

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

**REVISION APPLICATION NO. 591 OF 2019**

**BETWEEN**

**MALAIKA B. KAMUGISHA.....APPLICANT**

**AND**

**LAKE CEMENT LTD.....RESPONDENT**

**JUDGMENT**

Date of Last Order: 18/09/2020

Date of Judgment: 02/10/2020

**A. E. MWIPOPO, J**

This Revision application arise from the decision of Hon. H. Amos, Arbitrator dated 24<sup>th</sup> May, 2019, in labour dispute no. CMA/DSM/TEM/491/2018/180/2018. The Applicant Malaika B. Kamugisha being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) filed the present application praying for the following orders:-

1. That, the Court be pleased to call and examine the records of Labour Dispute No. **CMA/DSM/TEM/491/2018/180/2018** before the Commission.
2. That, the Applicant seeks the Court to set aside the impugned Arbitrator's Award which has been improperly and illegally procured in favour of the respondent namely Lake Cement Ltd.
3. That, this Hon. Court be pleased to make an order that the Applicant to be re-instated to his former employment without loss of employment rights which has to be paid from the date of unfair termination up to the date of final payment and not less than forty eight months remuneration with compensation for torture and discrimination.
4. That, this Hon. Court be pleased to clarify on the payment of the Applicant's salaries, and order that the applicant be re-instated with all his employment rights or remuneration and other benefits from the date of unfair suspension to the date of re – instatement or final payment of salaries and compensation of discrimination.
5. Any other relief that this Court may deem fit to grant.

The application is supported by the applicant's affidavit which contains six legal issue in paragraph 20. The legal issues are as follows:-

- i. Whether the arbitration award issued by the Commission is based on the substantive evidence adduced during the arbitration.

- ii. Whether the arbitration award issued by the Arbitrator was erred for failure to determine the ground of discrimination based on poor health condition of the Applicant caused by respondent workplace environment.
- iii. Whether the Applicant was entitled for granting general damages as compensation claimed for the injuries and mental torture sustained by the applicant.
- iv. Whether the award of the arbitrator was granted after considering the law and the proof thereof.
- v. That the Hon. Arbitrator erred in law and facts to analyze the documentary evidence submitted before her. That in the interest of Justice the prayers set forth in the Notice of Application and the Chamber Summons be granted.
- vi. Whether the Commission decision not to order re-instatement of the applicant was lawful and justified.

The brief history of the application is that the applicant was employed on 3<sup>rd</sup> March 2015 for the one year fixed contract by the respondent Lake Cement Ltd in the position of Machine Operator. The contract was renewed several times and the last contract signed was for the period of six months which was ending on the 1<sup>st</sup> August, 2018. The respondent decided not to renew the applicant contract of employment after expiry of the last contract

on the 1<sup>st</sup> August, 2018. Aggrieved by the employer's decision the applicant referred the dispute to the CMA which awarded the applicant with payment of shillings 317,000/= being salary for 12 days which the applicant worked without being paid and allowance for 35 extra hours. The Applicant was not satisfied with the Commission Award and he filed the present application for revision.

Both parties to the application were represented, Mr. Michael Deogracious Mgombozi, Personal Representative, represented the Applicant whereas the respondent was represented by Mr. George Vedasto, Advocate. The hearing of the application proceeded by way of written submission following the Court Order.

Submitting in support of the application, Mr. Michael Mgombozi submission was in respect of all legal issues as contained in the affidavit. He argued that the trial Arbitrator erred to hold that the contract was terminated for expiry of the contract period. The nature of the contract was renewable and the applicant has worked with the respondent for more than four years. The arbitrator contravened section 14 (1) (b) of the Employment and Labour Relations Act, 2004, which provides for fixed term contracts. The Arbitrator failed to evaluate the evidence tendered by the applicant that he was working to the respondent until he was terminated and that after the first contract, there was continuation of the employment. The respondent failed

to renew the contract under similar terms as a result it amount to termination of employment contract. He cited the case of **Jackson Jerome vs. Ultimate Security (t) Ltd**, Revision No. 236 of 2011, High Court, Labour Division, at Dar Es Salaam, (Unreported), to support the position.

The applicant submitted that the respondent terminated the applicant while he was undergoing treatment which was paid through respondent insurance policy according to Exhibit P4. Therefore it was wrong for the respondent to terminate the applicant while undergoing treatment at hospital. The applicant had right to work provided under the Constitution of United Republic of Tanzania of 1977.

The applicant was of the view that there was no valid reason provided by the respondent for terminating the applicant's employment as provided by section 37 (2) of the Employment and Labour Relations Act, 2004. That the applicant have right to be heard on the reason for termination which is provided under rule 8 (1) (b) and (c) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007. Also, the applicant have committed no offence during the period of employment to warrant to be terminated. To support the position the applicant cited the case of **Denis Kalua and Another vs. Flamingo Cafeteria**, Revision No. 210 of 2010, High Court, Labour Division, at Dar Es Salaam, (Unreported).

The personal representative for the applicant argued that the Arbitrator's Award is ambiguous as he found the termination to be fair and there was no remedy to the applicant as provided under section 44 of the Employment and Labour Relations Act, 2004. The applicant is entitled to the damages as compensation for applicant's injury and mental torture. The arbitrator blessed unfair labour practice conducted by the respondent. The applicant prayed for the application to be allowed.

In reply, the respondent commenced by stating that the application is bad for being uncertain, confusing, too demanding and for being drawn by unqualified person. Mr. Venance F. Lukoa who drafted the application is not in the roll of advocates as result the application is bad. Then, the respondent proceeded to submit that the evidence available in record shows that there were two issues for determination before the Commission. The issues are whether there was a breach of contract and to what relief are parties entitled. The applicant failed to prove that the contract was terminated prematurely as he alleged. The respondent was able to prove that the contract expired automatically on lapse of time through Exhibit D1 and testimony of DW1. Also Exhibit P7 proved that the applicant was not entitled to any privileges provided under collective bargaining agreement.

Regarding the issue of discrimination, the respondent submitted that there is no issue of discrimination committed to the applicant. The applicant did not state the acts done to him which amount to be discrimination.

On the applicant's argument that the Commission erred for failure to grant the applicant with general damages as compensation for his injury and mental torture, the respondent submitted general damages are granted where there is evidence that the applicant suffered injury as result of the respondent's act. Expiry of the contract does not amount to mental torture as the employee knew as to when the contract was ending. On the prayer for re-instatement, this can only be granted if the termination was unfair. However, in this matter the contract of employment automatically expired after expiry of contract period.

The respondent argued that the applicant alleged in his affidavit that he contacted disease in the course of his employment, however he did not inform the employer about the disease or report to the OSHA. Exhibit P6 shows that the applicant was supposed to appear to OSHA but he did not appear to OSHA for exit medical examination.

The relationship between the applicant and the Respondent was contractual and under rule 4 (2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, where the contract is a fixed term contract, the

contract shall terminate automatically when the agreed period expires, unless the contrary provided otherwise.

The applicant prays for the application to be dismissed and the CMA Award be upheld.

In rejoinder, the applicant stated that Mr. Vincent F. Lukoa is a member of trade union known as TUPSE hence he has locus to draft document and to appear before the Commission. Then, the respondent retaliated his submission in chief and argued that the six months contract which was issued on 2<sup>nd</sup> February, 2018, was illegal as it contradict section 14 (1) (b) of the Employment and Labour Relations Act, 2004, and Rule 11 of G.N. No. 47 of 2007 which provides that a contract for specified period referred to under section 14 (1) (b) of the Act shall not be for a period of less than twelve months. For that reason the last contract was illegal.

From above submissions, CMA records and the CMA Award, issues for determination of the revision application are as follows:

- i. Whether the termination of the applicant's employment contract was fair.
- ii. What are remedies entitled to the parties.

Before commencing to determine issues, I would like to state that I do not see any problem or injustice caused by Mr. Vincent F. Lakua to draft the



Application documents. As stated by the respondent, the person is trusted by the Applicant also he is a member of trade union known as TUPSE. Thus, the Applicant documents were properly filed according to the law.

In determination of the first issue on the fairness of the termination of the applicant's employment contract, the law provides in section 37 (1) of the Employment and Labour Relations Act, 2004, that it shall be unlawful for an employer to terminate the employment of an employee unfairly. The same Act in section 37 (2) provides for the duty of the employer, in dispute for termination of employment, to prove that the termination was fair. The section reads as follows:-

*37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*

*(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.*

The above section requires employers to terminate employees on valid and fair reason and on fair procedures. Failure of the employer to prove the fairness of the termination means that the termination was unfair.

Another relevant provision in this application 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”.*

The Section is read together with Rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 which 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.*

In the present application the evidence available shows that the applicant was employed by the respondent for specific fixed period of time of one year from 3<sup>rd</sup> February, 2014 to 3<sup>rd</sup> February, 2015. The contract was renewed several times after its expiry and the last contract was for a period of six months which was entered on 2<sup>nd</sup> February, 2018, and was coming to an end on 1<sup>st</sup> August, 2018, according to contracts of employment - Exhibit D1. The respondent decided not to renew the contract after its expiry on 1<sup>st</sup> August, 2018, and he informed the applicant through a letter – Exhibit D2. The applicant argued that the contract was permanent one but the evidence available proves that the contract was for specific period of time which was renewed several times after its expiry.

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 to agreement. For the fixed term contract, the contract terminates automatically when the agreed period expires, unless the contract provided

otherwise. In the case of **Mtambua Shamte & 64 others vs. Care Sanitation and Suppliers**, Revision No. 154 of 2010, High Court Labour Division at Dar es Salaam, (Unreported), 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."*

In the application at hand, the last contract of employment provides clearly that the contract commence on 2<sup>nd</sup> February, 2018, and ends on 1<sup>st</sup> August, 2018 and it will expires itself. The contract does not provide for automatic renewal of the contract. As a result, the applicant's claims for reliefs for unfair termination after the automatic expiry of the contract lacks some merits.

Rule 4 (3) and (4) of G.N. No. 42 of 2007, provides that 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. In the present case there is no evidence whatsoever which prove that the applicant continued to work after expiry of the fixed term. Therefore, it is my finding the applicant was employed in a fixed term contract and not on permanent employment as alleged in the submission.

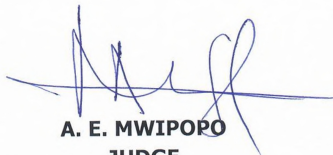
The applicant have asserted that the last employment contract was illegal as it was a contract for a period of 6 months which is contrary to section 14 (1) (b) of the Employment and Labour Relations Act, 2004, read together with Rule 11 of the Employment and Labour Relations (General) Regulations, G.N. No. 47 of 2017, which provides that a contract for specified period referred to under section 14 (1) (b) of the Act shall not be for a period of less than twelve months. I agree with this submission of the applicant that the law provides for the contract for specific period of time shall not be for a period of less than twelve months. The present contract was for six months as a result it was illegal. Even the applicant in his testimony before the Commission he stated that his contract was ending on 14<sup>th</sup> January, 2019, which means he believed that his last contract was for 12 months as provided by the law. Therefore, I'm of the opinion that period in the last contract of employment was supposed to be 12 months and not six months as it was stated in the respective contract. As a result, I find that the applicant's employment was terminated six months before its expiry, hence the termination was unfair.

Having found that that the applicant was unfairly terminated, the next issue is what are the remedies to parties? The applicant is praying for the Court to order for his re – instatement and payment of other statutory benefits as it thinks just to grant. The respondent is praying for the Court to

uphold the Commission Award. Since I have found that the applicants' employment was for specific period of time, the court could not grant a prayer for re engagement. The remedies that this court can grant is compensation for the remaining period of the contract payment of one month salary in lieu of leave as per item 11 of the Contract of employment, one month salary for notice as per item 16.1 of the contract, severance pay for each year of service according to item 17 of contract of employment and certificate of service as per item 16 of the employment contract.

Therefore, the respondent has to pay the applicant shillings 3,633,600/= being a six months gross salary compensation for the remaining period of the contract; shillings 605,600/= being a leave pay; payment of shillings 605,600/= in lieu of Notice pay; and payment of 705,835 being severance pay for a period of 5 years. The total amount to be paid to the Respondent is shillings 5,550,635/=.

Consequently, the Revision Application is allowed and the Commission Award is set aside.

A handwritten signature in blue ink, appearing to read 'A. E. Mwiopo', is written over a horizontal line. The signature is stylized and cursive.

**A. E. MWIPOPO**

**JUDGE**

**02/10/2020**