IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT SUMBAWANGA

LABOUR REVISION NO. 6 OF 2020

KATAVI & KAPUFI MINING CO. LTD ....APPLICANT

VERSUS

INNOCENT LEMBO SALIDA.................................... RESPONDENT

(Original Labour Dispute No. KTV/CMA/34/2019)

JUDGMENT

Date of Last Order: 27th December 2021

Date of Judgement: 15th March, 2022

NDUNGURU, J;

This revision application by the applicant, **Katavi & Kapufi Mining Co Ltd** is brought under **Sections 91 (1), 91 (1) (b)** and **91** (2), **91(2) (b), 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004** (herein ELRA) read together with **Rules 24 (1) (2) (a) (b) (c) (d) (e)** and **(f), (3) (a) (b) (c)** and **(d)** and **28 (1) (c) (d) and (e)** and **(2) of the Labour Court Rules, Government Notice No. 106 of 2007** (herein Rules).

The application is supported by the affidavit sworn by Mr. Twalib Mohamed, a Principal Officer/Human Resource Officer of the applicant

The applicant prays for this court to call, inspect, revise and set aside the award of the Commission for Mediation and Arbitration for Katavi at Mpanda (herein CMA) in Labour Dispute with reference No. KTV/CMA/34/2019 which, was delivered by Hon. Ndonde (Arbitrator) dated on 15th April 2019 and thereafter declared that the arbitrator erred in law and facts by disregarding facts which if otherwise considered he would have reached in fair, rational and just decision.

In opposing the application, the respondent, **Innocent Lembo Salida** filed a counter affidavit sworn by him.

Before making my mind on the submissions made by the parties, I believe a brief resume of facts on this matter is worth making. It is in record that, the respondent was initially employed by the applicant as a cooker on fixed term of three months with an option to renew on 12th April 2018. The contract of employment continued to be renewed by default until 1st September 2019 when he was notified by the applicant that his contract of employment will be of the period of one year effective from 1st September 2019 until on 31st August 2020. The contract of employment was therefore terminated by the applicant on 7th November 2019 for the reason described in a termination of employment letter as to refusal to sign

internal rules and failure to obey safety and security regulations after receiving training from safety officer. After termination of his contract of employment, the respondent was paid some of his terminal benefits including his transport allowances from Mpanda to Mwanza, however, he and his family was not repatriated to his place of recruitment that is Mwanza. During that time until now the applicant has not paid any subsistence allowance to the respondent. Aggrieved by that the respondent referred his claim for unfair termination at the CMA – Mpanda which was registered as "MGOGORO WA KAZI: KTV/CMA/2019. And the said CMA through its award dated 15.04.2020 determined that the respondent was unfairly terminated.

The arbitrator found and decided in the award vides Labour Dispute No. KTV/CMA//34/2019 and dated on 15.04.2019 that the respondent is entitled to remaining 11 months salaries, transport allowance, and subsistence allowance. The total amount awarded and ordered by the CMA was to the tune of Tshs. 7,874,000/= to be paid by the applicant to the respondent.

The applicant aggrieved by the Arbitrator award hence this revision to this court which was registered as Labour Revision No. 06 of 2020.

Unlike when the matter was before the CMA, before this court, the applicant had the legal services of Mr. Patrick Toyi Kaheshi; learned advocate while, Mr. Benjamini Daudi Dotto, the National Organization Officer for TAMICO (personal representative) appeared for the respondent.

When the matter was called on for hearing on 25.08.2021, Mr. Kipesha holding brief on behalf Mr Kaheshi for the applicant informed this court that Mr. Kaheshi, the learned advocate for the applicant is sick but they prayed that this application be argued by way of written submissions. On my part, I had no objection. Hence schedule to file respective written submissions was set and in fact both parties filed their respective written submission as scheduled.

In support of the application Mr. Kaheshi, prayed the content of the affidavit in this application be adopted and form part of his submission. He made his submission in form of answering issues.

As regards to the first issue that the award was improperly procured as the CMA for Katavi erred in law by holding that the respondent had a fixed term contract while there was no evidence to prove to that effect. He referred to the case of **South Africa Veterinary (SCA) and National Director of Public Prosecution vs Philip** (200) (I) BCLR No. 41 (4)

which made parameters for the principle of reasonable expectation to apply.

One, that there was a representation clear and unambiguous not subject to qualification as per the case of **National Oil (T) Limited vs Joffrey Dotto Msensemi and 3 Others**, Labour Revision No. 558 of 2016 HC DSM. The Court held that the principle of unfair termination under the labour laws do not apply for fixed term contract unless the employee establishes a reasonable expectation of renewal as provided under **section 36 (a) (iii)** of the Employment and Labour Relations Act No. 06 of 2004. He submitted that there is no evidence whatsoever that indicated that there was reasonable expectation of renewing the employment contract. He argued that respondent failed to prove neither the existence of an employment contract nor reasonable expectation of employment.

As to the second ground of complaint, Mr Kaheshi submitted that the name of the respondent who is the applicant in the CMA differ from the name appears on court records and other document to CMA – F No. 1 still the Commissioner for Mediation and arbitration continued to entertain this matter which is against the provision of the law. Mr Kaheshi submitted that the arbitrator ignored to amend the CMA Form No.1 and proceeded with a

wrong name to the claim, despite that section 90 of the ELRA gives him such powers.

Addressing other ground Mr Kaheshi submitted that according to **section 88 (11)** of the Employment and Labour Relations Act, the award must be delivered within thirty days, it reads that within thirty days of the conclusion of the Arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator. He argued that the arbitrator took long time to deliver the said award, which contravene the law and without any ground for such extension of time.

Mr Kaheshi further submitted as regards the illegality that it is obviously and clear that the respondent contract did not exist since he abandoned the training attendance sheet despite that he attended the training. That being a case, there is no way he has proved that he established a reasonable expectation of renewal of the said employment contract.

Furthermore, Mr Kahesi argued that as regards the amount of money awarded by the CMA which did not feature in the CMA-F1 form that according to the CMA form all the prayers have to be shown in the form, however in this case the respondent has never established the prayers

granted by the CMA. He argued that Court cannot grant a prayer which is not prayed for.

As to the ground that final written submission was filed out of time Mr Kaheshi submitted that according to the order of the CMA the order to file final written statement to the respondent were to be done on instead they filed the same on 4th December 2019 which were out of time and without seeking leave to file the same out of time.

Mr Kaheshi submitted further that Hon Arbitrator misdirected herself by awarding 11 months salary while they were no contract, the same to the award of transport allowance Tshs. 1,074,000/= while the contract specifically provides that the employment was executed in Mpanda. The CMA also misdirected to award 2,400,000/= as accommodation.

He finally contended that since the employment contract was of a fixed term contract and it ended after expiry of the contract. He was of the very strong view that there was no unfair termination whatsoever and there is no dispute that the respondent was paid all his employment benefits. That the respondent was fairly terminated by the applicant, hence CMA award be revised, quashed and set aside.

In response, Mr. Benjamin Daudi Dotto, national organizer of STAMICO (personal representative) prayed to adopt the notice of opposition and counter affidavit sworn by the respondent. Personal representative did not address his point of objection to this court, that means he abandoned it. Mr Dotto went on submitting that the applicant asserted that there is no evidence whatsoever that indicated that there were reasonable expectations of renewing the employment contract is baseless and out of the context due to the fact that apart from the CMA proceedings, in his written submission the applicant counsel has admitted that the respondent was employment on a fixed term contract of three months with an option of renewal.

Mr Dotto further submitted that after expiration of the original contract of employment, it was in the records that the respondent continued to work by default until 1st September 2019 when he was informed about the change of the duration of his contract from three months contract to 12 months contract of employment.

He argued that cases cited by the applicant are irrelevant to this application as they are referring reasonable expectation of renewal of the contract of employment while the context of the applicant's first ground of

revision is based on whether the respondent had a fixed term contract of employment. He said the first ground is devoid of merit.

As regards contradiction of names of the applicant whether KATAVI & KAPUFI LIMITED is the same as KATAVI MINING COMPANY LIMITED Mr Dotto prayed for this court to proceed to amend the applicant's name from KATAVI AND KAPUFI MINING CO. LTD to read KATAVI & KAPUFI MINING LIMITED as per the case of **Chang Qing International Investment Limited vs Tol Gas Limited**, Civil Application No. 92 of 2016.

As to the third ground Mr Dotto was of the view that Hon Arbitrator properly procured the award in delivering the award after the expiration of the period of 30 days in which she was supposed to deliver in accordance with **section 88 (11)** of the Employment and Labour Relations Act, Cap 366 RE 2019. He submitted that at last paragraph of page 16 of the CMA award Hon Arbitrator explained the reasons for the delay.

As to the fourth ground, it was his position that the burden of proving the existence of a 12 months fixed contract of employment between the respondent and the applicant lies on the applicant himself due to the fact that he is the custodian of all documents signed between the

respondent and the applicant. He cited the provision of **section 15 (6)** of the Employment and Labour Relations Act, Cap 366 RE 2019.

In addition, Mr Dotto submitted that during the hearing of the matter before the Commission, the applicant failed to produce any contract of employment to prove or disapprove the existence of 12 months contract between the respondent and the applicant. He argued that applicant admitted before the Commission that respondent was employed by the applicant on 12th April 2018 under the 3-month fixed contract of employment but he did not explain how the 3 months contract of employment ended and how the respondent continued to work after the expiration of that contract. Likewise, he said the respondent testified before the Commission that after expiration of 3 months fixed contract of employment, his contract of employment continued to be renewed by default until on 1st September 2019 when he was notified that his contract of employment will be of 12 months period until on 31st August 2020.

In response to the fifth ground Mr Dotto submitted that is devoid of merit due to the fact that in the CMA Form No. 1 and its attachment which was filed by the respondent on 15th November 2019, the prayers were prayed for.

Responding to the sixth ground, Mr Dotto submitted that the ground is devoid of merit for the reasons that;

The commission did not make an order requiring the parties to file final written statement (closing arguments) in the year 2019 because the matter was still at the hearing stage.

According to the CMA records, an order to file final written submission was issued on 29th January 2020 by Hon Ndonde after all parties winded up to produce their evidence before the Commission on the same date.

The parties were ordered to file their final written submission on or before 12th February 2020.

The CMA award was arranged to be pronounced on 14th March 2020.

I have carefully perused this Court and the CMA records, and duly considered the submissions of both parties in this revision. The issue to be determined by the court are two; one is whether the respondent was employed under fixed term of contract of employment. Two, whether the termination of contract of employment was fair.

As to whether the respondent was employed under fixed term contract of employment. It is apparent according to the testimony of both parties that the respondent was employed by the applicant as a cook on 12th April 2018 on a fixed contract of three months with an option to renew. However, on 2nd November 2019 the respondent was assigned another job as a workshop cleaner. On 7th November 2019 applicant issued a notice of termination of contract of employment to the respondent vide a letter for refusal to sign internal rules and failure to obey safety and security regulations after receiving training from safety officer.

It is very unfortunate that the applicant did not tender a copy of the contract of employment between himself and the respondent. It is a duty of the employer in any legal proceedings to produce a written contract as per the provision of **section 15 (6)** of the Employment and Labour Relations Act, Cap 366 RE 2019. However, as hinted above both parties in their written submission agreed that the terms of contract of employment between the applicant and respondent was of the fixed term contract of three months with an option to renew. It is crystal clear from the commission's record that the respondent renewed the contract even after expiry of the three months. The contract of employment by the respondent

continued to be renewed by default until on 1st September 2019 when he was notified that his contract of employment was terminated by the applicant dated on 7th November 2019 for the reason described in a termination of employment letter.

It follows that the respondent was working on a fixed term contract of employment renewed by default as per the **Rule 4(3) of GN No. 42 of 2007**. The Provision clearly provides that; -

> "a fixed term contract may be renewed by default if an employee continued to work after expiry of the fixed term contract and circumstances warrants it."

As to whether the termination of contract of employment was fair, as per applicant's affidavit particular paragraph 3.2, the respondent's contract of employment was terminated for breaching company disciplinary code several times. Also from tribunal records, other reasons for the termination of the respondent 's contract of employment was his refusal to sign internal rules and failure to obey safety and security regulations after receiving training from safety officer. At the trial tribunal, the applicant did not tender contract of employment of the respondent which could make the trial tribunal to ascertain whether the grounds/reasons used by the

applicant to terminate respondent's contract of employment was part and parcel of the terms and conditions of the contract or not.

In the absence of written contract of employment, this Court also finds difficult to ascertain the terms and conditions of the contract of employment which were breached by the respondent.

The applicant testified at the trial tribunal that the respondent was terminated as a result of contravening disciplinary code of the applicant. That he repeatedly did misconduct which made the applicant to take disciplinary action against the respondent. However, looking at the records of the tribunal nowhere the applicant has conducted investigation as per dictates of **Rule 13** of Code of Good Practice GN. No 42 of 2007. The rule requires the employer to notify the employee of the allegations using form and the employee is entitled a reasonable time to prepare his defence. It is very obvious; in this matter the applicant did not form a disciplinary committee in order to hear and determine the allegations against the respondent as required by the law. That means the respondent was not accorded with the right to be heard.

Our Labour laws has put a burden on the employer to prove and unsure that termination of employment by the employer is fair by proving

reason for the termination and procedure for the termination. That being the case, as per **section 36 (2) a, b, c** of the Employment and Labour Relations Act, Cap 366 RE 2019 the employer is duty bound to prove that reason for the termination is valid and employment was terminated accordance with a fair procedure.

I must state that the contention by the applicant that respondent's termination of the contract of employment was a result of contravening the applicant's disciplinary code is subject to proof. In the case of **Abdul-Karim Haji vs Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] T.L.R 420 the Court held that;

> "It is an elementary principle that he who alleges is the one responsible to prove his allegation."

This Court finds that the respondent's termination of employment was not justified in law in the absence of proof of a valid reason, a fair procedure, and a written contract of employment.

It is vividly clear from the record that, the applicant did not conduct an investigation as regards allegations against the respondent. Thus, I am

in agreement with the arbitrator and the respondent that the termination of employment was unfairly.

Now discussing the first ground of revision, this Court of the view that the ground is devoid of merit. As stated above, and determined by this court the contract of employment of the respondent was of the fixed term contract subject to renewal. As hinted above, the applicant did not prove to the satisfaction of the laws that termination of respondent's employment was valid and a fair procedure was followed. Thus, the issue of reasonable expectation as submitted by Mr Kaheshi does not fit in the circumstance of this case.

As regards contradiction of names of the applicant, I am in agreement with both parties that the trial tribunal should take initiative on its own to amend the applicant's name from KATAVI and KAPUFI MINING CO LTD to read KATAVI & KAPUFI MINING LIMITED, but such a failure should not be a ground of impugning the award. For the interest of justice let the name of the applicant be known as KATAVI & KAPUFI MINING LTD.

For the delay to deliver an award on time, this court finds that complaint is devoid of merit as Hon Arbitrator explained the reason for his

delay in his award particular at page 16 of his copy of award as rightly submitted by the personal representative of the respondent.

The complaint that the amount of money awarded by the CMA did not feature in the CMA -F1 Form the same is devoid of merit. Looking at the CMA-F1 Form, it has an attachment which annexed to it containing reliefs prayed by the respondent as rightly submitted by the personal representative for the respondent.

The complaint that respondent failed to file the final written submission accordance with the order of the Commission also falls short of merit. The applicant submitted that the respondent filed final written submission on 4th December 2019 a date which was out of time without leave of the tribunal. My perusal of the tribunal records show that parties were ordered to file final written submission on or before 12th February 2020. The respondent filed his final written submission on 14th February 2020. This court finds that delay as regards final closing arguments has no effect of adding value to the evidence already adduced. Thus, same is of no merit.

On the basis of the above discussion, this Court finds that the respondent contract of employment was terminated unfairly as rightly

decided by the Arbitrator. The complaints raised by the applicant in this application are all of no merit. Thus, I have no reason to fault the Arbitrator's findings that respondent was unfairly terminated from employment.

In the result, the present application has no merit. The arbitrator's award is hereby upheld and the present application is dismissed accordingly.

It is so ordered.

D. B. NDUNGURU

JUDGE

15.03.2022