IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

LABOUR REVISION NO.11 OF 2023

(C/F Labour Dispute No. CMA/KLM.MOS/ARB/43/22 in the Commission for Mediation and Arbitration for Moshi)

TUMAINI JACOB MATHAYO
OMARY MUSA MPHINANGA
YUSUF OMARY MZIMBILI
OMARY ATHUMANI MNDOLWA
IZACK GEORGE MULLA
CHARLES MARTIN MHINA
GODSON ANDREA MCHOMVU ……..…**APPLICANTS**

VERSUS

KILI SECURITY CO. LTD ……..……. RESPONDENT

JUDGEMENT

Last Order: 24.01.2024
Judgment: 19.03.2024

MONGELLA, J.

The applicants have moved this court vide **section 91(1) (a), (b); (2) (b) and (c); section 94 (1) (b) of the Employment and Labour Relations Act, 2004** as amended (ELRA) and **Rule 24 (1); (2), (a), (b), (c) , (d), (e), (f); (3) (a), (b), (c) (d) and; 28 (1), (a), (b), (c), (d) and (e) of the Labour Court Rules, 2007, GN No. 106 of 2007** seeking

for this court to examine and revise the proceedings and ruling of the trial arbitrator in the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/43/22 and to order the CMA to determine the matter on merit and grant any relief this court deems fit and just.

The application was accompanied by a joint affidavit of all applicants. The respondent disputed this application vide affirmed affidavit of one Rajabu Ally Mndewa, her principal officer.

The brief facts of the matter at hand are to the effect that: the applicants were employed by the respondent at diverse consecutive times for a fixed term of one year, which was subject to several renewals. The final contract signed between applicants and the respondent commenced on 01.08.2021 and was set to expire on 01.08.2022 as evidenced by Exhibits K-1, K-2, K-3, K-4, K-5, K-6 and K-7. On 30.07.2022, the respondent wrote letters to the applicants (Exhibits K-8, K-9, K-10, K-11, K-12, K-13, and K-14) notifying them of their contracts coming to an end and that they would not be renewed. He required them to hand over all equipment.

Aggrieved by the respondent's act, the applicants jointly filed a dispute in the CMA alleging unfairness of the termination. The reason thereof was reasonable cause to anticipate the renewal of their contract. They also claimed for: payment of salary in lieu of notice, severance pay, compensation, payment for annual leave,

overtime pay, payment for working on holiday, their NSSF contributions over the years and certificate of service.

All applicants testified as witnesses in their case. The 1st applicant as PW3, the 2nd as PW2, the 3rd as PW4, the 4th as PW7, the 5th as PW5, 6th as PW6 and the 7th as PW1. They also tendered 10 Exhibits which were duly admitted in evidence. The respondent had one witness one Rajabu Ally Mndewa who testified as DW1. He tendered 28 exhibits which were also duly admitted in evidence.

Upon hearing their dispute, the CMA found that the termination was fair. It denied their claims and ordered the respondent to pay each of the applicant a two days salary as she ended their contract prior the date of expiration of the same, that is, on 01.08.2022. Aggrieved by the said decision, the applicants preferred the application at hand advancing, in their affidavit, two issues for determination as reproduced hereunder:

1. *That, the arbitrator erred in law and fact for failure to consider that the applicants had previous contracts before arriving at an erroneous decision with regards to severance claims.*

2. *That, the arbitrator erred in law and fact by not considering the applicants' evidence in that they had reasonable expectation for the renewal of their contract.*

The application was resolved by written submissions whereby the applicants were represented by Ms. Fransisca A. Lengeju, while the respondent was represented by Mr. William A. Kitaly, both learned advocates.

Jointly submitting on both issues, Ms. Lengeju first made reference to **Rule 4 (5) of** the **Employment and Labour Relations Act (Code of Good Practice) Rules G.N 42/2007.** She averred that the applicants worked as security guards for the respondent for several years and the respondent renewed their contracts annually over the years. In her view, that served as evidence that the applicants had reasonable expectation to have their contracts renewed. In that respect, she faulted the arbitrator for failure to consider such argument thereby arrived at an erroneous decision.

Ms. Lengeju contended that the NSSF contribution forms and copies of attendance sheet (Exhibit T-1) served as evidence that the applicants had previous contracts with the respondent, but the same were disregarded by the CMA. She argued that reasonable expectation for renewal was created by statements and conducts of the employer. In that regard, the applicants' employment was terminated on short notice without any former notice from the respondent informing them that their contracts would not be renewed as was the case in previous years. She finalized her submissions by requesting for the CMA award to be set aside and for this court to determine the matter on merit.

The respondent opposed the application. Addressing the 1st issue, Mr. Kitaly supported the arbitrator on an argument that he properly considered the evidence of both parties and justly made her decision. He contended that the applicants misdirected themselves by submitting that they were unfairly terminated from employment and on short notice without justifiable cause. He argued that the evidence on record clearly shows that they entered into a fixed term contract for one year which ended on 01.08.2022, thus they were not terminated but rather their contracts with the respondent expired. That being the case, he had the stance that the termination was fair and having a one-year fixed contract, the applicants are not entitled to receive severance pay.

Replying on the 2nd issue, Mr. Kitaly contended that the trial arbitrator properly evaluated the evidence before her and correctly determined that the applicant's contracts expired on 01.08.2022 as demonstrated by Exhibits K-1 to K-7 and the testimony of the respondent's witness. He disputed the assertion by Ms. Lengeju that the applicants had a reasonable expectation for renewal of their contracts. He cited the case of **Board of Trustees of The Medical Stores Departments vs. Robert Njau** (Revision No. 621 of 2019) [2021] TZHCLD 262 (16 July 2021) TANZLII and **Rosamistika Siwema (Administrator of the Estate of the Late Joseph Mandago) vs. Add International Tanzania** (Labour Revision No. 498 of 2019) [2020] TZHCLD 21 (25 September 2020) TANZLII contending that the applicants had the responsibility to establish they had reasonable expectation and mutual agreement with the respondent.

He finalized his arguments by stating that the law is clear to the effect that fixed term contracts terminate on expiration of agreed term, unless provided otherwise. He supported this stance with the provisions of **Rule 4 of GN 42 of 2007**. Mr. Kitaly concluded by praying for the application to be dismissed for lack of merit.

Rejoining, Ms. Lengeju reiterated her submission insisting that the trial arbitrator failed to properly evaluate the evidence before he0r. She maintained her stance that the termination was unfair. She faulted the termination for being done under a 3 days' notice instead of 30 days' notice required under the contract and as entitled under **section 41 (1), (b) (ii) and 41 (5) of the ELRA.** That, having failed to issue notice, the respondent was to pay the applicants a month's salary in lieu of said notice, but that was not done.

Ms. Lengeju held the view that the applicants' contracts were renewed after every term rendering them to hold the expectation that they would be renewed for another term considering the longevity of their relation. She again referred the case of **Rosamistika Siwema vs. Add International Tanzania** (supra). She reiterated her stance that the termination was unfair in view of **Rule 4(4) of GN. 42 of 2007**. She maintained her prayers for the application to be allowed and for the CMA award to be quashed.

Upon considering the rival submissions by the parties' counsels, I find that the two issues raised by the applicants are interrelated. This is

in the sense that they raise a major question as to whether the applicants were unfairly terminated. The determination of this question, taking into consideration that the contract in question is undisputedly a fixed term 1 year contract; obviously depends on the question as to whether the applicants had reasonable expectation of renewal of their contracts. This condition is set under **section 36(iii) of the ELRA** and **Rule 4 (4) of GN. 42 of 2007** which states:

> *"36 for purposes of this sub-part (a) "termination of employment" includes;*
> *(i)NA*
> *(ii) NA*
> *(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal."*

Rule 4(4) *states:*

> *Subject to sub-rule (3), the failure to renew a fixed term contract in circumstances where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination. "*

The core element that requires proof is that there was reasonable expectation on the part of the employee and such burden is thus laid on the employee as well explained in **Ibrahim s/o Mgunga & Others vs. African Muslim Agency** (Civil Appeal 476 of 2020) [2022] TZCA 345 (13 June 2022) TANZLII.

> "…we are alive to section 39 of the ELRA which imposes the onus of proof on the employer to prove fairness in the termination of the employee's contract. However, in the circumstances such as the ones obtaining in the instant case, where an employee challenges the fairness of termination on the grounds of reasonable expectation of renewal of a fixed term contract, in terms of Rule 4(5) of the Rules, it is the employee who assumes the duty to prove the basis of his expectation and this cannot be said to be a shift of the burden of proof as it is an elementary principle that he who alleges is the one responsible to prove his allegations."

However, as well discussed in the above quoted case, in proving such expectation, the employee must prove that the employer acted in such a manner upon which he formed the expectation to be re-engaged. The Court made reference to the case of **Médecins Sans Frontiers (MSF) Belgium vs. Vengai Nhopi and Eleven Others**, Civil Appeal No. SC.278/16 whereby the Supreme Court of Zimbabwe approved the assertion by a Zimbabwean author one, **Prof. Lovemore Madhuku** in ***Labour Law in Zimbabwe,* Weaver Press, 2015**, at page 101, that:

> "The test for legitimate expectation is objective: would a reasonable person expect reengagement? This requires an assessment of all the circumstances of the case. To be legitimate, the expectation must arise from impressions created by the employer. "

In the case of **Asanterabi Mkonyi vs. TANESCO** (Civil Appeal 53 of 2019) [2022] TZCA 96 (7 March 2022) TANZLII. The Court of Appeal, having found that reasonable expectation was not defined in our labour laws, drew inspiration from a South African case of **Dierks vs. University of South Africa** (1999) 20ILT 1227 whereby the court set criteria to be considered in determining whether reasonable expectation exists. The court held:

> "[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeals Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business."

The applicants' reason on their expectation for renewal was majorly that the respondent had renewed their contracts consecutively since their first term of employment. PW1, the 7th applicant, was first employed in 2013 and the respondent has, since then, renewed his contract until 30.07.2022 when he received notice from the respondent on his intention not to renew his contract. PW2's contract was renewed for 7 years; PW3 for 6 years; PW4 for 4 years; PW5 for 7 years; PW6 for 4 years and PW7 for 3 years.

The question is therefore whether their expectation for renewal was reasonable given the consecutive renewal of their contracts of employment. It is apparent on record that all applicants stayed in employment with the respondent for more than three years, having their contracts consecutively renewed. In the premises, I am of the view that the duration upon which their contracts were being renewed for different consecutive times and the nature of the employer's business, gave the applicants an expectation that their contracts would once again be renewed. In fact, I find the respondent's act of consecutively renewing the applicants' contracts up to 9 years proving the existence of a custom of renewing of contracts annually.

Explaining the reason for non-renewal of the applicants' contracts, DW1 stated that the respondent works under BONITE Bottlers whereby there are high and low seasons of production leading to high and low season on demand of employees. He said that in the high season there is high demand for employees while the low seasons there is low demand. That, when the applicants' contracts expired their manpower was not in need. In my considered view, such reasoning is insufficient to justify the respondent's failure to renew the applicants' contract. The claim was also not substantiated.

In consideration of the fact that previously the applicants' contracts were renewed for several times, with some of them up to 9 consecutive times, it is incredible that their contracts had to stop

being renewed on ground of seasonal variations. The respondent ought to have provided thorough explanation as to how the seasonal variations affected the applicants' renewal of contracts. She as well ought to have proved that the said BONITE Bottlers company was the respondent's sole client or that the applicants were employed to be specifically stationed at BONITE Bottlers. Further, from the record, it appears that the posts were available and were later filled by the respondent. This is discerned from the testimony of DW1 whereby he refused to reply to such question during his cross examination.

Concerning notice on expiration of the contract, in fixed term contracts, it is not mandatory, under the law, for it to be issued, unless where the same is set under the contract. This position was as elaborated in **Ibrahim s/o Mgunga & Others vs. African Muslim Agency** (supra) whereby it was held:

> "Going by the evidence given before the CMA, we entirely agree with the learned High Court Judge that, although the respondent was not bound under the law to serve the appellants with the notice of nonrenewal of their contracts (as we do not know if that was a requirement under their contracts), he did so out of courtesy to remind them that their contracts would expire prior to the expiry of their annual leave."

In the matter at hand, the contracts of employment issued to the applicants specifically stipulated that a notice of 28 days shall be

issued upon termination of the employment contracts. It is vivid on the said contracts that the duration of the contract was from 01,08.2021 to 01.08.2022. The letters of termination indicate that the applicants' contracts of employment were terminated 2 days before the expiry of the contract period. This was on 30.07.2022. In the premises, in my considered view, since the contracts of employment were terminated before expiry of the contractual period, the applicants were entitled to a 28 days' notice as provided in their contracts of employment.

Further, I find rather concerning details appearing on the leave forms signed by some of the applicant. For instance, as seen in exhibit K-22, PW3 had a 53 days' leave commencing from 01.05.2022 to 22.08.2022 way beyond the date of expiration of his contract. It is questionable as to why he got 53 days leave while the contract indicated only 28 days of leave. In addition, the applicants' contracts, at page 7.2, indicate that each can take leave eleven (11) months after the date of commencement of their contract. However, some of the applicants like PW4 and PW6 took their annual leave prior to expiration of 11 months. It seems the respondent acted in such manner likely due to previous arrangements he had with the applicants in previous contracts. In that way, in my view, she treated the applicants as somehow long-term employees.

In the foregoing analysis, I hold the view that the applicants had reasonable expectation for renewal of their contract thus rendering their termination unfair.

To this juncture, I move to reliefs entitled to the applicants. The applicants requested this court to order the matter to be remitted to the CMA to be heard on merit. I find the prayer misconceived given that the matter was heard on merit and there are no any technical procedural flaws to vitiate the proceedings.

It is on record that the applicants prayed to be awarded annual leave pay, overtime pay, payment for working on holiday, their NSSF contributions over the years and certificate of service. As far as the annual leave is concerned, Exhibits K-22 to K-28, evidences that the applicants were granted leave during the subsistence of their contract. They are thus not entitled to any annual leave pay.

As to overtime pay and payment for working on holiday, I find no substantial proof being issued to prove their claims for previous years, that is, before 2021. The applicants' attendance register book for September 2019 and June 2020 (Exhibit T-1) and occurrence book covering from 03.05.2018 to 01.07.2018 were used to justify the applicants' overtime pay. I however, find the exhibit not solely proving that they worked overtime. This is because their respective contracts for the said period were not produced. There is thus no substantial proof on their assertion that they worked overtime or during holidays and that they were not paid on alleged work. From

the record, considering the testimony of DW1, it appears that all benefits owed to the applicants for their last contract, which is the subject of this matter were paid. This fact was also not contested by the applicants. The applicants were also issued certificate of service as witnessed by Exhibits K-15 to K-21.

With regard to severance pay, as a general rule, employees employed for a fixed term of 12 months, are not entitled to the payment when the contract comes to an end. In accordance with **section 42 (2) (a) of the ELRA**, severance pay is payable to an employee who has completed 12 months continuous service with the employer. In addition, what can be discerned from the provisions of **section 42 (3) (c) of the ELRA**, employees under fixed term contracts are not entitled to severance pay upon expiry of the time of the contract. In the case at hand, however, it is undisputed that the applicants had previous employment contracts with the respondent. That is, contracts signed before the ones that were terminated. Counting the time, it is obvious that the applicants had served the respondent for more than 12 months continuously and there is no evidence on record that they were paid any gratuity upon expiry of their previous contracts. In that respect, they are entitled to severance allowance.

To this juncture, the applicants are entitled to the following reliefs: a one-month salary in lieu of notice for termination of the employment contracts termed as "end of contract" "*Mwisho wa Mkataba*"; severance allowance payment calculated in terms of **section 42 (1) of the ELRA**; and a twelve-months' salary as compensation for the unfair termination for non-renewal of the employment contracts where there was expectation for renewal. The application is allowed to such extent.

Dated and delivered at Moshi on this 19th day of March, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA