

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 320 OF 2019

BETWEEN

ISAAK OLUTU APPLICANT

VERSUS

CSI ELECTRICAL LIMITED RESPONDENT

JUDGMENT

Date of Last Order: 21/05/2020

Date of Judgment: 10/07/2020

S.A.N. Wambura, J.

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] in Labour Dispute No. CMA/DSM/KIN/R.1259/16 dated 10/04/2018, the applicant **ISAAK OLUTU** has filed this application under the provisions of Sections 91(1)(b), (2)(a)(b), 4(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 [herein after to be referred to as ELRA] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c) and 28(1)(a)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007 praying for Orders that:-

- 1. This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration in Labour Dispute CMA/DSM/KIN/R.1259/16 dated 10th April, 2017 delivered by Hon. Kiangi, N - Arbitrator.*
- 2. That this Honourable court be pleased to determine the dispute in a manner it considers appropriate.*
- 3. Any other reliefs.*

The application was supported by an affidavit sworn by the applicant. The respondent **CSI ELECTRICAL LIMITED** filed the counter affidavit through Gloria Mwansele their Principal Officer to challenge the application.

The applicant enjoyed the service of Advocate Kheri Macdaviés Kusekwa, while the respondent was served by Advocates from Vemma Consult Attorneys. With leave of this court hearing was by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

The brief facts of the case are that, the applicant was employed by the respondent as an Electrician in a one (1) year fixed contract commencing on 17th November, 2015 up to 6th November, 2016. The

applicant worked with the respondent until 22nd November, 2016 when he was terminated on ground of committing a misconduct of gross dishonesty. It was alleged that on 31st October, 2016 at the respondent's office gate, the applicant attempted to steal the respondents property namely RCBO-32 Amp. The respondent conducted a disciplinary hearing and consequently the applicant was terminated. The applicant was aggrieved with the termination hence filed the complaint before CMA where the decision was not in his favour. Being resentful he filed this application.

Submitting on the application the applicant's counsel submitted that the Arbitrator misdirected herself when held that the applicant's employment contract ended on 6th November, 2016 Thus from 16th November, 2016 the parties had no any employer- employee relationship hence there was no any enforceable contract between them. That the contract was renewed by default from 6th November, 2016 since respondent neither proved or demonstrated on how written notice of renewal is issued to the employees nor showed a mode of renewal of the employment contract before CMA. The applicant as an employer has to keep particulars of employment referring the cases of **Director Ptorans**

Ltd v Daud Mohamed & Another, Rev. No. 173 of 2010 and **Ramadhan H. Ramadhan v Andro Roofing Products Ltd**, Rev. No. 347 of 2009.

It was further submitted that the contract was renewed by default on the sense that even after 6th November, 2016 the applicant continued to execute his duties till the day he appeared before the Disciplinary hearing. After the hearing he assumed his duties and he was paid his salary the fact which is not disputed by the respondent. Therefore the applicant had no valid reason of terminating the applicant's employment, citing Rule 4 (2), (3) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007.

The applicant's counsel further stated that the arbitrator erred in law and fact by failing to analyze and scrutinize the evidence of the parties brought before the commission. That according to Exhibit P1 (Employment Contract) Clause 1 provides that the contract was supposed to end on 6th November, 2016 and renewal was upon issuance of notice by the respondent. The arbitrator failed to determine under clause 17 of the employment contract the parties agreed that their contract will be interpreted and applied in accordance with the Employment and Labour

Relations Act. Since the applicant continued to work there was a renewal by default as per Rule 4 (2) and (3) of GN. 42.

It was further submitted that the respondent failed to prove that he had a valid reason of terminating the applicant. The respondent's evidence based on a hearsay evidence. The alleged stolen property was not in a list of evidence to be relied upon and was never brought before the commission, nor during the disciplinary hearing.

The applicant's counsel further contended that the arbitrator erred in law and in fact in holding that the respondent complied with the procedure for terminating the applicant. That the applicant was not availed with an opportunity to defend himself during the disciplinary hearing as he was not allowed to enter the room. That from Exhibit P3 (Disciplinary hearing form) there is no summary of the applicant's testimony and evidences, no mitigating factors as required by Rule 13(7) of GN 42 of 2007. That the applicant had no chance even to examine the witnesses contrary to Rule 13 (5) of GN 42 of 2007.

It was further submitted that the law requires investigation to be conducted so as to ascertain if there are grounds for the employer to

conduct the disciplinary hearing. The applicant alleged to have suspended the respondent and have conducted the investigation before issuing a notice to attend a disciplinary hearing. However there is no proof regarding the same.

The applicant's counsel submitted that the award is irrational illogical and illegal in the sense that, the issues which were framed were;

- i. Whether there was a valid reason to terminate the applicant from the employment.
- ii. Whether the respondent adhered to the procedure for terminating the applicant.
- iii. What are the reliefs to the parties?

That the arbitrator abandoned the 1st issue and determined the issue raised suo motto on whether the agreement between the respondent and the applicant is in existence. As a result she found and concluded that the said contract had come to end on 16th November, 2016. The parties were not afforded with a right to argue on that issue hence denied a right to be heard.

That the arbitrator admitted Exhibit D1 when DW2 was cross examined. That was contrary to the rules of evidence. That the arbitrator arrived to the findings by incorporating terms and conditions that were not in the agreement between the parties. That CMA's record shows that the termination was unfair both substantively and procedurally.

He thus prayed for the grant of the application.

In reply to the applicant's contentions the respondent's counsel submitted that the arbitrator did not error in law or facts due to the reasons that the employment contract between the parties clearly stipulates that there shall not be an automatic renewal unless the employer expresses so in writing. Therefore there was no need for employer to issue any further notice since on 16th November, 2016 the employment contract came to an a end. The Managing Director prudently finalized the disciplinary hearing by issuing the decision of the appeal of the applicant.

On the 2nd issue it was contended that CMA had exercised its duties in accordance with the law, and accorded the parties with a chance to bring evidence and be examined accordingly. For that reason, even the

decision was based on the adduced evidence only. That the respondent executed his duty of proving the validity of reason for terminating the applicant. The misconduct of gross dishonest as provided under Rule 12 (3) (a) GN 42 was proved as the applicant was found with the respondent's electrical device illegally. That he contravened the rules of employment referring the cases of **Metcash Training Ltd/ a Metro Cash and Carry v Fobb & Another** (1998) 19 ILJ (LC) and **Leonidas Ngonge v DAWASCO**, Rev. No. 382 of 2013.

It was further stated that the other reason for termination was that the contract of employment came to an end on 16th November, 2016. If the appeal was not filed by the applicant, then the contract would have ended automatically on that date.

Regarding the 3rd issue, the respondent's counsel submitted that the respondent adhered to the procedure for terminating the applicant. That the applicant was issued with notice of intention to hold a disciplinary hearing on the allegation dated 4th November, 2016. The applicant was suspended pending investigation, On 7th November, 2016 the Disciplinary hearing was conducted, The applicant was unsatisfied with the outcome

of the hearing and appealed to the Managing Director on 11th November, 2016. That the applicant was afforded with the right to be heard and he was procedurally fairly terminated.

On the 4th issue the respondent's counsel averred that since the applicant was fairly terminated both substantively and procedurally, then he was not entitled to any relief. The applicant was not entitled to severance pay as his contract ended by reason of time. Referring Rule 13(c) of Written Laws (Miscellaneous Amendments) Act No. 2 of 2010.

It was further contended on the last issue that the arbitrator analyzed all the evidence adduced before and considered the position of law and adhered to the procedure required for arbitration proceedings as provided for under Rules 24, 25, 26 and 27 of GN 67, hence the award was rational, logical and lawful.

He thus prayed for dismissal of the application.

In rejoinder the applicants counsel reiterated what has been stated in submissions in chief.

Having gone through the contesting submissions of the parties, I believe this court has to determine the following issues;

- i. Whether the extended disciplinary hearing amounts to renewal of a contract by default.
- ii. Whether the provision of Section 37(2) of Cap. 366 RE. 2019 applies to the employee under fixed term contract.
- iii. Relief entitled to the parties.

Starting with the 1st issue for determination, it is undisputed that the parties had a contractual relation of one (1) year fixed term contract, which was supposed to end on 16th November, 2016. Having been charged with a misconduct, the disciplinary hearing was held on 7th November, 2016 whereby the applicant was found guilty.

It is on records that on 11th November, 2016 the applicant appealed to the Managing Director who terminated the applicant on 23rd November, 2016 as per Exhibit CSI VII (termination letter).

It is the applicant's allegation that his contract was renewed by default on basis that he continued to work even after the expiry of their contract and he was paid the salary of the month of November.

I have gone through the record and found no proof that he was still working with the respondent. And even if he continued to render service,

it was on his own will since the contract of employment (Exhibit CSI 1) is very clear under clause 1 that there will be no automatic renewal of the contract unless the employer expresses so in writing.

In regard to the salary paid to the applicant, since the disciplinary hearing had not been finalized as the applicant appealed to the Managing Director, the applicant was entitled to the salary for the days he worked prior to his termination. This did not mean there was renewal of contract by default.

In response to the 2nd issue, I had to go through the provisions of the Cap. 366 RE. 2019 where Section 36(a)(iii) provides that:-

*"Section 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**"*

[Emphasis is mine].

Rule 4(4) of GN 42 of 2007 provides that:-

*"Rule 4 An employer and employee shall agree to
terminate the contract in accordance to agreement.*

(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 provisions were insisted in the case of **Mtambua Shamte & 64 others Vs. Care Sanitation and Suppliers**, Rev. No. 154/2010 at Dar es Salaam, the Court held that:-

".....Explained 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."

In the circumstances of the matter in hand, the applicant's employment commenced on November 17th, 2015 and ended on 16th

November, 2016. It was a one (1) year fixed term contract. Therefore the applicant was not covered by Section 37(2) of Cap. 366 RE. 2019.

In respect to the 3rd issue, it is an established principle of law that in a fixed term contract of employment, the employee is only entitled to payment of the remaining period salary where no valid reason is adduced in terminating the contract. This was emphasized in the case of **Good Samaritan v Joseph Robert Savari Munthu**, Rev. No. 165/2011 HC Labour Division DSM (unreported) where the Court held that:-

"When an employer terminates a fixed term contract, the loss of salary by an employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action...."

In the case at hand there is no doubt that the applicant was paid all his salaries, thus he has nothing to claim.

Basing on the above findings the application is accordingly dismissed.

S.A.N. Wambura
JUDGE

10/07/2020

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AT DAR ES SALAAM

REVISION NO. 320 OF 2019

BETWEEN

ISAAK OLUTU APPLICANT

VERSUS

CSI ELECTRICAL LIMITED RESPONDENT

Date: 10/07/2020

Coram: Hon. W.S. Ng'humbu, Deputy Registrar

Applicant:

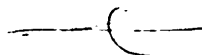
For Applicant: Mr. Kheri Kusekwa Advocate

Respondent:

For Respondent: Mr. Kheri Kusekwa holding brief for Advocate
Herman Lupogo

CC: Lwiza

COURT: The Judgment delivered this 10th July, 2020 in the presence of Mr. Kheri Kusekwa, Learned Counsel for the applicant who is also holding brief for Mr. Herman Lupogo, Learned Counsel for the respondent is certified to be the true copy of the original.



W.S. Ng'humbu

DEPUTY REGISTRAR

10/07/2020