IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 896 OF 2019

BETWEEN

HERRY NGOITIAMA..... APPLICANT

VERSUS

FABEC INVESTMENT LIMITED..... RESPONDENT

JUDGEMENT

Date of Last Order: 23/06/2021

Date of Judgement: 01/7/2021

A.Msafiri, J.

The Applicant filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 29th October 2019 in Labour Dispute No. C/F/CMA/DSM/UBG/74/18/722 by Hon. Msina H.H. Arbitrator. The application was made under the provisions of Sections 91(1)(a) & 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act Cap 366[herein the Act] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), and 28(1)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007 (herein the Rules).

The application was supported by the affidavit of the applicant HERRY NGOITIAMA and the respondent challenged the application

through the counter affidavit of BARAKA MTUI, Principal Officer of the respondent. Following is the brief background facts to the application. The applicant was employed by the respondent on one year fixed contract dated 1st April 2017.That the terms of contract of employment were of specified period of one year renewable upon performance evaluation. He worked for a full one year until the contract expired on 30th March 2018. After expiry of contract, the applicant continued working for executive three (3) months until on 1st June 2018, when he was issued with a notice of termination of employment contract.

Aggrieved, the applicant filed a complaint for unlawful termination before the Commission for Arbitration and Mediation (herein as CMA) at Dar es Salaam seeking for orders of compensation and payment of other employment benefits. After failure of mediation, the matter was referred to arbitration and after the hearing, the arbitration ended in favor of the respondent in the award issued on 29th October 2019 whereas the applicant claims were dismissed in entirety.

Aggrieved by the said award, the applicant has by way of chamber summons filed the present application praying for the orders that; this court revise the record of proceedings and award of the CMA and quash the findings and award; the court be pleased to grant a declaratory order

that the proceedings and award against the applicant was obtained illegally and incorrectly; this court to grant any such order as it deems appropriate.

When this application was placed before me for hearing, Mr. Datius Faustine, learned advocate appeared for the applicant. The respondent was represented by Mr. Lwijiso Ndelwa, learned advocate.

Submitting in support of the application, Mr.Faustine prayed to submit on one statement of legal issue only that is; the arbitrator erred in law and fact by ruling that there was no existing contract between applicant and the respondent. The arbitrator reasoned that, that was because the applicant contract ended on 13th March 2018. The counsel for applicant argued that as per the contract which was tendered at the CMA proceedings by witness 1, shows exactly that the contract between applicant and the respondent had commenced from 1st April 2017 and it was to continue until 30th March 2018 and it was one year fixed contract. Mr Faustine averred it is a trite law under Rule 4(2) of G.N 42 of 2007 that the fixed term contract terminates automatically unless the contract provides otherwise.

However, before the expiry of the fixed term contract the applicant communicated with the Chief Executive Officer via the email which was

marked as "RF2" in which the CEO who testified as DW 2, gave the applicant a list of the employees and directed the applicant to renew the contract of other listed employees' contracts except the applicant's contract.

The counsel submitted that, this act made the applicant continue to stay in the office without knowing if his employment contract will be renewed or not. On 30th March 2018, the applicant contract expired but he continued to remain in the office working, being paid salaries for three consecutive months from 1st April 2018 until 1st June 2018 when he was issued with a notice for termination.

The counsel for applicant cited Rule 42(3) of GN 42 of 2007 which provides that, the fixed term contracts can be renewed by default if the employee continue to work after expiry of the term of his contract. It was the contention of the applicant therefore that, his first contract expired on 30th March 2018, however, by the conducts and practice of the respondent of giving him salaries from 1st April to 1st June 2018 when he was served with a notice, warranted to suffice a notion that there was a new contract from 1st April 2018 which warranted the applicant to get benefits and other employment privileges as they were set in the first contract.

The counsel made a reference to Rule 8 (2) (a) of the Code of Good Practice which state clearly when the fixed contract is to be terminated. The counsel concluded that, the notice of termination of contract of 1st June 2018 was not meant to terminate the contract which had already expired on 30th March 2018 but rather it implies that there was a new agreement between the applicant and respondent. He prayed for this court to set aside the proceedings and the award of the CMA because the arbitrator reached the verdict without considering the material facts and legal relationship of the applicant and respondent of up to June 1st 2018. He also prayed for this court to compensate the applicant and any other orders which will remedy him.

In response, Mr. Lijwiso Ndelwa prayed to adopt the counter affidavit by the principal Officer of the respondent and submitted that, the Hon. Arbitrator was correct to decide that there was no existing contract between the disputing parties and that the arbitrator's findings were based on the evidence adduced at the hearing before the CMA both oral and written. The counsel submitted further that, it was undisputed truth that the applicant had one year contract with the respondent which started on 1st April 2017 and was to end on 30th March 2018. That it was on record that, before the expiry of the said contract, on 9th January 2018,

the applicant was informed by the Chief Executive Officer (CEO) of the respondent that, there won't be renewal of the applicant's contract and this was done through email exchange which was tendered as Exhibit RF2.

The respondent counsel contends that, from the evidence adduced at the CMA, the applicant knew that the contract won't be renewed, so the concept that the applicant was uncertain of his status of contract has no factual or legal support. He argued vehemently to the claim that the applicant was paid salaries and that this claim was not proved to show that he was indeed paid those salaries. He stated that it was clear and unchallenged before the CMA that the applicant was not given any task to perform. The counsel maintained that despite the applicant being informed several times before and after expiry of contract, he continued to work and thus he cannot benefit from his own fraud.

The respondent's counsel submitted that after expiry of his contract, the applicant wrote a letter which was admitted as exhibit RF4 in which he admitted he has been performing poorly throughout his contract and that he did not meet the required standard. That, by this confession of wrong doing, termination is warranted without even following the procedure. He referred this court to the case of **University of Dodoma vs David Andrew Hella & Another,** (2014) Labour Digest No. 23. Mr.

Ndelwa prayed that, that in the base of section 14(1)(b) and section 46 (a)(iii) of Cap 366 read together with Rule 4(2) (3) of G.N 42 of 2007 and the records of CMA, this court find in favour of the respondent and this application be dismissed with costs.

Mr.Faustine rejoined by reiterating his submission in chief and added that as far as the poor performance of the employee is concerned, any decision must adhere to the procedural aspects as highlighted under Rules 17 and 18 of Code of Good Practice G.N. 42 of 2007. And that Convention No.158 of 1984 strictly provides that, the agreement of the worker shall not be terminated for a reason of worker's conduct or performance without being given an opportunity to defend himself.

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 there was a reasonable expectation of renewal of the applicant's contract of employment;*
ii. *Whether there was existing contract between the applicant and the respondent after the expiry of one year term contract;*
iii. *Whether the termination was valid;*
iv. *What are the entitlements of the applicant(if any)*

Responding to the first issue, it is not disputed by both parties, that the applicant's contract was for a specific time that is one year which commenced on 1st April 2017 and expired on 30th March 2018. It is in the record that after the expiry of the contract, the applicant continued going to the office, working and was in fact paid salaries for those months until he was served with the termination notice on 1st June 2018. Counsel for the applicant, submitted before this Court that, before the expiry of the employment contract, the applicant communicated with chief executive officer, who testified as DW2 during the proceedings via the email, in which there were the list of employees whom their contracts were expiring including the applicant. That the CEO directed the applicant to renew the other listed employees contracts except the applicant's. That this act made the applicant continue to stay in the office without knowing whether his contract will be renewed or not.

The applicant's counsel added that nevertheless, the applicant's continuity in the office, being paid salaries, raised a reasonable expectation to him that his contract will be renewed.

The respondent's counsel vehemently objected, submitting that the communication between the CEO and the applicant via email was the

proper notification that the applicant's contract will not be renewed and after the expiration, the applicant was not supposed to continue working.

Going careful through the proceedings of the arbitration, at page 26, Joel Aminiel Makyao, as DW2, who is owner of the respondent's company and as CEO, admitted in cross-examination that he paid salary to the applicant after the expiry of the employment contract, this is reflected also at page 10 of the award. Therefore, from DW2 testimony, the owner of the company, the applicant was being paid salary after the expiration of the contract.

Although DW2, and the submissions of the respondent's counsel tried to show that the applicant continue to attend the office and work on his own will or without the consent of the employer, the evidence shows clearly that the employer accepted the applicant's actions and went even further to pay him salaries.

In his submissions, the respondent counsel told this Court that the act of applicant continuing working consecutively after three months was done because the applicant was finishing his work and preparing handover, however, that was not established during the CMA proceedings, and even if there could have been evidence on that, the act of paying salaries to the applicant, showed that there was expectation of renewal

and there continue to exist employer/employee relationship between the respondent and the applicant.

To cement this, if the applicant's contract of employment was not expected to be renewed then why there was a meeting held on 24th April 2018 between the Management of the Office and the applicant discussing issues relating to the applicant's work performance? The applicant's letter tendered as exhibit RF4 during the proceedings revealed that there was such meeting, and in the letter, the applicant committed himself to put extra effort to improve his work.

Why there was such a meeting and why the promise if the applicant's contract was not expected to be renewed? That meeting was held in 24th April 2018, the applicant's commitment letter was written on 25th April 2018, while his employment contract had already expired on 30th March 2018. This claim of meeting between the applicant and the management was not disputed and was in fact confirmed by the CEO of the Company, DW2 at page 24 of the CMA proceedings.

The testimony of DW2 who is the CEO and owner of the respondent's company shows the reasonable expectation of renewal and proved the existence of renewed contract between the applicant and respondent. I would like to quote some of DW2 testimony before the CMA;

*'**Q:** Nini kilitokea wakati mkataba umekwisha?*

***A:** Aliniandikia Awad (sic) ya watu mikataba inakaribia kuisha, nikamjibu anaweza kuextend lakini kwake nikaonesha la sisi hatuta extend, lakini pamoja na kumtaarifu hiyo aliendelea kuja kazini.*

***Q:** Huo mwezi aliokuja kazini aliandika chochote?*

A:** Hakuandika, **utendaji kazi japo uliendelea lakini utendaji kazi wake haukubadilika'.

(Emphasis mine)

About the applicant's 25th April 2018 letter of commitment, DW2 stated that;

Q: Barua ipi tena aliandika?

A: Commitment to improve work.

Q: Aliandika lini RF4?

*A: 25/04/2018, **alisema yupo committed ata pay extra effort na aka promise kuwa ata file matano kama tulivyokubaliana.***

(Emphasis mine).

When he was being cross-examined, DW2 had this to say about payment of applicant after expiry of his contract;

***Q**: Ieleze Tume kama mkataba wangu ulipoisha uliandika hiyo kwa nini; je mshahara nilikuwa nalipwa?*

***A:** Ndio.*

There are numerous cases which have been decided by this Court on the circumstances when one has to say there was reasonable expectation of renewal of the employee's fixed term contract.

In the case of **I.O.T (Travelling Bags) vs. Thomas Soko and 2 Others**, Revision Application No. 131, of 2015, Aboud, J, held that;

> *'And if the applicant was to let respondents to continue working for him even one day after the date of end of contract, that would be construed that the respondents had reason to believe their contract were to be renewed.....'*

Also Rule 4(3) of the G.N. 42 of 2007 provides that;

> *'.....a fixed contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrant it'.*

Basing on the evidence on record as I have analysed it and after considering submission on both parties, I find that there was a reasonable expectation of renewal of contract from the employee. This was derived from the conducts of both parties after the expiry of the one year contract.

In my view, the act of the applicant continuing work for three consecutive months, meeting with his employer to discuss his performance, being paid salaries, all this being done after expiry of the contract, suffice to warrant that there was indeed reasonable expectation of renewal and thus there was a new contract between the parties.

So, I totally agree with the submission of applicant's counsel that the Notice of Termination of 1st June 2018 was not meant to terminate the contract which ended on 30th March 2018 but it implied that there was a new agreement between applicant and respondent. Even the contents of the said Notice shows clearly that there existed a renewed contract. And this answer my first and second issues on this matter in the affirmative.

Next issue was whether there was unfair termination. It is on record that the applicant was served with Notice of termination on 1st June 2018. On the reason for termination, the letter (AP1) stated that;

> *'However, the company has assessed your ability and capability to execute your duties and obligations as far as the office of the Human Resource Manager demands and we are satisfied that the said office needs a change and replacement as soon as practicable'.*

In the case of **National Oil (Ltd) vs. Jaffery Dotto Msensemi & 3 Others**, Revision No. 558 of 2016, this Court held that, the principle of unfair termination under the Employment and Labour Relations Act, Cap 366, does not apply to fixed term contracts unless the employee establishes a reasonable expectation of renewal as provided under section 36(a)(iii) of ELRA, Cap 366 which provides that;

> *'Relying on this principle,the applicant's contract being a specific time contract, unfair termination could not apply, except for the applicable principles under section 36 (a)(iii)(supra).'*

As the applicant has established that there was a reasonable expectation and there was in fact a new contract by default then there was no unfair termination but a breach of contract. According to the Notice of termination, the reason for termination was inability and incapability of the applicant to execute his duties and obligations. However, there is no evidence on how that finding was reached by the employer.

As observed earlier, there was a meeting between applicant and employer management whereby the applicant committed himself to improve his work. However, there is no evidence to show whether before the termination the applicant was given a chance to be heard and there

was investigation which reached to the conclusion of incapability of the applicant and that the procedural aspects as highlighted under Rules 17 and 18 of Code of Good Practice G.N. 42 of 2007 and that which are stipulated under Convention No.158 of 1984 was adhered by the employer.

My last issue is on the remedies justifiable for the applicant. The applicant among other reliefs, he prayed through his counsel that this Court pass an order to compensate him accordingly. Having considered the circumstance of this case and the fact that the applicant's contract was a fixed term, which was expected to be renewed on similar duration and terms and the fact that he had already worked for three months, I hereby order the respondent to pay the applicant the compensation of 9 (nine) months salaries which is the remaining months, had the expected renewed contract continue.

In the final analysis, I allow this application and set aside the arbitrator's findings and award. Since this is a labour matter, I make no order to costs. Right of appeal is explained to both parties.

Order accordingly.

A. Msafiri
JUDGE
01/07/2021