IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO SUB-REGISTRY

REVISION NO. 31 OF 2020

BETWEEN

CHRISTIAN MWESIGA MICHAEL.....APPLICANT

VERSUS

BOARD OF BISHOPS.....RESPONDENT

JUDGEMENT

Date of Last Order: 03/07/2020

Date of Judgement: 10/07/2020

Aboud, J.

The application is made under the provisions of Section 91 (1) (a), 91 (2) (a) (b) (c), 91 (4) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act), Rule 24 (1), 24 (2) (a), (b), (c), (d), (e), (f), 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007 (herein the Labour Court Rules).

The applicant, Christian Mwesiga Michael calls upon the Court to call for record, examine, revise the proceedings and set aside the

award issued by Hon. Magreth Kiwala, Arbitrator of the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. RF/CMA/MOR/96/2017 dated 24/12/2018.

The application was heard orally and the applicant appeared personally while Mr. Asifiwe Alinanuswe, Learned Counsel was for the respondent.

The application is supported by the applicant's affidavit. The respondent bitterly challenged the application through the counter affidavit of Rev. Aloyce Mwenyasi, Respondent's Officer.

The background of the dispute may be summarised as follows, on 06/06/2013 the applicant was employed by the respondent as a teacher at St. Peters Junior Seminary on two years fixed term contract which was renewable on mutual understanding. The applicant's first contract of employment ended on 06/06/2015 and was renewed on 15/07/2015 to 15/07/2017. The dispute arose on 26/04/2017 when the respondent notified the applicant about none renewal of the existed contract. Aggrieved by the respondent's notification on 23/05/2017 the applicant referred the dispute to CMA where he claimed to be awarded Tshs. 19,430,400/= being 36

months compensation for unfair termination, reinstatement, certificate of service and other payments according to labour laws.

In its decision the CMA found the applicant was not terminated from work. Therefore, the Arbitrator awarded him transport allowances and subsistence allowances to the tune of Tshs. 1,640,000/=. Dissatisfied by the Arbitrators' award the applicant filed the present application for the Court to revise and set aside the CMA's award.

The affidavit in support of the application, under paragraph 4 has three statement of legal issue for the determination of this Court. For easy of reference, they are as follows; I quote:-

(i) That, the Honourable Arbitrator erred in law for delivering injustice award after failing to work on the framed issues to summarize the final submission of both parties according to law.

(ii) That, the Honourable Arbitrator erred in law and facts for delivering an injustice award after failing to summarize the final submissions of both parties.

(iii) The Arbitrator erred in law for delivering injustice award after failing to award according to prayers.

Arguing in support of the application the Applicant adopted his affidavit to form part of his submission. And on the first ground or issue for revision he submitted that, when the Arbitrator was determining the issue as to whether the employee's rights of employment were given by the employer, he did not consider that the right to be given new contract of employment was not followed. The applicant stated that, he was employed in 2013; however the respondent did not give him contract up to 2015.

The applicant argued that, the employer kept his employment on probation from 2013 to 2017 when he was terminated which is contrary to Rule 10 (4) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 (herein the Code of Good Practice). He further stated that, the contract which he signed with the respondent on 15/07/2015 was not legal because the signatory testified at CMA that he joined the school on 15/11/2015, which was after the date of signing the contract. He therefore submitted that, his employment was contrary to section 96 (1) (2) of

the Act because there was no any document in relation to his employment.

The applicant further submitted that, the respondent also contravened section 15 (3) of the Act due to the fact that, he asked the respondent to rectify his contract after probation, specifically to change his salary scale as they agreed it will increase after probation. However the respondent refused to do so. He added that, it is on the basis of the above submission he lodged his complaint at the CMA, but those facts were not considered by the Arbitrator.

The applicant strongly submitted that, he claimed for Tshs. Ten (10) million as compensation which was not disputed by the respondent. He also claimed for Tshs. 1,771,200/= being his pension, as they agreed the respondent had to pay him 10% of his salary as pension. He stated that, the respondent effected the agreed payment from 2013 to 2016 when he stopped without any good reason. He argued that the Arbitrator deliberately did not consider his claims in his award.

As regard to his termination, the applicant submitted that their agreement was to renew the contract of employment after the

expiration of his contract. He contended that, the respondent did not renew the contract as he notified him before there will be renewal of his contract. He strongly argued that, the issue of none renewal of his employment contract was not considered properly by the Arbitrator in his award. He also added that, the Arbitrator did not consider about subsistence allowance as it is provided under Rule 16 (1) (2) of the Employment and Labour Relations (General) Regulations, GN. No. 47 of 2007 (herein the General Regulation). The applicant therefore prayed for his application to be allowed.

In response Mr. Asifiwe Alinanuswe also prayed for the respondent's counter affidavit to form part of his submission. He submitted that, in this matter there was no unfair termination, but parties agreed before expiration of contract each party was free to notify the other if he wished to renew or not to renew the said contract, such agreement was tendered at the CMA as Exhibit P1.

He submitted that, it is on record that before the end of contract the respondent wrote a letter to the applicant to ask him if he wished to continue with the employment. The Learned Counsel stated that, the applicant did not reply until when the agreed period

for renewal of contract expired as is reflected in exhibits on the CMA record.

Mr. Asifiwe Alinanuswe further submitted that, the Arbitrator considered all the issues which were before him in regard to this matter. He said, it is not true that the applicant was not given contract of employment because according to Exhibit P1 at the CMA he signed it. The Learned Counsel submitted that, even if the applicant was not given a written contract but the respondent continued to pay him which by inference he was still in proper employment contract. He also submitted that, when the respondent decided to give him contract through new Rector (Head of School) was just to reduce in writing what they agreed before.

On the issue of compensation of Tshs. Ten (10) million Mr. Asifiwe Alinanuswe submitted that, they strongly disputed such claim at the CMA and, the applicant failed to prove or to satisfy the Arbitrator on its existence. He argued that, the law of evidence requires the one who alleges must prove as it is in section 10 of The Evidence Act [CAP 6 R.E 2019]. He therefore submitted that, the

Arbitrator correctly decided not to award the applicant's claim of compensation.

Mr. Asifiwe Alinanuswe further submitted that, the CMA also did not award the applicant the claimed pension because of the nature of his employment contract which was on fixed terms. He said, the applicant was entitled to gratuity in each end of his contract and the respondent paid him accordingly.

The Learned Counsel went on to submit that, as regard to other claims the Arbitrator considered them and correctly made his decision. He said, the CMA decided that after the respondent stopped paying the applicant, he was supposed to lodge his complaint at the CMA within the prescribed time limit, which he failed to do so. Mr. Asifiwe Alinanuswe argued that, the applicant did not ask for condonation to lodge his complaint and CMA decided not to entertain his claims. He added that, CMA also found payment of bonus was just an agreement between the employer and employee and the moment the applicant's contract of employment ended there was no reason to continue paying him bonus.

As to the claim of 36 months compensation Mr. Asifiwe Alinanuswe submitted that, it was not considered because the Arbitrator found there was no any termination of employment of the applicant. He argued that, the provision of Rule 16 (1) (2) of the General Regulation is not applicable in this matter. He therefore prayed for the application to be dismissed for want of merit.

In rejoinder the Applicant submitted that, the Respondent did not write a letter to notify or terminate his employment instead the letter informed him about his redundancy. He strongly argued that, his claim of Tshs. 10 million was not disputed at the CMA and he did not claim for gratuity. As to other claims including responsibility allowances he stated that they were according to the agreement as it is in Exhibit CM6 at the CMA. He prayed the court to allow his application.

After consideration of parties' submissions, court record, the relevant applicable labour laws and practice, I found the issues for determination in this matter are; whether the CMA award was properly procured and what reliefs the parties entitled. In hand, I will thoroughly discuss the grounds for revision as argued by the

concerned parties, which they focus on whether the applicant's rights in relation to his employment were observed according to the law and whether the applicant was terminated on the basis of fair reason and procedures. And lastly what reliefs the parties are entitled to.

On the first issue as to whether the applicant's rights in relation to his employment were observed according to the law, the applicant alleged that in his employment the employer did not comply with the provision of the law. He submitted that the employer contravened Rule 10 (4) of the Codes of Good Practice which is to the effect that:-

> "Rule 10 (4) 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 standards required, the custom and practice in the sector".

As indicated in the above discussion, the parties to this application entered into to two different contracts. The first contract started from 2013 up to 2015 and the second contract was of two fixed years. The second contract commenced on 15/07/2015 and ended on 15/07/2017 (exhibit CM1), which is the gist of the present

application. In each contractual period between the parties there was probationary period and applicant successful went through and continued with his contracts to the end. The first letter of appointment on temporary/probation term to the application was signed by both the respondent and applicant on 06/06/2013. This letter had three months probationary period. As regard to the second contract of employment there was letter of appointment on temporary/probation term signed by the respondent and applicant on 26/09/2015 and 08/10/2015 respectively. Therefore, it is clear that the respondent did not contravene Rule 10 (4) of the Codes of Good Practice as submitted by the applicant. Thus, the applicant submission is baseless.

The applicant also claimed that, the Arbitrator did not consider Section 15 (3) of the Act in dismissing his claims. For easy of reference the relevant section provides as follows:-

> "15 (3) If an employee does not understand the written particulars, the employer shall ensure that they are explained to the employee in a manner that the employee understands".

In this application the applicant contended that, he demanded the respondent to change the terms of the contract specifically the remuneration. However the employer refused to do so. In my general understanding of the provision cited above is that, the employer is obliged to explain the terms of contract to an employee in a language that he/she understands. However, the applicant at hand did not point any provision in the relevant contract which he failed to understand to the contrary he wanted the employer to change the terms of the contract. Under such circumstances the referred provision is irrelevant.

The applicant further contended that, the respondent contravened section 96 (1) of the Act because he did not keep his employment records. The alleged contravened provision provides as follows:-

> "96 (1) - Every employer and employee shall keep a record of the following information:-
>
> (a) The written particulars prescribed in section 15 and any changes to those particulars;

(b) Any remuneration paid to the employee.

(2) - Every employer shall retain the record of an employee prescribed in subsection (1) for a period of five years after the termination of that employee".

I have careful examined the exhibits tendered at the CMA and, all the information relating to the applicant's employment was in record. The applicant refused to sign his first contract, therefore in my view he waived his right to have a written contract. The applicant failed to satisfy this Court as to which records were not kept by the respondent. I have carefully laboured my mind to look for the alleged records but I found none.

Therefore, on the basis of the above discussion I have no hesitation to say that all the applicant rights as an employee were observed and complied with by the respondent. I have considered the claim by the applicant that his employment contract of 2015 to 2017 was illegal because was signed by the responsible person on 15/07/2015 while he joined the school on 15/11/2015. In other words

it was retrospectively signed. It is my view that this claim was out of time because applicant included it in his complaint which was lodge at the CMA on 23/05/2017 almost two years after the cause of action arose that is, the signing date. Thus, these claim goes with smoke.

On the second issue as to whether the applicant was terminated from employment and it was fair substantively and procedurally, the Court considered the employment contract between the respondent and applicant. The law provides for ways in which employment contracts may be terminated. This is provided for under Rule 3 (2) of the Code of Good Practice which is to the effect that:-

> "Rule 3 (2) - A lawful termination of employment under the common law shall be as follows:-
>
> (a) Termination of employment by agreement;
>
> (b) Automatic termination;
>
> (c) Termination of employment by the employee; or
>
> (d) Determination of employment by the employee;"

In the application at hand the applicant who had fixed term contract claimed that he was unlawful terminated on the ground that, the respondent neglected to renew his contract of employment contrary to clause 1 of the relevant contract. I have observed that at the CMA parties produced written contracts which stipulate all the terms and condition of their fixed term contracts. These pieces of evidence clearly indicate that parties were supposed to agree mutually if the contract of employment should be renewed or not. I have gone through such contracts and the disputed clause provides as follows:-

"1. TENURE:

(i) The term for which this agreement executed is for a period of 2 years from the 2015 day of 2017.

(ii) Three (3) months prior to the expiration or the term herein created, the employee shall notify the employer his/her desire to renew or not to renew the contract whereas by mutual agreement between the employee and the employer this contract may be renewed to

another term subject to the provisions of sub clause (iv) herein below.

(iii) That at the end of the term herein created, and where the employee, by mutual agreement with the employer, renews the contract, then, such and only such employee, upon his/her return shall have a leave allowance of a full monthly salary.

(iv) That should the term of contract herein created be renewed in terms of sub clauses (iii) and (ii) above, the said renewal shall be subject to changes in any particular aspect as the employer may deem fit".

From the quotation above in my view, the respondent was not automatically obliged to renew the applicant employment contract as he alleged. The renewal was subject to mutual agreement by the parties and in accordance to what is stated in clause 1 (ii), (iii) and (iv) in the parties' employment contract. As it is on the record in the second employment contract of 2015 to 2017 between the parties (Exhibit K1), the applicant was supposed to notify the respondent

about his desire to renew or not to renew his contract three month before the expiration of such contract. However, the record reveals that the applicant failed to comply with such requirement until when the respondent made his own initiatives to inquire from him if he wished to renew his contract. The respondent wrote two different letters to the applicant (exhibits CMA12 and CMA15) but there was no reply from the applicant. The applicant wrote a letter of his intention to renew his contract on 25/04/2017 (Exhibit CMA16) contrary to the three months notice before expiry of the contract as indicated above. He disclosed his intention to renew the relevant contract almost two months and twenty days to its termination which was contrary to the requirement of three months notice prior to expiration of his contract. According to the record the applicant was supposed to give his notice on 13/04/2017 as was reminded by the respondent in his letter dated 11/04/2017 (Exhibit CMA15), which was a second reminder following that of 03/04/2017 (Exhibit CMA12) as discussed above. Under such circumstances it is crystal clear that the applicant was the one who dishonoured the terms of employment contract.

It is an established principle that, employment contracts are like any other contracts where parties signing it are bound to its terms.

This was the position in the case of **Hotel Sultan Sultan Palace Zanzibar Vs. Daniel Leizer and another**, Civ. Appl. No. 104 of 2004 (unreported) where it was held that:-

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

The applicant further claimed that, he had expectation of renewal of the said contract because it was agreed in the relevant contract. To the contrary as discussed above there is no clause in that contract which provided for automatic renewal. Therefore, if the applicant wanted to succeed in his claim of unfair termination he should have established his reasonable expectation of renewal in relation to such contract. This is the requirement under Rule 4 (5) of the Code of Good Practice. I quote:-

> "Rule 4 (5)-Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee shall

> demonstrate that there is an objective basis for the expectation such as previous renewal, employer's under takings to renew".

In the application at hand the applicant did not demonstrate any reasonable expectation of renewal of the disputed contract.

The applicant also claimed that the employer terminated him without following proper procedures. It is on record as discussed above that the contract between the parties herein was not indeterminable contract of employment but was a fixed term contract which was for a definite period as reflected in two contracts (Exhibit CMA2 and K1). These contracts did not employ automatic renewals as the applicant would wish this Court to believe. It is very clear that if the applicant thought his fixed contracts were automatically renewable, that would have undermined the very purpose of fixed terms contracts of two years each as they agreed and, revert the same to indeterminate contracts.

The position of the law is that, when the agreed fixed period of contract expires the employer is not liable to follow the stipulated procedures for termination of employment because the contract itself

provides for its termination procedure which is a **lawful automatic termination**. It is a settled law that, a fixed term contract shall automatically come to an end when the agreed time expires. This is a position in law, to wit under Rule 4 (2) of the Code of Good Practice which provides that:-

> "4 (2)-Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise".

Under the circumstances, and on the basis of the above discussion it is my finding that the applicant was not terminated from his employment as he claimed, but truth is, his fixed term contract with the respondent came to an end automatically when the agreed time expired on 15/07/2017. It is my view that, the respondent being an employer had a right to decide to continue working with the applicant or not provided that he complied with the terms of the agreed contract as he did. The position of this matter would have been different if the respondent had terminated the applicant contract before its expiry period that is on 15/07/2017, and without any valid reason and fair procedures. In such situation the law

requires employer to comply with the provisions of Rule 8 of the Code of Good Practice, section 37 (1) (2) and section 41 (3) of the Act.

On the last issue as to what reliefs are the parties entitled. The Arbitrator upon finding that the applicant was not terminated from employment he awarded him transport allowances and subsistence allowances to the tune of Tshs. 1,640,000/=. It is on record that the applicant was paid leave allowances and gratuity as per clause 7 of the employment contract.

At the CMA the applicant claimed for Tshs. 19,430,400/= being compensation for underpayment, 36 months compensation for unfair termination, reinstatement, certificate of service and other payments according to labour laws.

The applicant urged the Court to order payment of subsistence allowances in accordance with Regulation 16 (1) of the General Regulations. The relevant provision provides as follows:-

> "16 (1) The subsistence expenses provided for under section 43 (1) (c) of the Act shall be quantified to daily basic wage or as may, from

time to time, be determined by the relevant wage board.

(2) In determining the subsistence expenses, the conditions prescribed under section 37 of the Labour Institutions Act shall apply".

The position of the law on subsistence allowances as set under Section 43 (1) (c) of the Act, it requires the employer to pay the employee transport allowance and subsistence allowance upon termination of the contract. The position was also reflected by this Court in the case of **Coca Cola Kwanza Ltd. Vs. Kajeri Misyangi,** Lab. Div. DSM, Rev. 238 of 2008 where it was held that:-

"That the transport and subsistence is to be paid where the employee is necessitated to quit job on employer's accord or at the end of the contract".

In this application it is not disputed that the applicant's contract came to an end on 15/07/2017. Therefore, he was entitled to transport allowances as a compulsory statutory payment. Thus, the

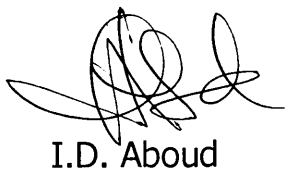
Arbitrator was right to award him transport and subsistence allowances as it was proved that he was not paid the same.

The applicant's contention before this Court is on the Arbitrator's computation of the subsistence allowances. In my view as rightly submitted by the applicant he was entitled to subsistence allowances at the calculation provided under Regulation 16 (1) of the law cited above. Therefore is my view, that the applicant is entitled to subsistence allowances from the date the contract came to an end to the date the respondent effect transportation allowances to the applicant's place of recruitment. This was also the position of this Court in the case of **Pyrethrum Company of Tanzania Ltd. Vs. Edda Nyalifa**, Lab. Div. Iringa, Labour Revision No. 21 of 2013 [2013] LCCD 1.

As to the applicant's claims of 10% of his salary, in my view the applicant waived such right when he refused to join in a scheme fund of his own choice. The respondent's obligation was to contribute the agreed percentage of the applicant's salary to his chosen scheme fund. However, it is evidenced that the applicant neglected to opt for any scheme. Thus, he cannot claim for such right.

In the result I find this application partly has merit. The respondent is ordered to pay the applicant subsistence allowances from the date the contract came to an end to the date the respondent pays transportation allowance to the applicant. Subsistence allowances should be paid in accordance with Regulation 16 (1) of the General Regulation. As to the payment of transport allowance this Court finds no reason to interrupt with the Arbitrator's award of Tshs. 1,640,000/= because it was the amount calculated by the applicant himself. However, the respondent should pay such amount upon applicant's proof of such amount as stipulated in their employment contract. Other applicant's claims are dismissed for want of merit.

It is so ordered.



I.D. Aboud

JUDGE

10/07/2020