IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 5 OF 2020

BETWEEN

DOTTO SHABAN KUINGWA...................................... APPLICANT

VERSUS

CSI ENGINEERING COMPANY LTD........................ RESPONDENT

JUDGMENT

Date of Last Order: 30/04/2020 & 10/06/2020

Date of Judgment: 10/07/2020

A. E. MWIPOPO, J

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] which was delivered on 25/01/2019, the applicants **DOTTO SHABAN KUINGWA** have filed this application. The applicant is praying for the following Orders:-

(i). That, this Honourable Court be pleased to call for record and examine the proceedings of the Commission for mediation and Arbitration at Dar es salaam in Labour Dispute No. CMA/DSM/KIN/168/19/83 issued by Hon. Arbitrator Faraja, J.L. dated 29th day of November, 2019.

(ii). That, the Honourable Court be pleased to revise and to set aside the CMA award delivered on 29th day of November.

The application is based on three issues which the applicant is seeking for the Court to determine. The issues are as follows:

a. Whether it was proper for the arbitrator to conclude that the applicant's termination was procedurally fair while the evidence tendered proved that the applicant was terminated on ground of operational redundancy.
b. Whether it was proper for the arbitrator to conclude that the applicant was fairly given his terminal benefits while the evidence tendered proved that the applicant was not given his terminal benefits.
c. Whether it was proper for the arbitrator to hold that the applicant is not entitled to any benefits from termination of employment.

The background of the dispute in brief is that the applicant was among the persons employed by the respondent namely CSI Engineering Co. Ltd on 21st May, 2008, under a fixed term contract for one year. The contract was renewed several times until 31st January, 2019, when they were terminated. Dissatisfied with the respondent's decision the applicant

and other employees referred the matter to the CMA which decided the dispute in respondent's favour. Aggrieved by the decision of the Commission the applicant filed this application. The application was supported by affidavit of Dotto Shabani Kuingwa whereas Ms. Jinnipher Euphrazi Mtani the Human Resource Supervisor of the respondents filed a counter affidavit challenging the application.

The application was disposed of by way written submissions.

In support of the application, the applicant who was represented by Advocate Sweetbert Elgidius submitted regarding the first issue that the Hon. Arbitrator erred in law and fact by holding that the applicant's termination was procedurally fair despite the testimony adduced by the respondent proving that the applicant's termination was due to operational requirements as was testified by respondent's key witness namely Gloria J. Mwansele at 2nd paragraph of page 3 of CMA's award. He was of the view that the Arbitrator was supposed to rule that the termination was due to operational requirements as testified by witnesses. To support his argument he referred this Court in the case of **Mtambua Shamte & 64 Others v. Sanitation and Suppliers,** Rev. No. 154 of 2010.

He argued that the Hon. Arbitrator improperly determined the matter since the applicant's termination was both substantive and

procedurally unfair. The respondent failed to give reason for termination as evidenced by notice of termination which is contrary to Section 41(3) (a), (b), Section 36(a) (iii) of Employment and Labour Relations Act, 2004 and Rule 4(4) of G.N No. 42 of 2007, despite the fact that the applicant's contract was of fixed term. The applicant's termination should have been fairly conducted since there was reasonable expectation of renewal of contract of employment basing on previous renewal. In supporting his stand he cited the case of **National Oil (T) Ltd v. Jaffery Dotto Msensemi and 3 Others,** Revision No. 558 of 2016, High Court Labour Division, ata Dar Es Salaam, (unreported), and the case of **Dar es salaam Baptist Sec School v. Enock Ogala,** Revision no. 53 of 2003, High Court Labour Division at Dar Es Salaam, (Unreported).

He further argued that the arbitrator was supposed to apply section 40(1) of ELRA on the basis that there was reasonable expectation of renewal. Where such expectation exist the termination of employment must be fair. The failure to renew the expected contract of employment should be considered as unfair termination. To support his position he cited the case of **Mtambua Shamte and 64 Others v. Care Sanitation and Suppliers**, Revision No. 154 of 2010, High Court Labour Division at Dar Es Salaam, (Unreported).

On second issue the applicant's counsel submitted that the Hon. Arbitrator wrongly interpreted PW2 testimony by concluding that applicants were paid their terminal benefits while the witness testimony did show that the previous employee were paid and not the applicant. Also the arbitrator relied on Exhibit D-3(end of month salary slip) in concluding that applicant was fairly paid his terminal benefits while it was his monthly payment. The terminal benefits claimed by the applicant at CMA was notice payment, severance payment, accrue leave and 12 months compensation.

The applicant argued that what was paid to applicant was his monthly salary for the work completed in a month therefore such payment should not be considered as the notice payment as evidenced by Exhibit D-3. Regarding terminal benefit he stated that there is no evidence tendered by the respondent to support Arbitrator's findings, the law set two conditions for an employee to benefit from severance pay that is an employee has completed 12 months working with the employer and termination was by employer. The Hon. Arbitrator merely based on leave taken in 2018 through Exhibit D-4 disregarding other leaves entitled to applicants in previous years. To strengthen his argument he referred this Court to the case of **Coca cola Kwanza Ltd v. Kajeri Misyangi** [2011-2012] LCCD 3.

On third issue he submitted that the applicant's claim is on compensation of twelve (12) months' salary being a remedy for unfair termination. He thus prayed for the award to be set aside.

In reply, the respondent submitted on the first issue that the employment contract between applicant and respondent are clearly provided under duration clause that the contract is for (12) twelve months starting from 1st February 2018 to first January 2019. This is in accordance with law as provided under Section 4(2) of G.N No. 42 of 2007. Therefore, it was clear that the applicant employment contract automatically ended on 31st January, 2019. There was no need for the employer to give notice of the end of the contract to the employee, but out of the respondent's prudence and courtesy he saw it is fair to give the applicant a notice so that the applicant can be aware of non- renewal.

He submitted that the nature of the respondent's business depend on project. Thus, DW1 clarified to the Hon. Arbitrator that the respondent had no stock of work that could have made the respondent to renew Applicant's contract.

Further, the respondent stated that it is not true that the arbitrator failed to examine the evidence tendered since the employment contract itself state exactly the time when the contract ends as stipulated at a page

12 of the employment contract. On such basis the applicant contract came to an end when the applicant was given the non-renewal letter so that the applicant can be aware that the contract will not be renewed after its expiry. Therefore the notification was done purposely so as to make the applicant be aware and to avoid any expectations.

On second issue the respondent submitted that the applicant payment was made in accordance with Section 42 and Section 44(1) of ELRA as stated at page 2 by DW-1 and at page 3 (applicant's testimony) of the CMA's award. Thus means what the applicant claim as stated in CMA form No.1 is contrary to the law with regard to final pay for fixed term contract.

On third issue, he argued that there are three things which the applicant have prayed to be paid as his terminal benefits. The payment prayed is the notice payment. She argued that the respondent made this payment as provided under Section 41(1) (ii) and 41(5) of the ELRA, whereby the respondent was paid his salary for the month of January which was the last month for the applicant to work with the respondent after the expiry of contract.

In respect of severance pay, respondent submitted that severance pay is not provided to an employee whose contract has expired. This is clearly stipulated under Section 42(3) (c) of ELRA, and also it is stated at

paragraph 13 of the Employment contract. Since the applicant did not breach the contract and hence the applicant was not under permanent contract but under fixed contract which expired then the applicant is not entitled to be paid severance pay.

Another terminal benefit which the applicant prayed to be granted by the Court is accrued leave. The respondent averred that the according to the evidence submitted in record as per Exhibit D-3(leave form) and as stated at paragraph 9 of the Employment contract, the applicant contract started on 1st February 2018 and ended on 31st January 2019. The applicant took 28 days leave on July 2018. Also the hearing form shows that the last leave of which was taken by the applicant was taken in the previous contract of 2017.

In relation to compensation of twelve month salaries, she submitted that the applicant's termination was not of unfair termination which could lead compensation of twelve (12) months as the applicant's contract was of fixed term contract for the period of one year. Therefore, payment were made in accordance to the law.

On the last issue that the applicant is not entitled to any benefits from termination of employment, the respondent argued that the merits of the termination was based on fixed term contract. Therefore, applicant's

termination was not based on operation requirement as raised by the applicant on first issue. The respondent is confident to say that the award was properly procured.

In his rejoinder the applicant reiterated his submission in chief.

Having gone through the submissions of both parties, pleadings and CMA record I find three pertinent issues to be determined by this Court. The issues as follows:-

i. Whether there was a reasonable expectation for the contract of employment of the applicant to be renewed?

ii. Whether the respondent unfairly terminated applicant's employment.

iii. What remedies are entitled to parties?

Starting with first issue, the relevant provisions in this circumstance is Section 36 (a) (iii) of the Employment and Labour Relations Act, Act No. 6 of 2004, and Rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. Section 36 of the Act provides that, I quote:-

36. (a) Termination of employment includes

> ***(iii) a failure to renew a fixed term contract on the same or similar terms, if there was reasonable expectation of renewal".***

Rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 provides that:-

> ***"4 - (1) an employer and employee shall agree to terminate the contract in accordance to agreement.***
>
> ***(2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.***
>
> ***(3) Subject to sub-rule (2), a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it.***
>
> ***(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstance where***

the employee reasonably expects a renewal of the contract may be considered to be an unfair termination".

The evidence available in record shows that the applicant was employed for a fixed term of 1 year in 2008. The contract was renewed several times until 31st January, 2019, when the contract came to an end. The last employment contract - Exhibit D-1 was signed on 1st February 2018 and ended on 31st January 2019. The Exhibit D1 clearly states that the applicant employment contract automatically come to an end on 31st January, 2019.

Another exhibit which is a notification letter dated 17th December 2018 - Exhibit D2 shows that the respondent notified the applicant about his intention not to renew the contract. This means the information was given one month before the contract came to end and it's undisputed that applicants continued to render services till the end of their contract and payment was made as per exhibit D 4. The Applicant is of the view that exhibit D2 was termination letter. I have read the content of Exhibit D2 and I'm of the opinion that the Exhibit D2 is not a termination letter since it was informing the applicant that the employment contract is coming to an end. The respondent submitted that there was no need for the employer to give notice of the end of the contract to the employee, but out of the

respondent's prudence and courtesy he saw it is fair to give the applicant a notice so that that the applicant can be aware of non- renewal.

The applicant submitted that there was expectations of renewal since the employment contract have been renewed several times by the respondent after it came to an end. He was of the view that even the last contract was supposed to be renewed after its expiry on 31st January, 2019. As result, failure to renew the contract on similar terms amount to unfair termination under section 36 (a) (iii) of the Employment and Labour Relations Act, Act No. 6 of 2004. The respondent submitted that the applicant's last and final contract commenced on 1st February, 2018 and expired on 31st January, 2019.

This being the contract for specific period of time the parties to the contract are bound by the term of the contract especially the end of time. The applicant contract commenced on 1st February, 2018 and came to an end on 31st January, 2019. According to rule 4 (1) and (2) of the G.N. No. 42 of 2007 the termination of the employment contract shall be in accordance with the agreement. For the fixed term contract, the contract terminates automatically when the agreed period expires, unless the contract provided otherwise. In the present case the contract states clearly that the contract of employment shall terminate on 31st of January, 2019 or when it shall be terminated in accordance with the law. Therefore the

applicant's contract of employment clearly stated that the contract expires on January, 2019.

In the present circumstances where the contract of employment does not provide for automatic renewal of the contract, the applicant's claims for reliefs for unfair termination after the automatic expiry of the contract lacks some merits. According to rule 4 (3) and (4) of G.N. No. 42 of 2007 a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it. Failure to renew a fixed-term contract in circumstance where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination. But in the present case there is no evidence to prove that the applicant continued to work after expiry of the contract term.

The applicant have asserted that there was expectation of the renewal of the contract for the reason that the contract have been renewed several times. I'm of the opinion that said reason have no merits since the parties to contract entered a new contract every time after expiry of the previous contract. Also the last contract provides clearly the date when the contract ends. Further, the evidence available shows that the respondent informed the applicant with a letter – Exhibit D2 as to when the contract will expire and that the respondent is not going to renew it. In such

circumstance the applicant expectation for renewal of contract of employment cannot be found to carry weight.

In the case of **Mtambua Shamte & 64 others Vs. Care Sanitation and Suppliers**, Revision No. 154of 2010, High Court Labour Division at Dar es Salaam, this Court held that:-

> ***"......the principles of unfair termination do not apply to specific tasks or fixed term contracts which come to an end on the specified time or completion of a specific task. Under specific tasks or fixed term, the applicable principles apply under conditions specified under Section 36 (a) (iii) of the Employment and Labour Relations Act, No. 6/2004 read together with Rule 4(4) of GN 42/2007."***

From the above position, since the applicant started to render service to the respondent subject to the condition of renewing the contract in each year until 2019, then he could not claim for continuation of the contract without a proper renewal or expectation of the renewal of the contract. In the record there is no evidence which show that the applicant continued to render service to the respondent after the contract expired. Thus, it is my finding that there was no renewal expectations of the applicant

employment contract and the contract came to an end on the date provided in the contract of employment. Therefore, the answer to the first issue is negative.

The second issue is whether the respondent unfairly terminated the applicant employment contract. Since the answer to the first issue is negative that the applicant's employment contract lawful terminated after its expiry on 31st January 2019, then it cannot be said that the termination was unfair. The termination was in accordance with the terms of the contract agreed by both parties to the agreement hence it was a fair termination. The employer and employee choose to be governed by agreed term governing the employment. The contract came to an end automatically according to the terms of the contract. Therefore, it cannot be alleged that the termination was not fair since it came to an end in accordance with the terms of the employment contract. Nobody terminate it. Thus, the answer to the second issue is negative.

Since the answer to the 1st and 2nd issues are negative the applicant is not entitled to any remedy. The employment contract being that of a fixed term contract it is not covered under section 40, 41 and 42 of the Employment and Labour Relations Act, 2004. Therefore no remedy could be claimed by the applicant.

Regarding accrued leave the applicant did not provide any evidence to prove the same. In the case of **Sangija Joseph Masaaga v. Ultimate Security (T) Limited,** Revision No. 566 of 2016, High Court Labour Division, at Dar Es Salaam, (Unreported), it was held that since the applicant did not adduce evidence at CMA for annual leave then the Arbitrator could not in any manner know whether the employee had accrued leave or not and whether the leave was out of time or not. Therefore, the arbitrator rightly held that the applicant is not entitled to any remedy or terminal benefit apart from what have already been paid by the respondent.

In the circumstances, I find nothing to fault the Arbitrator's award. I hereby uphold CMA's award and dismiss the application.

A. E MWIPOPO
JUDGE
10/07/2020