

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

REVISION NO. 339 OF 2019

BETWEEN

TANZANIA RUIDAR COMPANY LTD.....APPLICANT

VERSUS

SAID HATIBU AND OTHERS.....RESPONDENTS

JUDGMENT

Date of Last Order: 29/09/2020

Date of Judgment: 20/11/2020

A. E. MWIPOPO, J

The respondents namely **SAID HATIBU, HEMED KASIMU, JACKSON GAYO MOKORORO** and **OMARY SHABANI SEFU** were employed by the Applicant namely Tanzania Ruider Company Limited as a security guards on divers' dates. They were terminated from employment on 13th October, 2018. Aggrieved by the Applicant's decision, the Respondents referred the matter to the Commission for Mediation and Arbitration (CMA) where the dispute was heard and decided in their favour. Dissatisfied with the Commission award, the applicants filed this application for revision.

The applicant is praying for the Orders of the Court in the following terms:-

- (i). That, the Court be pleased to revise an award on a labour dispute between the parties which was delivered by Hon. Amos, Arbitrator, on 28th February, 2019, and make order quashing and setting aside the said award against the Applicant.
- (ii). Any other relief this Court may deem just fit and equitable to grant.

The application is accompanied by Chamber Summons and supporting Affidavit of Augustino E. Ndomba, Principal Officer of the applicant. The affidavit contains 5 legal issues that arises from material facts in paragraph 4. The issues are as follows:-

- a. That the arbitrator grossly misdirected herself and erred both in law and fact by disregarding the evidence adduced by the respondent.
- b. That the arbitrator erred both in law and fact by deciding that the employment contract between the Applicant and Respondents herein was renewed by default.
- c. That the arbitrator grossly misdirected herself by finding that the letters collectively admitted as exhibit P2 amounted to a termination letter.

- d. That the arbitrator erred both in law and fact by admitting Exhibit P2 as part of evidence.
- e. That the testimony by PW was unlawfully procured and admitted.

Hearing of the Application proceeded orally. During hearing, both parties were represented. Mr. Augustino Ndomba, Advocate, appeared for the applicant, whereas, Ms. Mwanakombo Chaponda, Personal Representative, appeared for the respondent.

The Applicant Counsel submitted on each of the 5 grounds of revision contained in the Affidavit. He argued on the first ground of revision that the complaint was referred to the CMA out of 30 days provided by the law for referring matter concerning termination of employment to the Commission. The issue was raised during the hearing of the dispute at the Commission. The CMA form No. 1 shows that the respondent was terminated on 13/01/2018. The matter was referred to the CMA on 20/02/2018 which is out of 30 days provided by the Law.

It was submitted by the Applicant on the second ground that the Applicant tendered exhibit D1 and D2 which were admitted. Exhibit D1 was contract of employment which was admitted without objection. Exhibit D1 shows that the employee contract were ending on 31/12/2017. The last date which the Respondents reported to work was on 29/12/2020. The

Attendance Register shows that the employees did not report in their office on the 30/12/2020. The Respondents witness PW1 testified that the contract of employment tendered by the employer was false one. The PW1 tendered their contract of employment which was admitted as exhibit P1. The exhibit P1 was a photocopy and the Applicant here in objected to its tendering but the same was admitted at the CMA record as the exhibit P1. In their testimony, the respondents insist that they were permanent employees the evidence which contradict the Exhibit D1 and DW1 testimony. There is no evidence whatsoever which shows that the respondents continued with their work after the end of the contract period. This means that the Arbitrator erred to hold that the contract was renewed by default.

The Applicant Counsel argued ground no. 3 and 4 together. He submitted that there is nowhere in the handwritten CMA proceedings where PW1 tendered the letter which was admitted by the Commission as Exhibit P2. Out of nowhere, the Arbitrator admitted the letter as Exhibit P2. This was not a proper procedure by the Commission. Also the typed proceedings differ from the handwritten proceedings. The difference is substantive as the Arbitrator added some words in typed proceedings which were not what was stated before the Commission. In page 15 of the typed proceedings it appears that PW1 prayed to tendered the termination letter but those words can not be found in the handwritten proceedings. Also the 4 last lines of the

last paragraph in page 15 of the typed proceedings contains the Arbitrator reason for admitting the termination letter as Exhibit-P2, the reason which were not part of the handwritten proceedings. The words were relied by the Commission in reaching its decision.

Also in page 14 of the typed proceeding in line 15 the words "pray to tender the letter as exhibit" are not found in the handwritten proceedings. The same page in the two last lines the phrase "pale ambapo muamuzi anaona inafaa" were not in the handwritten proceedings. On basis of the above points the Applicant prayed for exhibit P2 to be expunged from the Record/proceedings as it was wrongly admitted. The exhibit P2 was just a copy as the original document was never tendered to the court.

The Applicant Counsel abandoned their last ground of the revision, the ground number 5. Then, he prayed for the application to be allowed, CMA proceeding be quashed and the Award be set aside.

Replying to the Applicant's submission, Ms. Mwanakombo Chaponda, Personal Representative for the Respondents, submitted on each of the grounds as submitted by the applicant. On the first ground of the Revision, she argued that the Hon. Arbitrator considered all the evidence tendered by both sides basing on the issue raised. This can be seen in page no. 4 and 5 of the Commission Award. Both sides were heard by the Commission before delivery of the award.

On the second ground, it was submitted by the Respondent that the contract of employment was expiring on 31/12/2017. After the expiry the contract period the Respondents' continued to work with the Applicant until 13/01/2018 when the Applicant terminated their employment. The termination letter was issued to the respondent on 13/01/2018. The law is clear under rule 4(3) of GN No. 42 of 2007, that a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract. This means that from the moment they continued with their employment after expiry of the fixed term contract their contracts of employment automatically were renewed. Thus, the Arbitrator rightly held that Respondents' contracts were automatically renewed.

The Respondent submitted further that the employer failed to prove that the Respondents did not enter into the office after expiry of their contract. Also, the employer has the duty to prove that the termination was fair but he failed. In page 6 of the Award the Commission held that Exhibit D2 shows attendance of the employee on November and December, 2017. There is no evidence to prove that the respondents were not working in their workplace from 1-13 January, 2018. The presence of the employer's letter to the employees dated 13/01/2018 is a proof that the respondent continue to work for the Applicant and as a result their employment contract automatically renewed itself.

Regarding the Applicant's submission on the 3rd and 4 grounds of revision, the Respondents argued that Arbitrator rightly held that Exhibit P2 was termination letter since it ended the employer employee relationship. The exhibit P2 was among the listed document intended by the respondent during the hearing. The exhibit P2 was tendered and before it was admitted the applicants were given chance to object. After discussion, exhibit P2 was properly admitted. The procedure of admitting it was followed by the Commission. The applicant had no or objection.

Regarding the difference in the typed proceedings and handwritten proceedings, the Respondent submitted that the typed proceedings and handwritten proceedings were constructed by one person. What is contained in both proceedings are proper as long as the words used have no problem to the Applicant or cause no injustice to the Applicant. The Respondent prayed for the application be dismissed for lack of merits and the CMA Award be upheld.

In rejoinder, the Applicant retaliated his submission in chief. The Applicant emphasized that the exhibit P2 does not amount to termination letter as it informed the respondents that their employment contract ended on 31/12/2017.

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

- i. Whether the Commission for Mediation and Arbitration had jurisdiction to entertaining the complaint referred by the Respondents.
- ii. Whether there was a reasonable expectation for the renewal of Respondents fixed term contracts of employment.
- iii. Whether the Applicant unfairly terminated Respondents' employment.
- iv. What remedies are entitled to parties?

Starting with first issue whether the Commission for Mediation and Arbitration had jurisdiction to entertaining the complaint referred by the Respondent, the Applicant submitted that the complaint was referred to the CMA out of 30 days provided by the law for referring matter concerning termination of employment to the Commission. In reply, the Respondent submitted that the matter was referred to the Commission within time and both parties were heard.

The evidence available in record especially the CMA form No. 1 shows that the Respondents was terminated on 13/01/2018. The matter was

referred to the CMA by the 1st Respondent, Said Hatibu, where it was registered as Labour Dispute No. CMA/DSM/TMK/55/2018. On 20/02/2018 the Commission did strike out the application with 14 days leave to refile the proper labour dispute. Even though there is no evidence as to when the labour dispute no. CMA/DSM/TMK/55/2018 was filed in the CMA, it is clear that the subsequent labour Dispute No. CMA/DSM/TEM/139/2018/59/2018 was filed following the leave granted by Hon. Abdallah, Mediator, in his ruling dated 20/02/2018.

The Applicant filed the notice of the Preliminary Objection before the Commission on 02/05/2018 that the Application was filed out of time. The preliminary objection (P.O.) was heard by the Commission on 30/07/2018 where it was dismissed for the reason that the Labour Dispute was filed after the Respondents were granted leave by the Commission to file a Labour Dispute containing all Respondents on 20/02/2018. I'm of the same opinion with the Arbitrator that Commission had jurisdiction to entertain the Labour Dispute No. CMA/DSM/TEM/139/2018/59/2018 as it was filed following the 14 days leave granted by the Commission on 20/02/2018 in Labour Dispute No. CMA/DSM/TMK/55/2018. The Respondents filed the dispute on the same date according to CMA Form No. 1. Thus, the first issue is answered in positive that the Commission had jurisdiction to entertain the matter.

The second issue is whether there was a reasonable expectation for the renewal of the Respondents fixed term contracts of employment. The Applicant submitted that the Respondents contracts of employment came to an end on 31/12/2017 and there was no expectation of renewal as the Respondents did not proceed to work with the Applicant after 29/12/2017. In the contrary, the Respondents submitted that they continued to work after expiry of their contract until 13/01/2018 when the Applicant terminated their contract of employment.

The relevant provisions guiding on the issue of the expectation of renewal of the fixed term contract is section 36 (a) (iii) of the Employment and Labour Relations Act, 2007, read together with Rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. Section 36 (a) (iii) of the Employment and Labour Relations 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 (1) and 4(2) of the G.N. No. 42 of 2007, provides that termination of the contract of employment in accordance with the employer and employee’s agreement. The Rules provides further that for the fixed

term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise. The G.N. No. 42 of 2007 provides in rule 4 (3) for reasonable expectation of renewal as provided under section 36 (a) (iii) of the Act. The rules reads as follows, I quote:-

4 (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.

Back to the evidence available in record, the Respondents contracts of employment – Exhibit D1 collectively shows that the Respondents were employed by the Applicant for a fixed term contract of 12 months from 01/01/2017 to 31/12/2017. Exhibit D1 is the only evidence proving that Respondents were employed by the Applicant from 01/01/2017 to 31/12/2017 as Exhibit P1 which was tendered by PW1 is the contract of employment of the 3rd Respondent namely Omary Sefu for one year starting from 01/01/2016 to 31/12/2016 renewable for another period of one year. On the 13th January, 2018 the Applicant did write a termination letter – Exhibit P2 which informed the 3rd Respondent namely Omary Shabani Sefu that his contract of employment has come to an end and there will be no further renewal of the contract. The letter states further that the 3rd Respondent has to take his monthly salary if he still did not take it. Exhibit P2 is the only evidence which prove that the 3rd Respondent and not others

Respondents continued to work with the Applicant after the contract period expired. I'm of the opinion that if the 3rd Respondent was not working with the Applicant by 13/01/2018, then why the Applicant decided to write Exhibit P2 informing the 3rd Respondent that his contract has expired and there will be no further renewal of the contract? The answer is that the 3rd Respondent was still working for the Applicant at the time of writing Exhibit P2.

The Applicant argued that the Exhibit P2 was not properly tendered and admitted by the Commission. Also, the Applicant was of the opinion that there are differences in the Commission proceedings between the handwritten and the typed proceedings as a result the Exhibit P2 has to be expunged from the proceedings. I have read both typed and handwritten Commission proceedings. The hand written proceedings shows that when PW1 was introducing the Exhibit P2 before the Commission, the Applicant legal Officer namely William Fungo asked the Arbitrator if the letter is going to be admitted as exhibit then it has to be recorded that the letter has additional words annotated by the witness showing that the witness is rejecting to sign the new contract. PW1 replied that if the Applicant is objecting the letter then they have to produce before the Commission the original documents in their possession. Then the Arbitrator admitted the letter as Exhibit P2. From this evidence from record it is clear impliedly that the witness tendered the letter that is the reason the Applicant Legal Officer

objected. Thus, I find that the Exhibit P2 was properly tendered and admitted by the Commission.

Regarding the differences in the words contained in the typed and handwritten proceedings, I'm of the opinion that the differences were not fatal as the meaning of the proceedings is the same. The major difference is found in the 4 last lines of the last paragraph in page 15 of the typed proceedings where the Arbitrator provided reasons for admitting the letter as Exhibit-P2, the reason which were not found in the handwritten proceedings. The Applicant is of the view that the words were relied by the Commission in reaching its decision. Reading the Commission award, the Arbitrator reached the decision after evaluation of all the evidence including contracts of employment and the termination letter – Exhibit P2. Thus, it is not true that the Arbitrator relied on the reasons for admitting Exhibit P2 in reaching the decision.

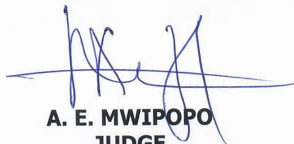
The Applicant argued that Exhibit P2 was just a copy as the original document was never tendered to the court. However, it is in record that the Applicant Counsel did not object the tendering of the copy, the objection was on the annotation in the Exhibit P2. Thus, the allegation is just an afterthought which cannot be raised at this stage as the Applicant did not dispute it before the Commission. Moreover, the Commission is allowed to regulate its own proceedings in order to reach fair and just decision. Thus, I

find Exhibit P2 was properly tendered and admitted before the Commission. The Exhibit P2 together with contracts of employment – Exhibit D1 the evidence is sufficient to prove that the 3rd Respondent employment was terminated unfairly after there was expectation of renewal of the fixed term contract. Concerning the remaining 3 Respondents there is no evidence whatsoever to prove that they continued to work after expiry of their contract on 31/12/2017 hence there was expectation of the renewal of their fixed term contracts.

The third issue is whether the Applicant unfairly terminated Respondents employment. Section 36 (a) (iii) of the Employment and Labour Relations Act provides that termination of employment includes a failure to renew a fixed term contract on the same or similar terms, if there was reasonable expectation of renewal. The section is read together with rule 4(4) of the G.N. No. 42 of 2007 which provides that 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. As I have found in the second issue that there was expectation of renewal of the fixed contract of the 3rd Respondent namely Omary Shabani Sefu, then failure to renew the fixed-term contract amount to unfair termination. Thus, I find that the 3rd Respondent was unfairly terminated.

The last issue is what are remedies to the parties? As I have find out that the 3rd Respondent was unfairly terminate, then probable, direct, foreseeable and reasonable consequence of employer's action is the employee loss of salary for the remaining period of the unexpired term. Thus, the employer is supposed to compensate the employee for the loss for the remaining period of the contract which is 11 months' and 18 days, one month's salary in lieu of notice and one month's salary as leave pay. As the evidence available in record shows that the 3rd Respondent salary was shillings 150,000/=, the Applicant is ordered to pay the 3rd Respondent a sum of shillings 2,053, 842/=. To the remaining Respondents, there is no evidence whatsoever to prove that they were unfairly terminated but rather their contract of employment expired.

Therefore, the CMA award is hereby set aside accordingly. Each party to bear its own cost of the suit.



A. E. MWIPOPO
JUDGE
20/11/2020