**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE SUB-REGISTRY OF MWANZA)**

**AT MWANZA**

**LABOUR REVISION NO. 46 OF 2021**

***(From Labour dispute number CMA/MZ/ILE/66202/47/2021)***

**EZEKIEL MAYUNGA..... APPLICANT**

**VERSUS**

**CHINA CIVIL ENGENEERING & CONSTRUCTION CORPORATION (CCECC).....RESPONDENT**

**JUDGMENT**

**13th July & 5th October, 2022**

**DYANSOBERA, J.:**

This is an application for labour revision in which the applicant herein is seeking revision of the Award of the Commission for Mediation and Arbitration in Complaint No. CMA/MZ/ILEM/66/202/47/2021 between Ezekiel Mayunga and China Civil Engineering and Contractors Corporation (CCECC) delivered on 15th November, 2021. The application is accompanied with a notice of application and is supported by an affidavit sworn by the applicant.

According to paragraph 4 of the affidavit, nine grounds have been identified for determination by this court. The same applicant has, under paragraph 5 of his affidavit, set out five reliefs.

In resisting the application, the respondent has averred in his notice of opposition that the applicant has absolutely failed to clearly

demonstrate that there are good grounds for this application to be entertained by this court and that there are neither points of law nor points of facts advanced by the applicant in support of the application.

The brief facts leading to the present application for revision are that the applicant had a fixed term of contract of one year commencing from 1st June, 2019 and ending on 31st May, 2020. According to the respondent, due to the end of the respondent's project on which the applicant's employment was based, on 6th February, 2021 parties executed the termination of contract by mutual agreement which was voluntarily signed.

The applicant thought that he was unfairly terminated and referred the matter to the CMA. According to the Referral of a Dispute to the Commission for Mediation and Arbitration, CM F.1, the applicant was claiming overtime payment, salary arrears, leave pay and severance allowance. The total amount he was claiming was TZS 9, 614,285.71.

At the commencement of hearing the labour dispute, the Arbitrator framed the following issues, namely: -

1. Whether the applicant was unfairly terminated
2. Whether the termination adhered to valid reasons and fair procedure
3. What reliefs are the parties entitled.

The CMA, after hearing the evidence on part of the respondent and the applicant, found that the applicant had failed to prove his claims. It dismissed the claims.

This Award aggrieved the applicant and on 15th day of December, 2021, preferred an application for Labour Revision, the subject of this judgment.

On 13th July, 2022 when this application for revision came up for hearing, Mr. Reagan Charles, learned Advocate, represented the applicant while the respondent enjoyed legal services of the learned Counsel, Messrs. Innocent Bernard and Joel Madata.

Arguing in support of the first ground, that is whether it was lawful for the Arbitrator not to consider the evidence of the applicant, Mr. Reagan Charles submitted that in resolving the issue whether '*Ajira ya Mlalamikani ilisitishwa kwa makubaliano ya pande zote mbili',* the Commission relied on the evidence of the respondent leaving aside the applicant unconsidered. In fine, learned Counsel asserted that the Arbitrator did not consider the evidence of both sides, the evidence of the applicant, in particular. This court was referred to the case of **Omary Abdallah Kilua v. Joseph Rashid Mtunguja**, Civil Appeal No. 178 of 2019. The learned Counsel abandoned ground 2.

Submitting on the 3rd and 4th grounds that that the Arbitrator erred in law by admitting hearsay evidence of the respondent's witnesses which had no credibility, Counsel for the applicant contended that the finding of the Arbitrator that the applicant's contract was terminated by mutual agreement was hearsay evidence by the respondent's witnesses. Reference was made to SU 1 Joel G. Madata who failed to prove his presence during the transaction. He pressed that hearsay is inadmissible. He relied on the case of **Ibrahim Shaib and Daniel Lipambila** in Land Appeal No. 133 of 2019. Counsel for the applicant was of the view that the evidence was contradictory.

With respect to ground number 5, Mr. Reagan faulted the Arbitrator's finding that the applicant did not testify on extra hours. He contended that there was failure to analyse the applicant's evidence and that no payment worked overtime was made from 1.6.2019 to 5.2.2021. Counsel for applicant cited the case of **Pauline Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017.

On the right to severance allowance which is the 6th ground, it was submitted for the applicant that the applicant stayed with the respondent for two consecutive years and was, therefore, entitled to severance allowance and further that leave pay was not considered.

The court was referred to the case of **Felician Rutwaza v. World Vision Tanzania, Civil Appeal No. 213 of 2019.**

Arguing on the 7th ground on admission of secondary evidence, Counsel for the applicant complained that at the time the secondary was admitted, no opportunity was given to the applicant to object.

Respecting the 8th ground that is whether the applicant was paid, this court was told that the amount was not specified and the applicant dined to have received the payment and the respondent failed to prove his assertion. Counsel for the applicant pointed out that the evidence of Joel Madata could not prove that fact as his evidence was a hearsay and incredible and also denied to have issued payments. The case of **Millenium Coach Ltd v. AFRI carriers Ltd**, Civil Appeal No. 323 of 2019 was cited in support of his argument.

Arguing on ground number 9, Counsel for the applicant contended that there was no analysis of evidence and that it was not clear how the contract came to an end. Counsel for the applicant was confident that the applicant gave valid, credible and sufficient evidence. He maintained that the persons who are alleged to have witnessed the contents of the documents were not called to testify. In his view, the respondent's evidence lacked validity, credibility and sufficiency.

Responding, Mr. Innocent Bernard, adopted the filed notice of opposition and the counter affidavit and made the following submission. The dispute was on unfair termination but that the applicant's evidence was on a one-year fixed term of contract renewable on the same terms and conditions. He argued that the holder of a fixed term of contract could only claim breach of contract and not unfair termination as the principles of unfair termination do not apply to fixed term of contracts. To buttress his argument, Counsel for the respondent cited the following case laws, that is **Jordan University College v. Flavia Joseph**, Revision No. 23 of 2019 and **Asante Rabbi Mkonyi v. TANESCO**, Civil Appeal No. 53 of 2019 at page 10. Making reference to Section 39 of the Employment and Labour Relations Act and rule 9 (3) of GN No. 42 of 2007, Mr. Innocent Bernard avowed that the principle is that in a fixed term of contract the employer has no burden of proof.

With respect to the argument on part of the applicant that the applicant was forced to sign the termination of contract by mutual agreement, Counsel confirmed that no force was used and there is no evidence to prove any use of force as the applicant signed, thumb printed the document and then left. It was Counsel's further argument that Exhibit SU1 and the evidence of SM 4 act as estoppel against the

On the cases referred to by Counsel for the applicant, Mr. Innocent Bernard informed the court that they are inapplicable. He asservated that the contract was a fixed term and the only remedy to which the applicant could resort was to claim on breach of contract.

Reacting during the rejoinder, Mr. Reagan Charles maintained that in a fixed term of contract a claim of unfair termination could be sustained provided there was expectation of renewal and that in the present case, the applicant gave evidence on expectation of renewal of contract. With regard to the payment, Counsel insistent that there was no proof on payment.

After considering the rival submissions of learned Advocates and the facts accepted by the Commission, I am satisfied that the following facts were established.

One, according to exhibit SM 1, the employment contract between the parties was made on 1st June, 2019 between China Civil Engineering Construction Corporation as an employer and Ezekiel Salwa Mayunga being an employee.

Two, the employment period was one year commencing from 1.6.2019 and ending on 1.6.2020, on a completion of a specific task.

Three, the ordinary week was commencing on Monday and ended on Saturday.

Four, the working hours of an employee was 45 hours per week and was to be on Monday to Friday 7:30 am to 18:00 pm. Lunch break at 12: 00 pm to 13:30 pm, Saturday from 7:30 am to 12:00 pm.

Five, over time was to be worked when agreed.

Six, on the termination of contract, it was stipulated that the contract could be terminated upon completion of the fixed period or the specified task.

A critical analysis of the material on record reveals that there was oral testimonies and exhibit SU 1, which is termination of contract by agreement between the respondent and the applicant which was executed on 6.2.2021 and duly signed by both parties. It was clearly stipulated therein that the employment would end on 6th February, 2021 and there would be no more claim between the two sides. Further that Ezekiel shall be paid 4, 200,000/= and in that respect should provide CRBD account and 3 M-pesa numbers to CCECC.

It should be recalled that that in the CMA F.1, the nature of the dispute was termination of employment. The claims were overtime, unpaid salaries, leave and severance allowance; the total amount being 9, 614,285.71.

The applicant had further pleaded that the termination was procedurally unfair because the letter was simply tendered before him

and he was forced to sign and that the substantive issues were that the reasons were not disclosed. The said form was duly filled in by the applicant on 3rd March, 2021 and filed in the CMA on 5th March, 2021.

With these glaring facts, it is clear that the contract between the parties was a fixed term. The applicant's appointment was for a specific time and termination was due when pre-determined term ended. According to the terms of the contract as indicated above, the employment was to come to an end on a particular date or at the completion of a specific task.

There is no dispute that fixed term contracts automatically expires or are renewed.

In the case under consideration, it was amply proved in evidence by the respondent and not substantially denied by the applicant that the contract of employment by the parties was terminated due to the end of the respondent's project on which the applicant's employment was based and on 6th February, 2021 parties executed the termination of contract by mutual agreement which was voluntarily signed. This fact has not only been proved orally but also by the '**Termination of contract by mutual agreement'** as evidence by Exhibit Su 1. The parties duly signed its execution on 6.2.2021. The argument by the applicant that he was forced to sign was rightly rejected by the Hon.

Arbitrator as that argument lacked any proof whatsoever. After all, the applicant's signature on the document terminating the contract signified the provenance and the authenticity.

There was an argument by Counsel for the applicant that in a fixed term contract, a reference of unfair termination can be maintained provided there is an expectation of renewal. He referred this court to the case of **Asanterabi Mkonyi v. TANESCO**, Civil Appeal No. 53 of 2019 to buttress his argument.

There is no dispute that there was a failure to renew the fixed term of contract on the same or similar terms. The crucial issue for consideration is whether there was a reasonable expectation of renewal of the contract. The law on this aspect is clear. It is provided under section 36 (a) (iii) of the Employment and Labour Relations Act as follows: -

'36.For purposes of this Sub-Part-

(a) 'termination of employment' ' includes-

(i) .....(not relevant);

(ii).....(not relevant);

(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal'.

Like wise, Rule 3 (1) (c) of the Rules provides that for purposes of these Rules, the termination of employment shall include:-

a) ..(not relevant)

b) ....(not relevant)

c) Failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal of contract;

d) ....(not relevant),

e) .....(not relevant)

As the evidence reveals, the employment contract between the parties was silent on what would be the consequences of the failure to renew the fixed contract which automatically came to an end upon the end of the agreed period. The applicant did not point out any term to that effect

As clearly stipulated under Rule 4 (2) of the Rules, where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise. It is true that under sub-rule (3) of rule 4 of the Rules, a fixed term of contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract. However, the renewal by default is subject to some factors which are stipulated by the law. For instance, under the same same sub-rule (3) of rule 4 of the Rules, the renewal by

**W.P. Dyansobera**
**Judge**
**5.10.2022**

This judgment is delivered under my hand and the seal of this Court on this 5th day of October, 2022 in the presence of applicant but in the absence of the respondent.


**W.P. Dyansobera**
**Judge**