IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 331 OF 2019

BETWEEN

AEA LIMITED..... APPLICANT

VERSUS

HILLARY KERARYO..... ..... RESPONDENT

JUDGMENT

Date of Last Order: 11/05/2020

Date of Judgment: 03/07/2020

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/392/18/159 dated 28/02/2019, the applicant **AEA LIMITED** has filed this application under the provisions of Rules 24(1), (2)(a)(b)(c)(d)(e)(f) and 28(1)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007 and Section 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 RE. 2019 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.392/18/159 dated 28th February, 2019 delivered by Hon. Chacha, B-Arbitrator.*
2. *Costs to application.*
3. *Any other reliefs.*

The application was supported by an affidavit sworn by Simon Getau Mungai the applicant's Principal Officer. In challenging the same, the respondent **HILLARY KERARYO** filed his counter affidavit.

The applicant was represented by Advocates from Apex Attorneys, while the respondent was represented by Mr. Mluge Karoli Fabian, Advocate. With leave of the 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 matter are that on 1st March, 2017 the respondent was employed by the applicant as a Technical Sales Executive on a one (1) year contract. He worked with the applicant until 24th October, 2017 when he issued a resignation notice. Upon receiving the

same, the applicant and respondent held thorough discussions. As a result the applicant promoted the respondent to a position of a Key Accounts Manager, and improved his remunerations.

On 30th October, 2017 the applicant served the respondent with a confirmation letter together with an offer of employment. It was not signed by the respondent on the ground that the offer did not contain the terms which were agreed in their discussion. However, he continued to work up to the 26th of March, 2018 when he was terminated for failure to sign the contract of employment. The applicant was aggrieved with the termination. He thus referred the matter to CMA whose decision was in his favour. Dissatisfied with CMA's award the applicant has now filed this application.

In his submissions the applicant's counsel submitted that the Arbitrator failed to consider the applicant's evidence which was adduced by DW1. That the respondent was employed in March, 2017 as a Technical Sales Executive on a one (1) year contract which was supposed to end on 28th February, 2018. That the respondent's resignation letter was not accepted by the applicant. Rather they agreed to adjust his terms of

employment including remuneration and issued a new contract which was admitted as Exhibit D1. That they confirmed his employment and the respondent continued to work though he refused to sign the new contract until his termination on 26th March, 2018.

It was further submitted that the arbitrator ought to have asked himself on which contract of employment was the respondent terminated on 26th March, 2018. Since the respondent's one (1) year employment came to end on 28th February,2018. That it was the respondent who wanted to terminate the contract after he wanted to be employed somewhere else. The law is very clear that the respondent was supposed to get the applicant to agree to an early termination, referring to Rule 6(1) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 which provides;

> *"Rule 6(1) where an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If there is no breach by the employer, the employee may lawfully terminate the contract before the expiry of the fixed*

term by getting the employer to agree to an early termination."

The applicant's counsel further contended that since the applicant allowed the respondent to continue working even after the expiry of his one (1) year employment contract on 28th February, 2018, that amounted to an automatic renewal as per Rule 4(3) of GN 42. That the respondent's position was Technical Sales Executive until his termination on 26th March, 2017 as far as the letter of offer dated 30th October, 2018 was not accepted by the respondent. That the arbitrator was wrong to find that Exhibit A4 (Confirmation and Promotion letter) was confirming a new contract which was supposed to commence on 1st November, 2017. That the awarded amount was wrong since it was based on a non-existing contract.

In reply to the applicant's submission, the respondent's Counsel argued that the respondent was unfairly terminated while holding a position of Key Accounts Manager which he was engaged on 1st November, 2017. The former Contract which he was employed as Technical Sales Executive ended on 31st October, 2017. That though the resignation letter

was not accepted and was withdrawn by the respondent, the agreement between the parties brought a new contract as per Exhibit A4 (the confirmation letter). That the withdrawal of the resignation letter was conditional as per their *consensus ad idem* that is why from 1st November, 2017 the respondent was paid according to what has been stipulated in Exhibit A5 (offer of employment).

It was further submitted that the applicant intended to mislead the court that, the respondent was not confirmed as a Technical Sales Executive until October, 2017. That there was no automatic renewal of the contract as the respondent was re-employed and given another offer of employment as per their agreement.

The respondent's counsel further contended that the arbitrator was right in his finding that Exhibit A4 was confirming the new contract which was supposed to commence on 1st November, 2017. That the new contract existed on the basis that the respondent was confirmed to the position of Key Account as Manager and was paid according to the agreement. The respondent commenced to perform the Key Account as Manager's tasks,

and the termination letter (Exhibit A6) was referring to the contract which commenced on 1st November, 2017.

It was further submitted that the ground of termination was alleged to be the respondent's refusal to sign an offer of employment. In the termination letter the applicant argued that signing of the employment contract is a mandatory legal requirement forgetting that the said contract did not reflect what was agreed between the parties. That the Arbitrator in his reasoning referred to the provisions of Rule 11(1) and (3) of GN 42 which stipulates that all employers should implement disciplinary policies and procedure which establishes the standard of conduct of their employee. That the applicant had no disciplinary policies and procedure that establishes the standard of conduct required. That the applicant contravened the provisions of Section 37(1), (2)(i) of Cap. 366, so the respondent was unfairly terminated.

Regarding the award, it was submitted that since the parties contract was of two (2) years and the respondent had worked for 5 months' only, then the arbitrator was right to order the award of 19

months, citing the case of **Good Samaritan V Joseph Robert Munthi,** Rev. No. 165/2011 where it was held that:-

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

That the applicant has not submitted anything in regard to the general damages awarded to the respondent meaning it was properly awarded.

He thus prayed for the dismissal of application for lack of merit.

In rejoinder the applicant's counsel reiterated his submissions in chief, and further submitted that the respondent is relying on the wording of the termination letter which has no power to change the position of the law. He thus prayed for application to be allowed.

Having carefully considered the parties submissions, I believe this Court is called upon to determine the following issues;

i. *Whether or not there was employment contract between the parties.*

ii. Whether or not termination was substantively fair.

iii. Whether or not termination was procedurally fair.

iv. The reliefs entitled to the parties.

1. Was there an employment contract between the parties?

It is the applicant's contention that the arbitrator did not determine which contract came to an end on 26th March, 2018. The fact that the respondent had not signed the offer of employment justifies that there is no new contract between them.

It is undisputed that prior to the respondent's notice of resignation, the parties had a one (1) year fixed term contract which was supposed to end on February, 2018. It is also undisputed that before the end of the 1st contract the parties renegotiated on the 2nd contract of 2 years, which confirmed and promoted the respondent to the position of Key Accounts Manager commencing on 1st November, 2017. Now the question is whether the respondent's refusal to sign the offer of employment means there was no contract?

I have carefully gone through the records and noted that;

I. From 1st November, 2017 the applicant started to perform the tasks as a Key Accounts Manager under the applicant's directives as it can easily be noted in paragraph 3 of the termination letter (Exhibit A6).

II. That the respondent was also paid on the terms provided in the confirmation and promotion letter (Exhibit A4), and

III. That the respondent was also terminated basing on the 2nd contract as he failed to meet the target set by the applicant.

Therefore in view of the above this court finds that the 2nd contract which commenced on 1st November, 2017 was an implied contract because through that negotiation, the parties agreed to abandon the 1st contract and engage in a new contract of two (2) years as per Exhibit A2 (reply to Job a job resignation notice) and Exhibit A4 (confirmation and Promotion letter). There was performance of the agreement, whereby the respondent performed his tasks as a Key Accounts Manager, and the applicant paid the respondent on the agreed terms.

The fact that the respondent did not sign the offer of employment does not invalidate the contract since the terms of that contract were

partly executed by both parties. Hence they accepted the contract by their conducts as it was held in the case of **Brodgen v Metropolitan Railway Co.** (1987) LR 2 APP Cad 666, that a contract can be accepted by the conduct of the parties.

Again in the case of **Smith v Hughes** (1871) LR QB 597 it was held that:-

> *"Whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*

2. Was the termination substantively fair?

It is a principle of law that, for termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as

provided for in Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004 which states that:-

> *"Section 37 (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 the employee's conduct, capacity or compatibility; or*
>
> *(ii) based on the operational requirements of the employer,"*
>
> *[Emphasis is mine].*

In the matter at hand, the respondent was terminated for failure to sign the employment contract as per Exhibit A6 and failure to meet the targets set by the applicant. CMA found that the respondent was unfairly terminated both substantively and procedurally on the basis that the applicant failed to prove if by refusing to sign the said contract, the

respondent had contravened any of his rules or regulations as required under Rule 12 (1) (a) of GN 42.

In regard to the issue of performance standard, Rule 17 of The Employment and Labour Relations (Code of Good Practice) Rules, GN 42/2007 provides for factors to be considered on termination for poor work performance. It provides as herein quoted:-

> *"Rule 17(1)* ***any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider-***
>
> *(a) Whether or not the* ***employee failed to meet a performance standard;***
>
> *(b) Whether the* ***employee was aware,*** *or could* ***reasonably be expected to have been aware, of the required performance standard;***
>
> *(c) The* ***reasons why the employee failed to meet the standard;*** *and*
>
> *(e) Whether the* ***employee was afforded a fair opportunity to meet the performance standard."***

[Emphasis is mine].

It is apparent from the termination contract that the respondent failed to meet the agreed revenue targets from the beginning of the contact in 1st November, 2018. His performance in delivering the set targets was NIL. Having gone through the evidence of the applicant I have noted that through Exhibit D1 (email from Simon Mungai) showing the agreed target to be 70 tractor unit annually or cash equivalent to TZS 3,500,000,000/=. However there is no evidence from the applicant showing financial report as to the status of the revenue from the date they engaged into a new contract. Also there is no proof as to what amount was expected to be produced within the 5 months period so as to meet the said target taking note that the said targets was to be met annually.

Since it is the finding of this court that there was only an implied contract, I fault the arbitrator's finding that the applicant had no valid reason of terminating the respondent. This is because the parties actually failed to reach an agreement on the terms of employment.

3. Was the termination procedurally fair?

For termination to be considered fair, an employer must adhere to the procedure for termination as provided under the laws. Section 37(2)(c) of Cap. 366 RE. 2019 provides:

> *"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove;*
>
> *(c) that the employment was* ***terminated in accordance with a fair procedure."***
>
> *[Emphasis is mine].*

In regard to the procedure, it is apparent that the applicant has not complied with any procedure for termination as required by the law. The applicant admitted the same based on the reason of circumstances of the case as per Rule 13(11) of GN 42. It is on record that when DW1 was cross examined he stated that they had a discussion prior to terminating the respondent the fact which has not been disputed.

Rule 13 (11) of GN 42 provides:

> *"In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines,*

the employer may dispense with them. An employer would have not to convene a hearing if action is taken with the consent of the employee concerned."

Since the parties were still negotiating and the respondent was disputing some of the contract terms as noted through Exhibit D2 (Email conversation) I join hands with the applicant's counsel that, according to the circumstances of that case there was no need of adhering to all the procedures as the contract was not yet sealed.

4. The reliefs entitled to the parties.

It is the applicant's contention that the Arbitrator wrongly awarded the respondent with a 19 months' salary and 6 months compensation as general damages.

Since it is the finding of this Court that the two (2) years term contract was an implied contract, and that the respondent worked for 5 months only, while negotiations were still taking place, I believe he cannot benefit from the same as the contract was not sealed. The principle established in the case of **Good Samaritan V Joseph Robert Munthi** (supra) as referred by the Arbitrator, cannot apply in the case at hand as

the parties were still negotiating on the terms of the contract. I therefore quash the Arbitrators order of payment of 19 months' salary and order the respondent be paid a salary of the days which he worked before his termination if the same were not paid.

As for the compensation of general damages, the Arbitrator awarded the respondent a tune of 16,500,000/= on the reason that he had secured a new profitable position with GF Truck Company. I find that the respondent is not entitled to the same as the law requires that the employee on a fixed term contract has to resign when the employer breaches the terms of the contract. On record there is no proof that the applicant breached any term of their contract. In that basis I quash the order for general damages.

In view of the above, the application is allowed with no Orders as to costs. CMA's award is herein revised and set aside.

S.A.N. Wambura
JUDGE
03/07/2020

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HILLARY KERARYO..... RESPONDENT

Date: 03/07/2020

Coram: Hon. F.A. Mtarania, Deputy Registrar

Applicant:

For Applicant: Mr. Mohamed Muya Advocate

Respondent: Present in person

For Respondent:

CC: Lwiza

COURT: Judgment delivered today in presence of Mr. Mohamed Muya Learned Counsel for the Applicant and the Respondent in person.

F.A. Mtarania

DEPUTY REGISTRAR

03/07/2020