do hereby revise the CMA award dated 09/04/2020 by Hon. Nnembuka, Arbitrator and order that the Applicant deserves to be paid the following entitlements namely: -

i. Notice in lieu of contract equal to the last salary of Tshs. Tshs. 227,322.19/=;
ii. Repatriation costs from Mwanza to Moshi based on the prevailing public transport costs;

iii. Subsistence Allowance from employment contract termination date 31/08/2019 to date of repatriation date based on the last month salary of Tshs. 227,322.19/=; and

iv. certificate of service.

This been a labour case, I make no order as to costs. It is so ordered.

F. K. MANYANDA

JUDGE

15/03/2022