IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 222 OF 2020

BETWEEN

ONESPHORY J. MBINA & 2OTHERS.....APPLICANT

AND

TANZANIA YOUTH ALLIANCE (TAYOA).....RESPONDENT

JUDGMENT

Date of Last Order: 29/07/2021
Date of Judgment: 20/08/2021

B. E. K. MGANGA, J.

In 2009 the applicants namely Onesphory J. Mbina, Paulo Gido Mapunda and Epafras Isdory Lyimo were employed by the respondent as outreach drivers on fixed-term contracts of one year. Their contracts were renewed on similar terms yearly. On 30th June 2017 they were notified by the respondent that their contract of employment will come to an end on 30th September 2017. It was alleged by the applicants that on 19th September 2017 they signed another one-year contract that was ending on 30th September 2018 but the same was not signed by the respondent. They further alleged that they continued to work without being paid their

salaries until on 20th April 2018 when they realized that motor vehicles, they were driving were being driven by other drivers. Being out of time for eleven months, they applied to the Commission for Mediation and Arbitration (hereinafter referred to as CMA) for condonation as a result they were granted and allowed to file application No. CMA/DSM/KIN/183/19/309. In the form initiating their application (CMA F.1), applicants indicated that they were unfairly terminated by the respondent and that they were claiming to be paid Sixty Three Million Nine Hundred Twenty Thousand Tanzanian Shillings (TZS 63,920,000/=) only in total covering salary arrears for seven months, twelve months as compensation for unfair termination, one year leave, one month salary in lieu of notice and damages for breach of contract. On 24th April 2020 the Arbitrator (Wilbard G.M) issued an award in favour of the respondent on ground that there was no unfair termination, that their fixed contracts of employment came to an end on the agreed date and that they were not entitled to any payment.

Being aggrieved by that decision, applicants have applied for revision before this court. In their application, they have raised three legal issues namely; -

That, the Honorable Arbitrator contradicted in his findings by admitting that the applicants were insured with Medical Insurance by TAYOA from Nation Health Insurance Fund which covered from 19/09/2017 to 30/08/2018 yet his findings relied on the notice which ended on 30/09/2017.

That, the Honorable Arbitrator's decision based in favor of respondent by failure to instruct the employer to submit records of attendance, logbooks, pay roll and other documents which would reveal the truth on whether the applicants were coming for work or not.

That the Honorable Arbitrator erred in law and facts by shifting the burden of proof on unfair termination to the applicants instead to respondent(employer).

When the Application came for hearing, Applicants were represented by Mr. Andrew Ngwada, their Personal Representatives whereas the Respondent was represented by Mr. Evance Ignas, Advocate.

It was submitted by Mr. Ngwada on behalf of the applicants that, the Commission considered only Exhibit T-1 that is the Notice of intention not to renew the contracts and came to the conclusion that their employment was not terminated but came to an end automatically. He submitted that the arbitrator did not consider the claims of the applicants in CMA Form No. 1. He criticized the arbitrator for failure to consider medical insurance cards (Exhibit O-3) that was issued to the applicants on 19th September 2017 and expired on 30th September 2018. He submitted that; these cards are issued

to the employees of the respondent. He therefore nailed his argument on these medical insurance cards and submitted that applicants were employees of the respondent up to 30th September 2018 and that their employment was unfairly terminated.

Mr. Ngwanda argued further that, applicants had reasonable expectation of renewal of their fixed term of contract. He submitted that they worked with the respondent for ten years (10). That, their contracts were being renewed yearly as evidenced by exhibit O2 and that at every renewal they were issued with new insurance cover. He further submitted that the arbitrator did not take into consideration that applicants had reasonable expectation for renewal of their contracts as they used to renew the same and that failure to renew amounted to unfair termination. He cited the case of **Kinondoni Municipal Council v. Rupia Said and 107Others,** Revision No. 417 of 2013, Labour Division, at Dar es salaam (unreported) and argued the court to hold that employment relationship existed between the applicants and the respondent and that the same was unfairly terminated. He thus prayed for the award to be revised, applicants be paid arrears of seven (7) months from the date they signed a new contract and further that an order be issued for them to be paid twelve

months' salaries for unfair termination as they were paid monthly salary of USD 400.

Mr. Ngwanda, faulted the Arbitrator that he favored the respondent in his findings. Mr. ngwanda submitted that the Arbitrator failed to instruct the employer to submit records of attendance, logbooks, pay roll and other documents which would have revealed the truth on whether the applicants were coming for work up to 20th April 2018 or not. It was also argued by Mr. Ngwanda for the applicants that the arbitrator erred in his findings by shifting the burden of proof to the applicants without considering the nature of the dispute. He insisted that, this was contrary to Section 15(6) of the Employment and Labour Relation Act, [Cap 366 R.E 2019].

In reply, Mr. Ignas, counsel for the respondent, submitted that the respondent tendered a letter informing the applicants that after expiration of the current contract, there will be no renewal for lack of funds (Exhibit T-1 - notice). He cited the case of ***National Oil Tanzania Ltd v. Jaffery Dotto Msensemi and 30 Others,*** Revision No. 558 of 2016, High Court, Labour Division, at Dar es salaam (unreported) in support of his argument that fixed contracts of the applicants were automatically terminated when the agreed period expired i.e., on 30th September 2017. He also referred the court to Rule 4(2) of the Employment and Labour Relations (Code of

Good Practice) Rules GN. No.42 of 2007. He submitted that the respondent operates under international standards which is why, the applicants were given exhibit T1 to remind them that after expiration of their contracts there will be no renewal. He further submitted that applicants were paid their entitlements as stated by DW-1 (Mr. Kimweli). He disputed the allegations by the applicants that they were given new contract that were ending on 30th September 2018. He went on that the burden of proof was not shifted to the applicants as the arbitrator considered evidence of both parties and came to the conclusion that applicants did not prove their case to the required standard. He thus prayed for the application to be dismissed.

The main issue for determination in this application is whether the applicants were unfairly terminated by the respondent.

As pointed above, applicants were employed on the fixed term contract of one-year renewable. Their contracts therefore fell under the provisions of Rule 4(2) of G.N No. 42 of 2007 which provides that: -

> *"Rule 4(2) where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.*

Rule 4(1) of the said Rules provides that an employer and employee shall agree to terminate the contract in accordance to agreement. Rule

4(4) provides that 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"

On the other hand, Section 36(a)(iii) of the Employment and Labour Relation Act, [Cap 366 R.E 2019] provides:-

"Section 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"*** *[Emphasis is mine]*

I have gone through the evidence of Ibrahim Kimwele (DW1) the only witness who testified on behalf of the respondent and that of Onesphory J. Mbina (PW1) the only witness who testified on behalf of the applicant and find that both stated that on 30th June 2017 a notice (exhibit T1) was issued to the applicant to the effect that there will be no renewal of the contracts. Both DW1 and PW1 testified that the respondent was depending on donor fund and that in 2017 there was less flow of money from donors. Dw1 stated that this insufficient flow of money was among the reasons as to why they did not renew contracts of the applicants. DW1 maintained in his evidence that applicants were issued with medical insurance cards as part of their benefits and not otherwise. According to

evidence of DW1, PW1 and exhibit T1, the contracts of the applicants came to an end on 30th September 2017. PW1 testified that on 19th September 2017 they signed another one-year contract that was ending on 30th September 2018 but the same was not signed by the respondent. I have carefully considered that evidence and find, in the circumstances of this case, to be embroidered with lies. I am of that opinion for two reasons. One, both DW1 and PW1 in their evidence testified that the there was insufficient fund due to withdrawal of donors. The respondent was therefore, in economic crisis, which is why, he preferred not to renew contracts of the applicants. I see no logic for the respondent on 30th June 2017 to notify the applicants that their contract will come to an end on 30th September 2017 and thereafter ask the applicants to sign new contracts on 19th September 2017. Two, the alleged contracts signed by the applicants on 19th September 2017 were not tendered in evidence. In his evidence, PW1 testified that, the Respondent did not sign that contract.

It was argued by the applicants that there was reasonable expectation for renewal of their fixed term contracts and that failure to renewal amounted to unfair termination. Reliance was made to previous renewals and on allegations that on 19th September 2017 they signed new

contracts that were not signed by the respondent. This was denied by the respondent in his evidence and submissions before me. In disposing this issue, I will be guided by the quoted provisions of the law and evidence of the parties at CMA and precedents from foreign jurisdictions as to what is the test to be applied.

The South African court was faced with a similar issue of reasonable expectation in the case of ***Armscor Dockyard vs CCMA and 2 others, case No. C853/15***. The court gave out the following test to be applied before concluding that there was reasonable expectation of renewal of a fixed term contract:

> ***"...that the expectation must be reasonable in the objective sense. The question that one has to ask is whether the circumstances were such that any reasonable employee would, in the circumstances, have expected the contract to be renewed ...here the court has to conduct a two-stage enquiry. The first stage is to determine what the applicant's subjective expectation actually was in relation to renewal. This is a question of fact. Once the subjective expectation has been established...the court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstance..."***

The court went on to state that:

"...The law does not protect every expectation but only those which are legitimate. The requirements for legitimacy of expectation include the following:

(i)The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification'. The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing of which they act at their peril.

(ii) The expectation must be reasonable

(iii) The representation must have been induced by the decision maker and

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate."

That decision is from a foreign jurisdiction which is not binding this court, but this court is enjoined to borrow a leaf from inspirational decisions made in other jurisdictions once found that the area is novel in our jurisdiction as it was held by the Court of Appeal in the case of ***Attorney General vs. Mugesi Anthony and 2 others, Criminal Appeal No. 220 of 2011*** (CAT) unreported. I therefore take inspirational

from the above South African case and apply the same principle in this application.

As pointed out hereinabove, applicants did not tender the contracts they allege they signed on 19th September 2017. Instead, they tendered medical insurance cards to indicate that their contracts were renewed. DW1 testified that applicants were given the said medical insurance cards as part of their terminal benefits only. Taking into circumstances of the case and evidence in totality, I conclude that, the said cards were not meant and cannot be taken as a substitute of contracts, for this court to hold that applicants were unfairly terminated. My decision is fortified by evidence of both DW1 and PW1 who were on the same page in their evidence that, the respondent was in economic crisis after cut of funds by donors. No material evidence was brought to the Arbitrator to show that the respondent recovered from the said economic crisis or that donors thereafter continued to donate funds to the respondent. In absence of that evidence, the respondent cannot be expected to have intended to renew fixed contracts of the applicants knowingly that, he will have no money to pay their salaries. Based on circumstances prevailing at a time, and according to evidence of both DW1 and PW1, any reasonable employee or

employer, *will* come to the conclusion of not renewing the contract. Applicants might have expectations, yes. But in my view, not every expectation is protected by the law as it was held the Dockyard's case (supra). An invitation to hold that applicants had reasonable expectation and that their fixed term contract was unfairly terminated, in the circumstances of this application, is an invitation to strangle the respondent to death, while she is fighting for life after withdrawal of donors. At any rate, how are they expected to be paid while they concede that respondent experienced economic difficulties. In my view, any reasonable employee would have formed a different opinion other than that was taken by the herein applicants. For all these, I am unable to accept the submissions by the applicants that the arbitrator was supposed to hold that there was reasonable expectation of renewal of their contracts and that there was unfair termination.

The criticism that the Arbitrator favored the respondent as he failed to instruct him to submit records of attendance, logbooks, pay roll and other documents which would reveal the truth on whether the applicants were coming for work or not, is but without merit. There is nothing on record to show that applicants informed the arbitrator that they needed the

said documents to build up their case and that their prayer was rejected. Those documents were not listed in the list of documents to be relied upon by them in proving their case. It is my firm view that it is unfair to condemn the arbitrator for that. He was not under duty to find evidence for the parties. He was there to facilitate if parties needed the same, but they didn't. Likewise, the complaint that the arbitrator shifted burden of proof to the applicant is misconceived.

For all what I have pointed out herein above, I uphold the award and dismiss this application for want of merit.

It is so ordered

B.E.K. MGANGA
JUDGE
20/08/2021