IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR COURT)

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LABOUR REVISION NO. 38 OF 2021

(Originating from CMA/SHY/153/2018)

HAMISI RAMADHANI KAMESA.....APPLICANT

VERSUS

TANESCO KAHAMA.....RESPONDENT

JUDGMENT

24th February & 19th April, 2022

A. MATUMA, J.

The Applicant was employed by the respondent as a driver. Accordingly to the facts and evidence which is undisputed by both parties, the applicant started working with the Respondent in the year 2010 up to 2018 when he was terminated. It is further not in dispute that the applicant worked under different contracts within such period on a specified period of three months per each contract.

The last contract was entered between the parties on 1/4/2018 and was expected to expire on 30 June, 2018 but at the end of May, 2018, on the 29th the respondent issued a termination notice to the Applicant on the ground that there was shortage of vehicles.

The Applicant was therefore to stop his job but was paid a one-month salary, i.e the salary of June, 2018 without working. The notice further

informed the Applicant that there was no intention to enter into a new contract on the afore mentioned reason i.e shortage of vehicles.

The applicant was aggrieved for the termination hence a dispute at the Commission for Mediation and Arbitration which was decided against his favor hence this application for Revision.

The Applicant`s claims contended that he was a permanent employee and not an employee for a fixed term. He thus asked to be decreed that he was unfairly terminated and he deserves terminal benefits.

On the other hand, the respondent contended that the applicant was not a permanent employee but an employee for a fixed term of three months in which he worked two months, and they paid the salary for the third month without the applicant working as they terminated the contract due to shortage of vehicles.

The honorable arbitrator found that the contract between the parties was fixed for a specific period and that the termination of such contract in one month before its expiry was justified for shortage of vehicles.

The arbitrator however awarded the Applicant one month salary in lieu of leave, and severance pay for a total worked years (8 years).

The applicant is aggrieved hence this application on two grounds that;

i) The learned arbitrator erred in law and facts by failure to properly evaluate and analyse evidence tendered during arbitration in line with the applicable labour laws thus, arrived at erroneous decision.
ii) The learned arbitrator erred in law by issuing an instant award prior to the parties submission of closing arguments.

At the hearing of this application, the Applicant was present in person and had the service of Mr. Gervas Geneya learned advocate.

On her party the Respondent, it was M/S Juliana William who entered appearance.

Mr. Gervas in submitting in the first issue concentrated on the legality or otherwise of the Applicant's employment contract.

He argued that the applicant was being given a three months contract renewable which is illegal in terms of section 14 (1) (b) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 read together with rule 11 of the Employment and Labour Relations (General Regulations) GN no. 47/2017 which requires the employment contract to be of not less than 12 months.

The learned advocate thus argued that the Hon. Arbitrator erred to rely on the said illegal contract and instead, there should have been a presumption of employment under section 61 of the Labour Institutions Act, Cap 300 R.E 2019. In that respect the Applicant should have been presumed a permanent employee on permanent basis, he contended.

When I asked the learned advocate on whether the issue of legality or otherwise of the employment contract of the Applicant was raised, argued and determined at the trial Commission, he readily conceded that it was not. He however contended that, it was not raised because they were not given opportunity to make their closing submissions.

In the second ground of complaint, the learned advocate argued that the arbitrator erred to pronounce the award without inviting the parties to make their closing arguments.

He made reference to rule 26(4) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules G.N. 67 of 2017.

The learned advocate rested his submission by arguing that it was due to such denial of opportunity to make the closing arguments they

did not raise up issues of the illegality of the contract and presumption of employment.

On her party M/S Juliana William learned advocate, submitted that the issue of legality or otherwise of the contract in question was not raised at the trial Commission and therefore no evidence was given to that effect by the parties.

The learned advocate further submitted that at the earliest stage, the parties were given opportunity to make the so called **"Maelezo ya awali"** in which the parties were expected to raise all potential issues to be determined by the trial Commission. She argue that the applicant did not raise the issue of his employment contract being illegal. She argued that they were thus confined to the issues framed for determination.

She also argued that the contract cannot be illegal merely because of its length as in terms of section 14 (1) of the Employment and Labour Relations Act supra, three types of employment contracts are recognized including a contract for a specific task and thus employment contract can even be of a period less than such three months. The learned advocate faulted her brethren (Advocate Gervas) for his interpretation of section 14 (1) (b) of the law supra as covering the Applicant because such provision applies to professionals and managerial positions while the applicant was an ordinary staff. She argued that the presumption of employment in this case was uncalled for because there was no dispute that the parties had employment relations between them.

On the second issue, the learned advocate argued that they were given fully the rights to make there closing arguments but none opted to exercise such right.

She therefore argued that closing arguments are not mandatory and even when it is made, it is a mere persuasive and not binding to the arbitrator. She finalized by praying that this application be dismissed.

In rejoinder, the learned advocate for the applicant argued that his client was a professional and thus covered within the provision supra as he did not work occasionally, seasonal or non-continuous.

Starting with the first issue I must admit that the records does not show whether the parties contested any how on the legality or otherwise of the applicant's contract. No issue was drawn to that effect and therefore the learned arbitrator did not determine whether or not the employment contract for a period of three months was illegal.

The law is settled that an appellate Court will only look on matters which came up and were decided by the lower court and not on matters which were not raised nor decided by the trial Court or first Appellate Court as the case may be. See, ***Elisa Mosses Msaki V. Yesaya Ngateu Matee (1990) TLR 90 (CA)***.

If the applicant thought it wealthy to have the legality of his employment contract determined he should have raised as such. He did not do so. Even when he filed the dispute at CMA according to CMA form no. 1, he invited the Commission to determine only whether the termination of his employment was fair or not.

In that particular form at page 3 on the **"nature of Dispute"** the applicant ticked that the nature of dispute was **termination of employment.**

He could in addition thereof tick for an interpretation of the law or his contract relating to his employment in the first box of the said form but he did not do so.

I therefore find such argument as an afterthought. Rejecting to act on afterthoughts on the matter with similar facts in the case of ***Nimbo Yusufu @ Kebumba V. Ngusa Sambai, Misc. Land Application no. 20 of 2020,*** High Court at Kigoma, I ruled;

"I find again this ground to have been raised as an afterthought because it was not raised in the first appellate Court. It did not feature in the appeal documents nor in the arguments of the parties during the hearing of the appeal at the appellate tribunal.

I the like manner, the argument that the applicant's employment contract was illegal did not feature anywhere during trial. It is raised for the first time at this stage. In fact even the ground before me does not say or connote that it intended to argue the illegality of such contract. The ground is plainly that the arbitrator is challenged on the manner the evidence on record was evaluated and analyzed. It seems the learned advocate switched his mind when he was already before me and could not argue on the evidence and the manner it was analsed by the trial arbitrator.

I agree with M/S Juliana learned advocate that the parties did not argue and or give evidence on that matter and it would be unfair to entertain such complaint at this stage. I thus reject the advocate's argument in that line. What remains is whether the Applicant was a permanent employee or an employee for a fixed period of time. That is what featured in the evidence of the parties at the trial and they had even cross examined each other on that. The trial Commission also determined such issue.

On this it is my firm finding that the learned arbitrator properly evaluated the evidence before the commission.

The applicant had no evidence that he worked on a permanent base. Instead he admitted both during examination in Chief and at the cross-examination stage that he had no permanent contract with the respondent.

Let me extract a bit the applicant's ownevidence in the original record. During his examination in Chief;

"Nilisimamishwa kazi ya mkataba wa miezi mitatu kwa Sababu shirika halina magari."

And during cross examination;

"Swali umesema umefanya kazi kwa miaka 8

Jibu; Ndio

Swali; kwa mikataba tofauti tofauti au ni mmoja

Jibu; Mikataba tofauti tofauti

Swali; Ya muda gani

Jibu; miezi 3

Swali; katika hiyo mikataba yako kuna ulioandikwa ni wa ajira ya Kudumu"

Jibu; Hapana"

From such extraction it is undisputed fact that the applicant was employed on a fixed term and not permanent one. The arbitrator cannot therefore be faulted on her decision.

Not only that but also according to the applicant's own evidence, at first he worked with the Respondent at Meatu District but in the year 2011 he was transferred to Kahama without any payment. He did not however produce the transfer letter and or his reporting letter to the new working station. In that regard, it is presumed that there was no transfer but a new contract after the expiry of the previous contract. Otherwise, the Applicant could have given such evidence of the transfer and would as

well demand the transfer costs. He did not claim for the transfer entitlements and even during this matter at the trial commission he did not claim such transfer costs.

That is an indicator against that he was not transferred but obtained a new contract after expiry of his previous contract.

Lastly, the Applicant did not produce his employment contract for scrutiny by the Court whether it was a permanent one or of a fixed period of time. He did not explain why he did not tender his contract. It was the respondent who tendered a copy of the previous contract dated 29/03/2015 exhibit K1 for a period of three months on account of what they said the dispute contract was not traceable. The Applicant on his part did not account for his failure to tender such contract.

Failure to tender the last contract which was terminated calls for adverse inference to be drawn against the applicant that had he tendered the same, it would speak loudly against him to the effect that he contracted with the respondent for a fixed term of three months.

The question therefore is whether the termination of the Applicant's fixed term contract one month before its expiry time was justified.

On this I once again join hands with the learned arbitrator in her findings that the Applicant was fairly terminated because of shortage of working tools;

"Tume inaona kwamba aliachishwa kazi kihalali na alipewa taarifa na alikuwa akijua kwamba ajira yake ni ya muda maalumu wa miezi 3 hivyo hakuna uonevu wowote ulifanyika. Aliachishwa kazi kwa sababu ya kukosa vitendea kazi na taarifa alikuwa nayo mapema kabla ya kufikia ukomo wa ajira yake".

I subscribe to the herein above quoted holding of the trial commission. The averments of the Applicant that there were sufficient vehicles numbering seven are without any substance. He should have given

evidence that the seven vehicles were over and above the manpower (drivers) the respondent had. But in his evidence he clearly testified that the vehicle he was driving was given to another driver. That is an indication that drivers were many than vehicles and that is why upon his termination the vehicle he used to drive was given to another driver.

Accordingly to the respondent's evidence they terminated those fixed term contracts to remain with drivers with permanent terms of service.

The Applicant did not dispute this fact by either evidence from his side or cross examination. There is no evidence that the driver who took over was a newly employed staff and thus in line of the respondent's evidence such driver was serving a permanent term of service. In that regard it was justified to terminate the fixed term contract to protect the permanent one provided that the due benefits are paid.

If the termination of fixed term contract if not justified, the consequences against the employer is to pay the employee the loss of salary for the remaining period of the unexpired term. This can be seen in the case of ***Tanzania Saruji Cooperation versus African Mible Company Limited (2004) TLR 115*** in which it was held.

"Where an employer terminates a fixed term contract, the loss of salary for the remaining period of the unxpired term are direct, foreseeable and reasonable consequences of the employer's wrongful action."

In the instant matter therefore, even if the termination would have been held to be unlawful, the remedy would be to order the respondent to pay the applicant salaries of the unexpired term of the contract.

According to the evidence the unxpired term was only one month whose salary was **Tshs.530,000/=** and such amount was indisputably paid to the Applicant by the respondent.

In addition to that the arbitrator awarded the Applicant severance pay for 8 years and one month salary in lieu of the annual leave. These awards by CMA are wanting and were uncalled for because there is no evidence that the Applicant worked with the respondent in all eight years consecutively. This is because while the Applicant alleged to have worked in such period of time the respondent testified that they only used the Applicant when need arose;

"Swali; Mmefanya naye kazi kwa vipindi gani

Jibu; Kuna muda tulikuwa tunafanya naye kazi na kuna muda hatufanyi naye kazi. Kama kuna kazi tunafanya naye kazi. Kama hakuna hatufanyi naye kazi."

To disprove such respondent's evidence, the Applicant ought to have tendered all contracts he entered with the respondent for us to ascertain that he worked for all eight (8) years consecutively.

In the absence of such contracts, no evidence that he worked for all eight years consecutively and the Respondent's evidence that they employed the Applicant only when need arose remain unchallenged.

It was thus wrong to award him severance pay for all eight years. The same applies to the annual leave. The applicant never worked for a period which demanded the annual leave. He only worked for three months with the respondent. Even though I would not disturb the awards because the respondent seems not aggrieved and that is why she did not challenge such award even at the hearing of this application.

The first ground of complaint thus fails in its totality.

The second ground of complaint should not detain me much. I agree with M/S Juliana learned advocate that the Applicant was not denied opportunity to make his closing arguments. The records does not show whether either party requested to make a closing submission. The

arbitrator is not empowered to force the parties to make closing submissions. In any case the parties were heard on 05/08/2019 and the decision was made and delivered on 23/08/2019. The Applicant did not argue that he attempted to file his closing arguments between such period before the decision date and or that he went to file the same but denied. It seems the applicant's advocate was not serious with the prosecution of his client's case and would wish this court to shoulder the blames to the honorable arbitrator for their own wrongs.

The arbitrator cannot therefore be condemned for the parties' own faults.

Even through the applicant's explanation that had them been given opportunity to make the closing arguments they would raise issues of illegality of contract and presumption of employment do away their complaint on this ground. This is because closing argument according to the law; rule 26 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN no. 67 of 2007 must be confined to the issues for determination before the court. The issues for determination did not include such complaint and therefore the intent of the applicant and his advocate in their intended closing submissions was to ***beat about the bush.*** This ground is dismissed as well.

In its totality this application is dismissed without any orders as to costs. Right of further appeal explained.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
Judge
19/04/2022