IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

APPLICATION FOR REVISION NO. 22 OF 2021

(Arising out of Labour Dispute No. CMA/MOR/153/2020)

TAYLOR MAGUNDU .... APPLLICANT

VERSUS

REGISTERED TRUSTEES OF THE HOLY
SPIRIT SISTERS TANZANI....................................RESPONDENT

JUDGMENT

Last Order: 07.10.2022
Judgment: 16.11.2022

HASSAN, J

The applicant, Taylor Magundu filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 15th November, 2021 in labour dispute No. **CMA/MOR/153/20202**. The application is made under Section 91 (1) (a), 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] and Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), (3)

(a) (b) (c) (d) and Rule 28 (1) (b) (c) (d) (e) of the Labour Court Rules, 2007 GN. 106 of 2007 (herein GN. No 106 of 2007).

The application is supported by the affidavit of Taylor Magundu, the applicant herein. The respondent confronted the application through the counter affidavit of Sr. Agnes Wilson, the Respondents Principal Officer, and the matter proceeded orally.

At the hearing, Mr. Baraka Lweeka, the learned counsel appeared for the applicant, whereas Mr. Ignas Punje, the learned Counsel entered presence for the respondent.

The brief background of the matter is as follows: The applicant herein was employed by the respondent as a teacher on 24rd August, 2018 with renewable fixed term contract of two years which was expected to end on 23rd August, 2020. The said contract appeared to be signed by the parties, and the same was admitted at CMA as exhibit D1 without objection. On 24th July, 2020, the respondent issued a reminder letter to the applicant about expiry of her contract which was expected to end on 23rd August, 2020, as aforementioned. The said letter was admitted and exhibited as D2.

It follows, that on 27th July, 2020, the applicant wrote to the respondent requesting to renew the contract before it expires on 23rd August, 2020. Though the letter was not admitted at CMA as exhibit. Upon receiving of that letter, the respondent replied through the letter dated 29th July, 2020, acknowledging receipt of the applicant's letter of request for renewal of her employment contract, and also informing her on the decision met by her employer not to renew the contract; it also informed the applicant to see the Bursar on 23rd August 2020 for the payment of her necessary due. Similarly, that letter was tendered and admitted at CMA as exhibit D3 without abjection. After that, on 21st August, 2020, before contract expired the applicant received her remuneration including 10% gratuity, receipt of which was admitted as exhibit D4.

Notably, it appeared from the record of evidence at CMA that before the applicant signed his employment contract on 24rd August, 2018, she had already started to work with respondent since 23rd April, 2018 to 27th July, 2018 when the two years fixed term contract was signed. During which time, the parties had signed three months under probation contract which was not submitted to the CMA as evidence by either party. Counting the days from 23rd April, 2018 to 24rd August, 2018, it seems 4 months

lapsed which means, one month stand in excess without any explanation as to their working agreement.

Wounded by the decision of her employer to oust her from employment, the applicant forwarded her complaint at CMA for determination. Pained by the verdict of CMA to decide in favour of respondent, the applicant preferred the current application seeking to revise and set aside the award delivered on 15th November, 2021 with the following grounds:

i. That, the Honourable Arbitrator grossly erred in law and in facts failure to make finding on each issue especially issue No. 1 as framed before parties as well as assigning reason for the finding.
ii. That, the Honourable Arbitrator erred in law and in facts by failure to consider complainant/applicant evidence including the fact that he worked for 28 months and that his agreement renewed by default on 23rd April, 2020.
iii. That the Honourable Arbitrator grossly erred in la and in facts by basing decision/an award on extraneous matters out to wit three months' probation agreement which was never tendered as an exhibit before the CMA.

iv. That the Honourable Arbitrator grossly erred in law and in facts by making decision/issuing an award without reasoning.

Arguing in support of the application the learned advocate Baraka Lweeka kick started by asked the court to adopt an affidavit sworn by the applicant Ms. Taylor Magundu to form part of his submission. He also averred that though his application composed of four (4) grounds as they appeared in the paragraph four of affidavit, he only desires to argue two grounds numbered 4.2 and 4.3, and abandon the rest two notably 4.1 and 4.4.

Starting with ground number 4.2, the learned advocate argued that Arbitrator erred in law and facts by failure to consider complainant evidence including the fact that he worked for 28 months and that his agreement renewed by default on 23rd April, 2020. To elaborate on the same, he explained that there is clear evidence from both parties that the applicant started to work with the respondent on 23rd April, 2018 as it was testified by the first witness, Agness Wilson and also by applicant.

Mr. Baraka went on submitting that there was also a documentary evidence of exhibit C2 which was a letter from respondent dated 04th July, 2018 which acknowledged the date the applicant started his employment.

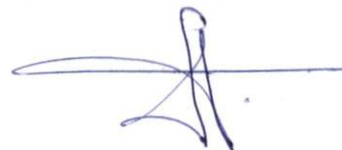
He stated further that it was agreed by both parties that the employment contract was a fixed term contract of two years. It was similarly agreed that the applicant will not be terminated from her employment at any time until 24th August, 2020. It is therefore the conclusion that from 23rd April, 2018 to 24th August, 2020, is a period of two years and four months. Therefore, since the fixed term contract was for two years only, the applicant continued to work beyond the two years fixed term.

The learned advocate Baraka submitted further that on the part of the respondent, it was alleged that the applicant has had an under-probation contract of three months which started on 23rd April, 2018 and ended on 22nd July, 2018. Likewise, it was said that the second contract of two years started on 24rd August, 2018. With that, he contended that the respondent has failed to put clear three things namely:

1. To justify the gap between 23rd July, 2018 to 23rd August, 2018, as the gape was not explained. In this point the learned advocate averred that the employment contract must be in writing as according to section 14 (2) of the ELRA Chapter 366 (R.E 2019). Thus, he asserted that it was not proper to say that the applicant has worked from 23rd July, 2018 to 23rd August, 2018 without any written contract.
2. Failure to tender the purported probation contract of three months as an exhibit. He pointed out that, this suggested that the said contract is not existed, it was just a mere afterthought. To furtherance his point, he argued that even if they assumed that the purported contract exists, though they do not admit that it exists, the same would be contrary to regulation 11 of the ELRA, G.N 47 of 2017 which requires the fixed term contract to be not less than twelve months. So, the purported three months' probation contract would be illegal and contrary to the law. Mr. Baraka submitted further, that the said contract could not be of any effect and it is not existing.

3. They failed to put clear in the contract, an existence of probation period in the two years employment agreement at paragraph 15 which is exhibit C1/D1. The learned advocate argued that in Para 15 of that exhibits, there is another probation period of three months, where by the only witness of respondent, sister Agness Wilson admitted in the cross examination that the applicant was not subject to two probationary period. He further argued that it is the same witness who told CMA that there was separate probation contract of three months. Again, same witness tendered exhibit D1 with another probation period of three months. Therefore, her evidence was very contradictory in respect of probationary period of the applicant.

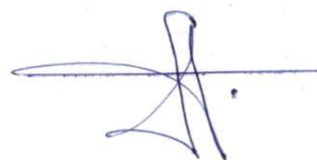
On the other hand, it was the evidence of the applicant that, she started to work on 23rd April, 2018 but he failed to sign written contract on that date due to the administrative activities which were not disclosed to him and therefore, he decided to remind his employer on 25th June, 2018 and the said date is reflected in the exhibit C2 which is the letter from respondent. Thus, according to the applicant evidence, he just delayed to sign the contract but he had only one contract of two years.



The two years contract ended on 22nd April, 2020 but the applicant went on with his duty until 24th August, 2020.

According to Rule 4(3) ELR (Code of Good Practice) Rules, G.N No. 42 of 2007, the two years contract was renewed by default since 23rd April, 2020. The advocate referred the court to the cases of **Jonas Oswardy V. Cost Data Consultsnt Limited, Labour Division No. 3 Of 2020** and that of **Paul Simon Bufengu V. The School Board of Kirumba Sec. School, Labour Division No. 41 of 2021** at page 5 and 6. The collective effect of these authorities is that fixed term contract is renewed by default or automatically when the employee extends to work beyond the last date of the fixed term contract. Hence, the terms of previous contract will apply ***mutatis mutandis*** to the contract which was renewed by default.

He further argued that it is the applicant humble submission that the first contract of the applicant started on 23rd April, 2018 and ended on 22nd April, 2020. Whereby the second contract started on 23rd April, 2020 by default and it was expected to end on 22nd April, 2022. However, the second contract was terminated by respondent on 24th August, 2020 before its expiration date.



Mr. Baraka submitted further that since the applicant served for only four months in the second contract, so it was terminated save 16 months of the second contract. The said termination did not follow any procedure, and there were no any substantive reasons for terminating the said contract. With that reasoning, he succumbed that the said termination was unfair both substantively and procedurally. He denoted that, what was done is contrary to section 37 (1)(2)(a), (b) and (c) of ELRA Chapter 366 (R. E 2019). It is also contrary to rule 13 (1) (2)(3)(4)(5)(6)(7)(8)(9)(10) of ELR (code of good practice) Rules, G.N No. 42 of 2007.

In conclusion, the learned advocate prayed to the court to quash and set aside the award granted by CMA at Morogoro in the labour dispute No. CMA/MOR/153/2020. Inline of what he has submitted, Mr. Baraka prayed to be granted the relief which was prayed by the applicant at CMA, plus statutory compensation under section 40 (2) of ELRA Chapter 366 (R. E 2019).

Submitting in contention to what was submitted by the applicant, Mr. Ignas Punje, the learned advocate for the respondent pray to the

court to adopt the affidavit sworn by Agness Wilson as part of respondent submission.

He went on submitting that the contract in hand was a specific term employment contract of two years which was signed on 24th August, 2018 and ended on 23rd August, 2020. There is no any other written contract after and before this one. The assumption by the applicant's advocate that there was a contract concluded on 23rd April, 2018 is unfounded, because they never submitted such contract at CMA. He submitted further that they acknowledged that there was a kind of relationship between the parties before official signing of the contract on 24th August, 2018, but such relationship come to an end after signing the new contract, and had it been that, there was a prior contract the applicant herein could have refused to sign the contract on 24th August, 2018.

Mr. Ignas argued further that, according to Rule 4(2) of the employment (code of good practice) Rules, G. N No. 42 of 2007, it provides that where the contract is of a fixed term contract, the contract shall terminate automatically when the agreed period expires. He contended that in the case at hand, the applicant was reminded by a letter dated 24th July, 2020 that his contract of employment will come to

an end and that there will be no renewal. He went on arguing that the applicant replied that said letter by his letter dated 27th July, 2020 requesting for the renewal. The learned advocate asserted that, with that undertaking the respondent knew well that his contract would expires on 23rd August, 2020. So, this claim that there was a contract concluded 23rd April, 2018 is just a dare assumption and it is an afterthought. He referred the court to the case of **Rosa Miskika Siwema (Adm) V. Add International Tanzania, Revision No. 498** of 2019, where it was held that:

> *"It is settled law that a fixed term contract shall automatically come to an end when the agreed time expired."*

Mr. Ignas averred further that the contract in hand was endorsed by both parties and it was admitted at CMA as exhibit D1 without any objection, and there was no any other contract which was tendered. He pressed more, that there was no any unfair termination, since unfair termination does not apply to the fixed term contract as it is well expressed in the case of **Ibrahim Mgunga & 3 Others V. African Muslim Agency, Civil Appeal No. 476 of 2020** at page 9 where the court held that:

"An employer may be held liable for unfair termination if he failed to renew fixed term contract where there is a reasonable expectation of renewal".

He argued that in the instant case there was no any reasonable expectation of renewal. Even the applicant himself, he did not claim under reasonable expectation of renewal, but he claimed for renewal by default, something which does not exist. Finally, he prayed to the court to dismiss the application and uphold the award meted at CMA.

In rejoinder, the applicant's advocate reiterated that the applicant was employed on 23rd April, 2018 but he signed the contract late on 24th August, 2018. He submitted further that the applicant did not submit a letter dated 27th July, 2020 to the CMA, and that, the letter was not tendered at CMA. It was not even in the list of respondent's exhibits, so he invited the court to reject that evidence.

With respect to the case of **Rosa Miskika Siwema** (supra) as it was cited by the respondent's advocate, he avowed that they have no problem with the principle projected out of it, but the facts of the case are not similar to the case at hand.

Again, for the case of **Ibrahim Mgunga & 3 Others** (supra), the learned advocate argued that it is also not applicable to the case at hand. For that he asserted, that in this case the applicant did not state anywhere that he expected to renew the contract, but he said that his contract was renewed by default, and it was subsisting when it was terminated by respondent, therefore, the facts are different.

Lastly, Mr. Baraka echoed that in respect of the relief for unfair termination and breach of contract, there is no distinction between the two when it come to the contract of employment. He elaborated that the two have the same effect of putting employer out of employment. At the end, he reiterated his prayer as raised in the submission in chief be granted.

After considering the parties submissions, court records as well as relevant laws and practice of the court, I find the key issues for determination of the court are as follow:

(i) When the disputed two years fixed term contract between the applicant and the respondent has commenced?

(ii) Whether or not, the contract between the applicant and the respondent was renewed by default?

(iii) What relief if any, the applicant is entitled?

In addressing the matter above, I will align myself to the trend followed by the parties' submission by approaching one issue after another in a bid to warrant intervention of CMA decision.

To start with the first issue as to when the disputed two years fixed term contract between the applicant and the respondent commenced. Boarding to this point, it was the submission of the applicant that the applicant worked for 28 months and that her agreement was renewed by default on 23rd April, 2020. He averred that from 23rd April, 2018 to 24th August, 2020, to 23rd April, 2020, it is a period of two years and four months. He further argued that, since the fixed term contract was for two years only, the applicant continued with contract beyond the two years fixed term and for that reason her contract was renewed by default for another two years term.

On the other hand, the respondent advocate countered the argument that, what the applicant is trying to submit is an assumption

that there was a contract concluded on 23rd April, 2018. He argued that, the assumption is unfounded, because they never submitted such contract at CMA.

He averred that the contract in hand was a fixed term employment contract of two years which was signed on 24th August, 2018 and ended on 23rd August, 2020. There is no any other written contract, after and before this one. He submitted further that they acknowledged that there was a kind of relationship between the parties before official signing of the contract on 24th August, 2018, but such relationship come to an end after signing the new contract. Thus, had it been that there was a prior contract, the applicant herein could have refused to sign the contract on 24th August, 2018.

Now, canvassing through the record of proceeding, it is apparent that apart from being raised in the oral testimony by the applicant at CMA that she was employed by respondent since 23rd April, 2018, but she signed a contract on 24th August, 2018 which was expected to end on 23rd April, 2020, the applicant never mentioned, that before signing the two years fixed term contract on 24th August, 2018 she had earlier on

signed a separate under probation contract of three months of which extended to four months.

Notably, the said under probation contract of three months was not tendered at CMA by either party. Looking at the record of proceeding with respect to the issue of probationary period, and the contract which happen to be entered by the parties, it is as though both parties were veiling the fact aliased to the said contract. That is why, they both resisted to tender as evidence at CMA.

At this point, I feel necessary to observe position of law underpinning the aspect of probationary agreement. Thus, I will draw authority from Rule 10 (4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 which provides:

> "*The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standard required, the custom and practice in the sector*".

On the basis of the cited rule above, it is my considered view that the law permits the scope of probationary period for up to twelve months subject to the condition stipulated in the rules. similarly, the same can be

extended if the initial period has expired subject to consultation between the employer and employee.

To that end, coming to the case at hand, it is the finding of this court that the four months probationary period spent by applicant to work with respondent before employment contract exhibit D1/C1 was officially concluded on 24th August, 2018 are not justified. The contract was not tendered at CMA, and it does not form part of the record, for it to be considered by the court.

Notably, with this view in mind, I am aware of section 14 (2) of the Employment and Labour Relation Act [cap 366 R. E 2019] which requires that:

> *"A contract with an employee shall be in writing if the contract provides that the employee is to work within or outside the United Republic of Tanzania*".

Couched by the provision above, it is the finding of this court that the written contract of employment for two years fixed term entered into by the applicant and respondent on 24th August, 2018 to end up on 23rd August, 2020 was a lawful contract which form the base of their employment relationship. The said contract was never denied by either

party at CMA, and the same was tendered by both parties and admitted as exhibit D1 and C1 without any objection.

Going through the contract document itself (D1/C1), it is apparent that both parties endorsed the terms of the contract by putting their names, signature and dates. Needless to say, the applicant endorsement came after she made declaration that: I quote:

> *"Mimi **TAYLOR DAUD MAGUNDU** wa Morogoro nikiwa na akili timamu, kwa hiari yangu nathibitisha kwamba nimesoma na kuelewa na kukubaliana na masharti yote yaliyomo katika mkataba huu, na ninatia Saini yangu leo, siku na mwaka kwa namna inavyoonekana hapa chini".*

At this far, for the applicant to hold otherwise to what she had committed herself before, is an afterthought which need to be disregarded. It is apparent that, the thought two years contract of employment for fixed term was entered into by the applicant on 24th August, 2018 to end on 23rd August, 2020, freely and without any undue influence.

upon this finding, for better understanding of the party's responsibility, I should now make references to the case of **Hotel Sultan**

Palace Zanzibar vs. Daniel Laizer & Another, Civil. Appl. No. 104 of 2004 (unreported), where it was held: -

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue".*

In the circumstances, relying on the above findings, I am inclined to hold that the contract in question between the applicant and the respondent has commenced on 24th August, 2018 and expired on 23rd August, 2020.

Moving on to the second issue as to whether or not, the contract between the applicant and the respondent was renewed by default. It was the argument of the applicant that the Arbitrator erred in law and facts by failure to consider complainant evidence including the fact that she worked for 28 months and that her agreement renewed by default on 23rd April, 2020. He averred that from 23rd April, 2018 to 24th August, 2020 is a period of two years and four months, and since the fixed term contract was for two years only, the applicant continued with contract beyond the two years fixed term. He further reiterated that the applicant

was employed on 23rd April, 2018 but he signed the contract late on 24th August, 2018. He submitted further that the applicant did not submit a letter dated 27th July, 2020 to the CMA, and that, the letter was not tendered at CMA. Adding that, it was not even in the list of respondent's exhibits, so he invited the court to reject that evidence.

Disputing what was submitted by the applicant's advocate, the advocate for the respondent heatedly submits that the contract in hand was a specific term employment contract of two years which was signed on 24th August, 2018 and ended on 23rd August, 2020. There is no any other written contract, after or before this one. The assumption by the applicant's advocate that there was a contract concluded on 23rd April, 2018 is unfounded, because they never submitted such contract at CMA.

He submitted further that they acknowledged that there was a kind of relationship between the parties before official signing of the contract on 24th August, 2018, but such relationship come to an end after signing the new contract. He reiterated that, had it been that, there was a prior contract the applicant herein could have refused to sign the contract on 24th August, 2018.

To strengthen his argument, he referred the court to Rule 4(2) of the employment (code of good practice) Rules, G. N No. 42 of 2007, together with the case of **Rosa Miskika Siwema** (supra).

Upon considering the submission by the parties and record of proceedings, it is my considered view that the contract of employment hereinafter referred was not renewed by default as it was hotly averred by the applicant advocate. I have arrived to the above view after seeing that, the contract of employment between the parties was entered into from 24th August, 2018 and ended on 23rd August, 2020, at which period no single day was added.

Upon that observation, I concur with the advocate for respondent, that an assumption that the contract had started to run on 23rd April, 2018 is unfounded and it is an afterthought. Thus, it is clear from the record of proceedings that the issue of two years fixed term contract of employment has emerged from 24th August, 2018 after signing of the same. Definitely so, before that time the issue of two years contract of employment was not dispatched anywhere and simply it was unborn.

At this juncture, it worth observing that, in order the contract of fixed term employment to be renewed by default, the employee should have continued to work after the fixed period has expired. As rightly observed by applicants' advocate. Reference can be made in a number of decisions including that of **Jonas Oswardy V. Cost Data Consultsnt Limited, Labour Division No. 3 Of 2020,** and that of **Paul Simon Bufengu V. The School Board of Kirumba Sec. School, Labour Division No. 41 of 2021** at page 5 and 6. The collective effect of these authorities is that, a fixed term contract is renewed by default or automatically when the employee extends to work beyond the last date of the fixed term contract. Hence, the terms of previous contract will apply ***mutatis mutandis.***

In my view, and rightly so, that was not the case in this appeal. Considering the date the said contract was signed, 24th August, 2018 and the date it ends 23rd August, 2020, no single day was added. Hence the principle underpinned in the case of **Jonas Oswardy** and **Paul Simon Bufengu** (supra) cannot apply and they are distinguishable to the circumstance in hand.

Understandably, it seems from the record of proceeding at CMA and even during submission of appeal to the court that, there were working relationship between the parties. Yet, there is no written contract tendered and admitted at CMA to support the existence of such agreement. Consequently, there is no link between the former alleged agreement and the later one. That being the case, considering there was no any documentary support admitted in evidence at CMA as required under section 14 (2) (supra). It is my considered view that the same should be disregarded by the court for not being part of evidence.

Consequently, and for the above reasons, I find this application devoid of merit and hereby dismissed. As the matter was raised from an employment dispute. I make no order as to costs.

Order accordingly.

DATED at **MOROGORO** this 16th day of November, 2022.

S. H. HASSAN

JUDGE

16TH November, 2022

This Judgment delivered this 16th day of November, 2022 in the absence of both parties with order for the copy to be served in dispatch. The court was electronically linked with video conferencing facility from Dodoma to Morogoro High Court (RMA/MWINGIRA).

S. H. HASSAN

JUDGE

16th NOVEMBER, 2022