IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LABOUR REVISION NO. 58 OF 2022

(Arising from Labour Dispute No. CMA/ARS/ARS/175/21/83/2021)

ISRAEL PAULO AWERI _____ **APPLICANT**

VERSUS

ST. PETER PAUL

KIJENGE CATHOLIC CHURCH _____ **RESPONDENT**

07/03/2024 **&** *03/05/2024*

BADE, J.

JUDGMENT

This Application for Revision is made under section 91(1) (a) and (b) (2) (a)(b) (c) and 94(1) (b) (i) of the Employment and Labour Relations Act, CAP 366 R.E 2019 and Rule 24(1), (2), (a),(b), (c), (d), (e), (f), (3) (a), (b), (c), (d), and Rule 28 (1) (a) (b) (c), (d) and (e), of the Labour Court Rules, G.N. No.106 of 2007.

The applicant prays for the following orders:

I. That, this Court be pleased to call for and examine the records of the proceedings of Commission for Mediation and Arbitration of Arusha in Application No. CMA/ARS/ARS/175/21/83/2021 and

satisfy itself as to the correctness, legality, and/or propriety of the Ruling thereto.

II. Any other orders that this Honourable Court deems fit and just to grant.

A brief background which leads this Application according to the records of this appeal is that the Applicant was employed by the Respondent as a security guard from 01/08/2003 up to 30/04/2021 when his employment was terminated on what alleged that he refused to sign a new contract. That, after refusing to sign a new contract he was suspended from his employment on 09/04/2021. After being suspended applicant complained to CHODAWU. After the applicant made a complaint to the CHODAWU, the secretary of CHODAWU tried to reconcile them, but the reconciliation did not bear fruit that is when the respondent decided to terminate the applicant's employment. After terminating his employment respondent gave the applicant his entitlements but the applicant refused to collect the same.

The Applicant lodged his complaint before the Commission for Mediation and Arbitration ("the CMA") for unfair termination but his Application was dismissed by the Commission on the reason that the Applicant's contract was renewable on annual basis, and the act of Applicant to

refuse to sign a new contract is gross insubordination; and the Respondent was justifiable to terminate his employment.

The Applicant was aggrieved by the said decision, hence the instant Application.

This appeal is disposed of by way of written submissions. The Applicant appeared in person unrepresented while Mr. Godfrey Saro, learned advocate appeared for the Respondent.

The Applicant adopted the contents of his filed affidavit to form part of his written submission. He argues that he was unfairly terminated since there was no reason that would have caused a person to disagree with an amended employment agreement if the said agreement had no complications. His further argument was that he could not have signed the amended employment agreement as he did not understand it unless it had been made clear to him before signing the same.

The Applicant further argues that the Respondent hid behind the shield of meeting and claim that he was offered but refused his terminal benefits. He further argued that the CMA Award had neglected clear evidence that the Applicant was offered terminal benefits while he was still the Respondent's employee. To support his position, he cited the

case of **John Msigala vs Pan African Energy Tanzania Ltd,** Labour Revision No. 688 of 2018 (unreported).

Moreover, the Applicant submitted that in the absence of sufficient evidence to prove the insubordination in question, he was denied his right to be heard and, hence unfairly terminated which denied him his fundamental right to work.

The Applicant further argues that the commission failed to analyze and evaluate the evidence adduced before it, and that not only was his evidence not summarized, but also key points from the analysis of the evidence from both parties were left out. The Applicant contended that the Respondent claims that he held a meeting with his employees concerning the new employment contract, however, the Respondent never produced the minutes to that meeting, because it does not exist and he was never informed of the said meeting. To cement his position applicant cited the case of **Leonard Mwanashoka vs R,** Criminal Appeal No. 226 of 2014 (unreported). The Applicant contends that the reasoning by the Commission that his refusal to sign the new contract amounted to gross insubordination is misconceived. In his view, had the Commission analysed the evidence of both parties, it would have found that the reason for the refusal to sign the contract was not

insubordination, nor would the same have amounted to a ground of termination of employment.

The Applicant further argues that, a new contract had a number of clauses which he did not agree with, and that based on such premises, it would have been unwise for the Applicant to reluctantly enter such an agreement. He particularly pointed one of the disagreeable clauses was about working hours. The former contract stated working hours to be from 06:00 am to 07: 00 pm, while the new clause in the contract is from 05:30 to 07:30. The Applicant insisted that it is not insubordination if the employees refuse to sign the contract where it is not to the satisfaction of both parties, maintaining it to be an error from the Commission. To buttress his stance, he cited the case of **Leonard Mwanashoka** (supra).

He argues that the CMA Award disclosed that the Respondent's witnesses stated that the Applicant was offered but refused proceeds of his employment arguing that he did not deny receiving the said cheque particularly because they were not proceeds, but rather a payoff since the Respondent still owes him his overtime payment.

In opposing the Application for Revision, Mr. Saro equally adopted the contents of the Respondent's counter-affidavit to form part of his

submission. He argues that the allegations that procedures were not adhered to and the Applicant was unfairly terminated is unfounded because it was proved through the proceedings of the Commission that the Applicant disagreed in signing a new contract without adducing any reason as to why he refused to sign the new contract. He referred this Court at page 3 and page 4 of the Commission proceedings. Mr. Saro further contended that if employee refused or neglected to sign the contract it is assumed that he does not want to work anymore, that is to say he has decided on his own to abandon his right to work.

In his view, the statement by the Applicant that he refused to sign a new contract because the same has complications is an afterthought as in his evidence there is no place he stated that the said contract had complications or the same was not explained to him or he did not understand the same. On the allegation that the Applicant was offered his terminal benefits while he was still an employee of the Respondent, the counsel submitted that, the issue of terminal benefits arises from the discussion and settlement made between the Applicant and the Respondent at the CHODAWU after the Applicant presented his claim for unlawful termination while in fact he was not yet terminated, referring this Court to page 4 of the Commission's typed proceedings.

In further response, he explained that the terminal benefits were issued pursuant to the settlement agreement after the Applicant had refused signing a new contract and exhibit D1 evidenced that parties appeared before the CHODAWU for mediation.

Moreover, Mr. Saro contended that writing a judgment is an art and that every Arbitrator has his own style of writing, which is reflected in the evidence adduced. He lamented that this is so since the evidence adduced by the Applicant at the Commission was too scanty causing the Arbitrator to be unable to have enough evidence for the judgment referring this Court to page 12 of the typed proceedings. In his opinion all what was stated in the proceedings by the Applicant were reflected in the judgment and the same was subjected to a proper analysis.

He further argued that the meeting was conducted as it was proved by DW1 and DW2, adding that the Applicant's testimony did not give reason for refusal to sign the new contract, asking where then would the Arbitrator have obtained such evidence so as to rule the same. In his view, the allegation by the Applicant is an afterthought. That, the refusal by the Applicant to sign the new contract was an obvious insubordination, hence a valid reason for his termination.

The counsel contended further that the issue of additional hours in the contract is new evidence which cannot be entertained at this stage. Equally, he contends that the issue of whether the cheque issued were proceeds of termination of employment, or were payoff or the argument that the Applicant owes the Respondent his overtime were all not amongst the issues during trial, and the same cannot be discussed in this Revision.

Having read and considered the rival submissions for and against the appeal and going through the record of appeal, the task before me is to determine whether the Respondent had a valid and fair reason to terminate the Applicant's employment.

In answering the above issue, I will reproduce section 37 of the Employment and Labour Relations Act [Cap 366 R.E 2019] ("the ELRA") for ease of reference.

"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:

(b) that the reason is a fair reason-

(i) related to employee's conduct, capacity, or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure".

According to rule 9(3) of the Employment and Labour Relations (the Code of Good Practice) Rules, GN No. 42 of 2007 ("the Code") it is provided that the burden to prove that there was a valid reason for termination lies to the employer.

Now considering the facts, it is on the record that the Applicant was employed under a permanent term contract, see exhibit D1 and statement of DW1 on cross examination. A permanent term contract is where the agreement to work is without reference to time or task. On the other hand, in a fixed term contract or specific task contract there must be specified period or specific task, and it comes to an end on the specified time or on completion of specific task. See the cases of **Mtambua Shamte & 64 Others vs Care Sanitation and Suppliers,** Revision No. 154 of 2010 (unreported) and the case of **Asanterabi Mkonyi vs TANESCO,** Civil Appeal No. 53 of 2019**.** On the foregoing

basis, I am inclined to hold that the reasoning by the Arbitrator that the Applicant's contract was renewable on annual basis is misconceived.

Now since it is determined that the Applicant was employed on permanent terms contract the question that follow is was the Respondent's action of changing the Applicant's permanent term contract to a fixed term contract without first consulting the Applicant justifiable? I am asking so because the new contract exhibited as D2 is for a fixed period, that is for two years.

Before making a change to an employee's contract or create a new contract, the employer should first obtain the employee's consent. Employers can do this by discussing and explain the proposed change with the employees or their representative, if relevant. Employers should provide full details of the change and the reasons for making the said change. They should deploy the consultation and listen to any suggestions or feedback. An employer cannot lawfully change a contract terms or create a new contract without first having each employee's prior agreement, unless the contract allows them to do so under a specified flexible clause. The flexible or variation clause, being relied on must permit the employer to change the particular term in question. As it can be seen in the new contract (exhibit D2) there are changes on

hours of work as well as adding of new responsibilities to the Applicant. DW1 testified that in 2021 the Respondent's committee decided that all employees should have a new contract. He further testifies that after creating a new contract on 31/03/2021, he directed the secretary to set a meeting involving all employees to discuss the said contract. From this statement one would notice that the Respondent created a new contract prior to consulting the employees. DW1 further testified that the Applicant did not attend this particular meeting, adding that one Sebastian and the Applicant refused to sign the new contract, so on 09/04/2021 the Respondent decided to suspend their employment. Further that the Applicant resorted their dispute to CHODAWU and after the reconciliation failed, the Respondent terminated the Applicant's employment on 30/04/2021. On cross-examination, DW1 stated that the Applicant was called to attend the meeting but he refused. On the other hand, DW3 testified that the Applicant was called through the phone to attend the meeting but he did not heed. No evidence was produced by the Respondent to prove that the Applicant was called to attend the said meeting, neither did they call the person who informed the Applicant about the meeting to adduce evidence on such fact.

Changing the contract of employment from permanent term contract to a fixed term contract without consulting the Applicant amounted to denying the employee his right to be heard, which brings to the conclusion that the termination was unfair. The reasoning by the Arbitrator that the act of the Applicant to refuse to sign the new contract amounted to gross insubordination under rule 12 (3) (f) of GN 42/2007 is misconceived as there is no proof that the Applicant refused to obey a reasonable and lawfully issued instruction from a person in a position of authority.

It is my considered view that the Applicant did not commit any offence the commission of which would lead to termination of his employment. Section 37 of the Employment & Labour Relations Act (ELRA) is explicit in prohibiting unfair termination of an employee. Subsection (2) provides for the circumstances that may lead to unfair termination, including failure to prove that the reason for termination is valid, that the reason is a fair reason or that the employment was terminated in accordance with fair procedure. Further, section 8 (1) (c) of the Code states that employer may terminate the employee's employment if they have a fair reason as defined under section 37 (2) of the Employment & Labour Relations Act.

The argument by the Respondent's counsel that the Applicant refused to sign a new contract without assigning a reason and that there was evidence that the meeting was convened is without any merits. This is based on the reason that I have pointed out previously that the Respondent created a new contract without consulting the Applicant, and for that purpose, the Applicant was justified when he refused to sign the said contract. In any case, the Respondent did not produce any evidence to prove that prior to creating the new contract, they consulted the employees on the proposed changes.

Having said so, this Revision Application is found with merits and it is hereby allowed. It is further ordered as follows:

i) 12 months compensation which is TZS 168, 525 X 12 equalling to TZS 2,022,300

ii) Notice payment that is TZS 168,525

iii) Severance payment that is 5,617.5 X 7 X 10 amounting to TZS 393,22

iv) Salary for the month of April 2021 that is TZS 151,672.50 as per exhibit D5

v) Leave payment for 2020/21 that is TZS 168,525.00 as per exhibit D5, totalling to TZS 2,904,277.5, and

vi) Certificate of Service.

It is so ordered.

DATED at **ARUSHA** this **03rd** day of **May, 2024**

A. Z. BADE
JUDGE
03/05/2024

Judgment delivered virtually in the presence of the Parties and or their representatives in chambers on the **03rd** day of **May, 2024**

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
03/05/2023