

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

**REVISION NO. 51 OF 2020**

**BETWEEN**

**BANK M TANZANIA PLC..... APPLICANT**

**VERSUS**

**ANDREW BAZO SHIYO.....RESPONDENT**

**JUDGMENT**

Date of Last Order: 24/09/2020

Date of Judgment: 13/11/2020

**A. E MWIPOPO, J.**

The applicant namely **BANK M TANZANIA PLC** has filed the present application for revision against the award of the Commission of Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/DSM/ILA/R.1236/2017. The Applicant is praying for the following orders:-

- (1) That this Court be pleased to call for and examine the records of the decision / arbitral award of the Commission for Mediation and Arbitration at Dar Es Salaam by Hon. Kachenje J.J.Y.M.,

Arbitrator, dated 9<sup>th</sup> July, 2018 in Labour Dispute No. CMA/DSM/ILA/R.1236/2017 for the purpose of satisfying itself as to correctness, legality or propriety of the said proceedings and as to their irregularity therein, revise and set aside accordingly.

(2) Any other order that this Court may deem fit and just to grant.

The application is supported by the sworn affidavit of Neema Masanja, Principal Officer of the Applicant. The Affidavit contains two grounds of revision in paragraph 11. The grounds are as follows:-

- i. Whether the Arbitrator misconducted himself in law and fact by holding that the contract between the Applicant and the Respondent was breached by the Applicant as a result awarding the Respondent Tshs. 73,008,000/=.
- ii. Whether the Arbitrator erred in law and facts in holding that the claim for breach of contract was not time barred.

The Respondent namely Andrew Bazo Shiyo was employed for one year fixed contract by the Applicant on 13<sup>th</sup> July, 2010 as Manager ICT Hardware. The contract was renewed several times and on 7<sup>th</sup> September, 2017 the contract was renewed for 2 months. When the Contract came to an end, the Applicant decided not to renew the contract. Aggrieved by the Applicant

decision the Respondent referred the dispute to the Commission which decided in his favour. The Applicant was not satisfied with the Commission Award and he filed the present application.

Both parties to the application were represented. The applicant was represented by Mr. Rahim Mbwambo, Advocate, while the respondents was represented by Mr. Bernard Stephen, Advocate. The Court ordered hearing of the application to proceed by way of written submissions.

Submitting in support of application, Mr. Rahim Mbwambo argued that the Arbitrator misconducted himself to hold that the letter dated 7<sup>th</sup> September, 2017 is a contract in law and it was breached. The Applicant's witness – DW1 testified that the contract for six months entered on 5<sup>th</sup> April, 2017 was extended to two months period up to 7<sup>th</sup> November, 2017 because there were uncompleted task. The contract were tendered as exhibit BM1 collectively. The extended contract was not supposed to be treated as a basic contract. For that reason Rule 11 of G.N. No. 47 of 2017 is not applicable to the extension agreement. The Arbitrator erred to hold that there was expectation of renewal of one year contract based on the allegation that the Respondent had a contract of one year which was being renewed continuously from 2010 to 2017. There is no evidence to prove the

Respondent's allegation. Thus, the Arbitrator improperly arrived at the holding of expectation of renewal.

The Applicant's Counsel further submitted that the Arbitrator erred to award 10 months' salary compensation to the Respondent for pre mature termination of his contract. The agreement entered on 7<sup>th</sup> September, 2017 was not a fully contract. Also, the Respondent basic salary Tshs. 5,076,364/= but the Arbitrator calculation was based on gross salary of Tshs. 6,084,000/= instead of basic salary. Gross salary includes transport cost, PPF contribution, meal allowance, airtime allowance and housing allowance. Even the two months' salary awarded to the Respondent as payment in lieu of termination notice was not proper as the contract ended due to lapse of time.

On the second ground of revision, it was submitted by the Applicant that if the Respondent was aggrieved by extension agreement dated 7<sup>th</sup> September, 2017 then he was supposed to file a dispute to the Commission within sixty days from the date of signing the agreement. However, the Respondent referred the dispute to the Commission on 13<sup>th</sup> November, 2017 while he was supposed to refer it by 7<sup>th</sup> November, 2017, thus the same was time barred contrary to rule 10 (2) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. The Applicant prayed for the Commission Award to be revised and set aside.

The Respondent Counsel contended to the Applicant's submission and submitted that the Respondent was employed by the Applicant for a fixed term contract from 2010 to 2017. The employment contracts were carrying forward the terms and conditions of the previous contracts. The evidence from the testimony of the Applicant – PW1 shows that he had an expectation for his contract to be renewed for the reason that he received continuous renewal of his contracts of employment for a fixed term of one year from 2010 to 2017. Also DW1 admitted in cross examination that the Respondent was employed for a fixed term contract of one year renewable for a period of six years which carried forward fundamental terms and condition as well as rights and obligation of the parties.

It was submitted further by the Respondent that he was employed in a managerial post and the contract was supposed to be for a period of not less than 12 months'. The two months' contract signed on 7<sup>th</sup> September, 2017 was against G.N. No. 47 of 2017. The letter of service dated 6<sup>th</sup> November, 2017 which is part of exhibit BM1 collectively certifies that the Respondent has worked for the Applicant from 10<sup>th</sup> July, 2010 to 7<sup>th</sup> November, 2017. Therefore, there is sufficient evidence to prove that there was expectation of the renewal of contract.

On Applicant's submission that the Respondent was not entitled to be awarded Tshs. 73,008,000/=, the Respondent's Counsel submitted that under section 41(1) (b) (ii) of the Employment and Labour Relations Act, 2007, the period of notice is supposed to be not less than 28 days for employee employed on monthly basis. The law provides further in section 41(2) of the Act that the period of notice may be longer if agreed by parties. As the contract of employment provides for two months' notice or one month's salary in lieu of notice, the 24 hours' notice which was issued by the Applicant was not proper and the Commission rightly awarded the Respondent to be paid with two months' salary in lieu of notice. As the Respondent was employed for a fixed term contract renewable yearly save only for the last contract of two months', the last contract was contrary to the law which provides in rule 11 of G.N. No. 47 of 2017 that all fixed contracts for professionals and persons of managerial cadre shall not be for a period of less than 12 months. Therefore, Respondent was supposed to be compensated for the remaining 10 months' from the mandatory period of 12 months' contract by payment of the salary which is Tshs. 6,084,000/=.

On the Applicant's second ground of revision the Respondent submitted that the ground is new one which was raised for the first time on submission. The Respondent argued that the dispute arose on 6<sup>th</sup> November,

2017 at Dar Es Salaam and it was referred to the Commission on 20<sup>th</sup> November, 2017. The Respondent was given 24 hours' notice of non-renewal of the employment contract on 6<sup>th</sup> November, 2017 that is when the dispute arose. Therefore, the dispute was referred to the Commission within time.

In rejoinder, the Applicant retaliated his submission in chief. The Applicant submitted further that a things reduced in writing cannot be proved by oral evidence under section 100 of the Evidence Act, Cap. 6 of R.E. 2019, thus the Respondent was supposed to prove that he was employed by the Applicant for the period of 6 years. The Respondent was employed as DATA Entry Clerk in the contract dated 5<sup>th</sup> April, 2017 which was latter extended for two month's thus he was not in the managerial cadre or a professional employee. The Applicant in alternative submitted that if the Court find that the Respondent employment was supposed to be for one year then it has to count from 5<sup>th</sup> April, 2017 when the contract was renewed and not on 7<sup>th</sup> September, 2017 when the contract was extended as the extension agreement was part of the 5<sup>th</sup> April, 2017 contract.

From the submissions, record of proceedings, Commission award and the pleadings, there are four issues for determination. These issues are as follows;-

1. Whether the Commission for Mediation and Arbitration had jurisdiction to entertain the dispute.
2. Whether the Applicant terminated the Respondent's employment.
3. If the answer to the second issue is positive, then whether the termination was fair.
4. What are the remedies to both parties?

The Applicant submitted regarding the first issue that the dispute did arise on 7<sup>th</sup> September, 2017 when the Applicant gave 2 months' contract of employment to the Respondent as result the Respondent was supposed to refer the dispute for breach of contract to the Commission within 60 days as per rule 10 (2) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. The Respondent contended the Applicant's submission on the point that the dispute arose on 6<sup>th</sup> November, 2017 when the letter of non-renewal of contract was served to him. I agree with Respondent submission that the dispute before the Commission did arise after the Respondent was served with a letter on non-renewal of the employment contract – Exhibit BM2. It is the Exhibit BM2 which informed the Respondent that the contract would be fulfilled on 7<sup>th</sup> November, 2017 hence no possibility of any further renewal of the contract. Thus, this is the date the



dispute did arise. As the dispute was referred to the Commission 14 days later then the dispute was referred within time as it was rightly held by the Commission. Therefore, the answer to this issue is positive that the Commission had jurisdiction to determine the matter as it was referred within time provided by the law.

In determination of the second issue, it is relevant to traverse provisions of the law on the termination. The Employment and Labour Relations Act, 2007 provides in section 36 the scenario amounting to termination for the purpose of fairness of termination. The Section reads, I quote:-

"36. For purposes of this Sub-Part

(a) "termination of employment" includes

- (i) a lawful termination of employment under the common law;
- (ii) a termination by an employee because the employer made continued employment intolerable for the employee; and
- (iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;
- (iv) a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave;
- (v) a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them;

(b) "terminate employment" has a meaning corresponding to 'termination of employment'."

The termination of employment contract is considered to be fair where the reason for termination is valid and fair and where the procedure for termination is fair. Under section 37 (2) of the Employment and Labour Relations Act, 2004, it is the duty of the employer in dispute for termination of employment to prove that the termination was fair substantively and procedurally. The Section 37 (2) reads as follows:-

*"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, and*
- (c) that the employment was terminated in accordance with a fair procedure."*

Thus, the termination of employment is considered to be unfair if the employer fails to prove that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair. Once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise. (see. **Amina Ramadhani vs. Staywell Apartment Limited**, Revision No. 461 of 2016, High Court Labour Division, at Dar Es Salaam; and **Association of Tanzania Tobacco**

**Traders vs. Ahmed Ally Ahmed**, Revision No. 11 of 2012, High Court Labour Division, at Tabora).

In the present case, the trial Arbitrator held that the termination was not valid as it contravened the law and conditions of the employment contract as the Respondent was expecting renewal of the contract. In his submission, the Applicant was of the view that the two months' agreement was extension of the contract entered on 5<sup>th</sup> April, 2017 hence it was not a basic contract. The extension agreement was for the purpose of completing the specific task.

I read the letter dated 7<sup>th</sup> September, 2017, with the heading "RE: EXTENSION OF EMPLOYMENT CONTRACT". The content of the letter shows that the Applicant decided to extend Respondent's employment contract for two months' up to 7<sup>th</sup> November, 2017 and all terms and conditions remains as in employment contract dated 5<sup>th</sup> April, 2017. Thus, it is clear that the letter was not an agreement for specific task as alleged by the Applicant but an extension of the six months' contract dated 5<sup>th</sup> April, 2017. Thus, it is my finding that the letter dated 7<sup>th</sup> September, 2017 was extension of the 6 months' contract entered on 5<sup>th</sup> April, 2017.

The Applicant alleged that the requirement of 12 months' contract to employee in managerial cadre or professional is no applicable to the

Respondent since he was a data entry position. I have read the said contract which shows that the Respondent was offered a position in the Funds Transfer Unit and he will be reporting to the Head of Funds Transfer of the Bank. The contract did not provide the Respondent position. Even the previous contracts dated 6<sup>th</sup> January, 2017 does not provide the position or title of the Respondent in the new department. The letter revoking the suspension – Exhibit BM 4 provides a picture regarding the reason for Respondent's transfer was based on agreement that upon resuming to work from suspension the Respondent will be working in the Fund Transfer Unit. However, the post was not named. The contract dated 19<sup>th</sup> July, 2016 which is part of Exhibit BM1 shows that the Respondent was employed in the position of the Manager ICT. This contract and other contracts before this one shows that the Respondent was employed in a position of Manager ICT. Therefore, he was in managerial cadre since the following contracts did not state if the Applicant was no longer in managerial cadre.

As it was held by the Arbitrator, after the coming into operation of the Employment and Labour Relations Regulations on 24<sup>th</sup> February, 2017, a contract for a specified period of time for professionals and managerial cadre shall be for a period of not less than twelve months. Thus, the contract for specific period of time that followed after the coming of the Regulation were

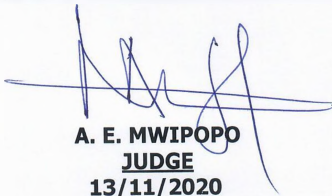
supposed to be for a period of not less than 12 months. The last contract entered was for 6 month's which was contrary to the law. The contract was extended for 2 more months' making the total period of the contract to be 8 months'. This means the contract was terminated four months' before the minimum period of 12 months' for contract of employees' of managerial cadre or professionals. Therefore, I find the Applicant terminated the Respondent 4 months' before the expiry of the legal period of the contract of employment according to law.

The last issue is what remedies parties are entitled? The Arbitrator awarded the Respondent to be paid by the Applicant Tshs. 60,840,000/= being 10 months' salary compensation for the remaining period of the specific contract and Tshs. 12,168,000/= being two months' salary in lieu of notice. The Applicant argued that as the contract of employment expired the Respondent was not supposed to be paid 2 months' salary in lieu of notice or 10 months' salary compensation for unfair termination. In opposition the Respondent submitted that the award was in accordance with the law. As, I have held that the contract was terminated after 8 months' the period which is contrary to the mandatory 12 months' period for specific term contract provided by the law, then the Applicant has to pay the Respondent for the

salary compensation for the remaining period of the contract according to the law.

The evidence available in Exhibit BM1 shows that the Respondent salary was Tshs. 6,084,000/= and not Tshs. 5,076,364/= as alleged by the Applicant. There is nothing to prove that the salary included the allowances as alleged by the Applicant. I'm of the opinion that the calculation of the compensation and notice of termination has to be on the basis of the Respondent salary contained in the last specific contract of employment which is Tshs. 6,084,000/=. Thus, Applicant has to pay Tshs. 25,360,000/= being Four months' salary compensation and 12,168,000/= being two months' salary in lieu of notice.

Therefore, the application is partly allowed as discussed herein. The Commission Award is hereby set aside. The Applicant is ordered to pay the Respondent a sum of Tshs. 37,528,000/=being four months' salary compensation for unfair termination and two months' salary in lieu of notice of termination. Each party to this application to cover his own cost of the suit.



**A. E. MWIPOPO**  
**JUDGE**  
**13/11/2020**