

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 809 OF 2019

BETWEEN

BERNARD A. MSIRIKALE.....APPLICANT

VERSUS

G4S SECURE SOLUTIONS (T) LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 21/06/2021

Date of Judgment: 28/06/2021

Msafiri, J.

The Applicant herein, Bernard A. Msirikale has filed an application for revision of the Award of the commission for Mediation and Arbitration (herein to be referred to as CMA) at Dar es Salaam, delivered on 13th September, 2019.

The Application is made under the provision of section 91(1) (a), 91(2)(a) and (b), 94(1)(b)(i) of the Employment and Labour Relations Act, Act no. 6 of 2004. (Herein after to be referred to as ELRA), and Rules 24(1), (2)(a)(b)(c)(d)(e) and (f), 3(a)(b)(c) and (d), and Rule 28(1)(c)(d)(e) of 2007.

The Applicant is praying for the following orders:-

- 1. That, this Honourable Court be pleased to call for, examine and revise records of proceedings and Award of the CMA at DSM Zone in CMA/DSM/KIN/R.227/18 by Hon. KIANGI, N-Arbitrator, dated 13th September 2019 for purposes of satisfying itself as to the correctness, legality or propriety of the said award and order(s) made thereof.*
- 2. Costs of this application be paid by the respondent*
- 3. Any other relief that this Honourable Court may deem fit and just to grant.*

The Application is supported by the sworn affidavit of the Applicant.

Following is the brief background facts to the application. The applicant was employed by the respondent as a driver on 16th February 2015 on the terms and conditions stated in the contract of employment. On 22nd October 2015, the applicant was suspended from duty by the respondent.

In the suspension letter, the respondent notified the applicant that he will be notified of the charges and the date of disciplinary hearings. Having stayed for some time (two years) without being summoned for the hearing, the applicant decided to follow up on the matter by the respondent whereas

he was informed that his employment had terminated since 16th February 2016 so he is not entitled to remunerations claimed.

Aggrieved, the applicant filed a complaint before CMA at Dar es salaam Zone. Arbitration was conducted before Kiangi N (Arbitrator). It ended partly in favor of the applicant on 13th September 2019 whereas he was awarded with compensation of three months salaries and 23 days only from the date he was suspended to the date his contract was terminated.

Aggrieved by the said Award, the applicant has by way of chamber summons filed the present application praying for the orders started herein above.

When this application was placed before me for hearing, Mr. Makubi Kunju, learned advocate appeared for the applicant. The respondent was represented by Mr. Moses Kiondo, learned advocate.

Submitting in support of the application, Mr. Makubi argued that the applicant was employed by the respondent on 17th February 2015. On 22nd October 2015, applicant was suspended on Notice. The Notice informed the Applicant that he will continue to receive his salary during the suspension, and will be summoned for the disciplinary hearing.

However, the applicant was never paid salary since the date of suspension, that is 22nd October 2015 and he was never summoned for disciplinary hearings. The learned Advocate for applicant stated that, the applicant reminded the respondent of his duty to give the applicant his rights but the respondent did not respond. He said that the applicant reminded the respondent through his personal letter, and through Demand Letter by his Advocate.

That following that, the applicant filed his demands before the CMA praying that the applicant be paid the monthly salaries while waiting for the disciplinary hearings.

The Advocate for the applicant submitted further that, the CMA erred in law and facts when it agrees with the respondent's claim that the applicant's employment contract terminated since 16th February 2016 and proceeded to award him salaries of three months and 23 days only, which is a computation of time from the date when he was suspended to when the employment contracts was allegedly terminated. That, the applicant was never given a notice for termination nor given a right to be heard.

The counsel for the applicant added that, the applicant's contract states that whenever there is termination of contract, the applicant will be

given a Notice for Termination. But this was not done when the applicant's contract was terminated. He argued that in the absence of notice of termination, the contract continued to exist by conduct, hence the applicant is still on suspension and still an employee of the respondent.

The counsel for the applicant submitted to the court that even the Notice of suspension did not reveal the time limit for suspension nor did it reveals reasons for suspension. He proceed to move the Court to consider the position in the case of **Parastatal Pension Fund Vs. Sireli Mchembe**, (2014) Part 1 Labour Court Digest 24, which set out what should be revealed to the employee when he is being suspended.

The counsel for the applicant also pointed out the case of **Aurora Premium Outlets Services Vs Esther C. Mahenge**, Rev. No. 32 of 2016 which was referred by the Arbitrator, at page 5 of the disputed Award. The cited case stated that the employee who is on suspension is entitled to be paid his salary until the disciplinary hearings.

The counsel submitted that, the Arbitrator did not consider this trite principle in his decision and further, the Arbitrator misdirected himself when he was interpreting this Rule.

The counsel, referred this court to the case of **Jimson Security Service Vs Joseph Mgedela**, Civil Appeal No. 152 of 2019, where it was stated that it is unprocedural not to inform the employee of his offenses and that summoning him for disciplinary hearing is mandatory.

The counsel urged me to revise and set aside the decision of the Arbitrator at the CMA and for this Court to find that the applicant is still the respondent's employee on suspension.

He further prayed that the applicant be paid the arrears of his salaries and continue to be paid monthly salary while waiting for the respondent to summon him for disciplinary hearing or to reinstate him.

In response, Mr. Kiondo submitted that, it is true that the applicant had one year contract with the respondent which started on 17th February 2015 and was to end on 16th February 2016. That the applicant was clearly aware that on 16th February 2016 the contract will terminate so there was no need for Notice for termination, because the contract was the "notice by itself"

Mr. Kiondo submitted that, that it is not in dispute that the applicant was suspended. After the suspension, the applicant knew that he was supposed to attend at the office and sign the attendance register so that he

can continue to be identified by his employer and be paid salaries as per the procedures.

Mr. Kiondo contended that, the applicant disappeared after receiving the Notice for suspension and the respondent made the efforts to contact him through his mobile telephone and through his guarantors but to no avail.

Mr. Kiondo stated further that it was only in 2018 when the applicant reappeared and filed the claim at the CMA and now before this court.

The learned counsel cited the provision of Rule 4(2) of the G. N. 42/2007 which provides that fixed contract shall be terminated automatically when the agreed period expires unless the contract provides otherwise.

He argued that, the applicant had one year fixed contract and it ended on 16th February 2016, and he was never given another term of contract. He concluded that, the decision of CMA to award the applicants three months salaries and 23 days which amount to Tshs. 726,500/= was fair and right for both parties. He prayed that this application be dismissed as it has no basis and there is no any reason for this court to revise the CMA's decision.

Mr. Makubi Kunju rejoined by reiterating that the applicant's claim before the CMA are not for unfair termination or dismissal but it was for failure to pay full remuneration and all benefits during the time of

suspension. Responding to the issue of the disappearance of the Applicant from his place of work which was raised by the counsel for the respondent, Mr. Makubi Kunju vehemently denied and argued that the mandatory requirement to report at work and sign is not shown on the Notice of suspension which were issued to the employee. However, he rejoined that the said Notice of suspension was clear that the applicant should not report at work for duty nor allowed access to his place of work without prior written agreement during the period of suspension.

After carefully evaluating and examining the submission by both parties and the record at hand, I believe the issues to be considered by this court are;

- i. Whether the applicant's contract was for specific period; if yes*
- ii. If the said contract had terminated automatically while the applicant was still on suspension;*
- iii. What are/where the entitlements of the applicants during the suspension;*
- iv. Whether the applicant is still an employee of the respondent on suspension.*

Responding to the first issue, it is not disputed by both parties, that the applicant's contract was for specific period of time commencing on 17th February 2015 and end on 16th February 2016. This is clearly shown in the said contract which is in court records as Annexure "A 1" forming part of list of documents material to the application. The same was produced during the Arbitration hearing and was tendered as Exhibit P1. The contract was of a fixed term and stated that **"Your contract will commence on February 17th 2015 and shall terminate February 16th 2016"**

This takes me to the second issue on whether the said contract terminated automatically while the applicant was still on suspension. To respond to this, I wish to refer to the case of **Abel Kikoti & 5 Others Vs. Tropical Contractors Ltd**, Revision No. 305 of 2019 (unreported) HC DSM at page 4 where it was stated that;

'As distinct from unspecified time contracts, specific time contracts have an expiry of the contract period although the parties may enter into new contracts'.

In the case of **Christian Mwesiga Michael Vs. Board of Bishops**, Revision No. 31 of 2020 (unreported), the court when considering the employments contract between the respondent and applicant, it stated at page 14 that;

'The law provides for under Rule 3(2) of the Code of Good practice G.N. No. 42/2007 which is to the effect that, A lawful termination of employment under the common law shall be as follows;

- a) Termination of employment by agreement*
- b) Automatic termination(emphasis mine)***
- c)*
- d)*

Further, the law Under Rule 4(2) of the same GN 42 of 2007 provides that;

'Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provides otherwise.'

In the light of foregoing, I find that the applicant's employment contract came to an end automatically after expiry of one year.

When he was submitting before this Court, Mr. Makubi Kunju, counsel for the applicant argued that the applicants' contract states that whenever there is termination, the applicant will be given a notice for termination and this was not done in the present dispute. That if the employer (respondent) did not give Notice of termination, it means that, the contract was presumed to continue by conduct.

With this submission by the counsel for the applicant, the court pondered on whether there was a reasonable expectation of renewal on the

side of the employee (applicant). This can be due to the employer's conducts of suspending the applicant for unknown time and not summoning him for disciplinary hearings, while instructing him to wait for the same.

In the case of **National Oil (T) Ltd Vs. Jaffery Dotto Msensemi & 3 Others**, Revision No. 558 of 2016 (HC Labour Division at DSM), the court at page 7 restated the provision of Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 which I have already discussed above.

Furthermore, the Court restated the provision of Rule 4(3) of the GN 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 and circumstances warrant it'.

In the present matter at my hand, the applicant was on suspension from 22nd October 2015 and his contract terminated on 16th February 2016. The Applicant was not working as he was on suspension, nor was he attending the office for signature. A letter of suspension from duty, which is attached with the applicant's affidavit as annexure "A 2" and was tendered as exhibit P2 during the CMA proceedings, stopped the applicant from reporting to duty and denied him access to the place of work.

So, by such circumstances, I am certain that there was no reasonable expectations of renewal of a fixed contract between the applicant and employee nor was there continuation of that fixed term contract as it was put by the counsel for the applicant. This also answers my fourth issue on whether the applicant is still employee of the respondent on suspension.

As I have analyzed above on the terms of a fixed contract, the applicant is not an employee of the respondent as his fixed contract expired on 16 February 2016. In his submission before this court, the applicant's counsel avers that the Applicant was never given Notice for Termination and that the applicant's contracts stated that, whenever there is termination, the applicant will be given a Notice for Termination.

I have perused the said fixed term contract of employment. The same was tendered at CMA as Exhibit P1 and is hereby attached as annexure A1 with the applicant's affidavit. Clause 12 of the said contract gives conditions on when a notice can be given. I find this condition did not mandatorily require the respondent to issue the said notice.

Furthermore, in the above cited case of **National Oil (T) Ltd Vs. Jaffery Dotto Msensemi & Another** (supra), it cited the position of the law which was held in the case of **Dar es Salaam Baptist Sec. School Vs.**

Enock Ogala, Revision No. 53 of 2009 HC Labour Division at DSM (unreported) whereby Rweyemamu J. (as she then was), stated that;

*'....Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise or there were no expectations of renewal, **the contract would have expired automatically with no need to write a termination letter**'.*

(Emphasis mine).

So in this present matter, the contract of the applicant expired automatically so there was no need of termination letter.

This takes me to my 3rd issue which is the last one on what are/were the entitlements of the applicant during the suspension.

The Applicant's claim before the CMA was that as he was still an employee on suspension, he should be paid by the employer the salary and his entitlement while waiting for the disciplinary hearings. The counsel for the applicant submitted before this court that the applicant had never been paid his salaries since his suspension.

Replying to this argument, the counsel for the respondent stated that after receiving the Notice of suspension, Applicant knew he was supposed

to go to the office and sign so as to continue being identified by his employer's system and paid salary as per the procedure.

The respondent's counsel avers that the applicant never appeared at the office for signing and in fact he reappeared after filing his claims. However, I find this submission by the counsel for the respondents to be doubtful because as I have shown earlier, the Notice of suspension which was served to the applicant estopped him from going to the office and denied him access to office premises.

In this circumstances, it is crystal clear by this court that the applicant was never paid salary from the date he was suspended on 22nd October 2015 to the date his fixed term contract expired automatically on 16th February 2016.

Therefore, this court agrees with the findings and the award of the CMA by Hon. Kiangi, N. Arbitrator that the applicant was entitled to be paid salaries from 22nd October 2015 and 16th February 2016.

I therefore confirm the Arbitrator findings and the given award to the applicant dated 13th September 2019. Application for revision is dismissed with lack of merits. Right of appeal explained.

It is hereby ordered.



A. Msafiri

JUDGE

28/06/2021

Labour Court TZ.