IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 185 OF 2022

PIUS LWAKAHUTU LAZARO ..... APPLICANT

VERSUS

ALFA EDUCATION CENTRE LTD ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Chacha: Arbitrator)

Dated 29th April, 2022

in

REF: CMA/DSM/KIN/258/2021/106/21

==== ==========

JUDGEMENT

31st October & 14th December, 2022

Rwizile, J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/258/2021/106/21. This court has been asked to call upon the proceedings, revise, quash and set aside the award.

Briefly, the applicant was employed as a teacher by the respondent in a fixed term contract of two years and a half. His contract started on 13th

January, 2014 to end on 12th July, 2016. On 29th May, 2021, he received a notice of no intention to renew his employment contract.

The applicant filed a labour dispute at the CMA claiming for terminal benefits due to unfair termination. The award however, was not in his favour. He has filed this application for revision in protest.

The application is supported by the applicant's affidavit advancing grounds for revision thus: -

i. *Whether it was legally in law in a dispute of unfair termination for the employee to prove his case.*

ii. *Whether the arbitrator had legal right not to consider that the respondent did not follow procedure in termination of the employment.*

iii. *Whether honourable arbitrator had a legal right not to consider expectation for renewal of the applicant.*

iv. *Whether honourable arbitrator had legal right to decide that the applicant had a new (second) contract.*

v. *Whether honourable arbitrator had a legal right to decide the applicant had a probation period in a second contract.*

vi. *That the decision given by the arbitrator was contrary to the law on the face of the record.*

vii. That the arbitrator failed to analyse the testimony and exhibits tendered by both parties.

The application proceeded by way of written submissions. Mr. Pius Lwakahutu Lazaro, the applicant appeared in person, whereas Mr. Edwin Somoka Nkalani, learned counsel was for the respondent.

Submitting on his application, Mr. Lazaro, argued on the first ground that, the employer has the burden to prove fairness of reason and fairness of procedure.

To support the point, he cited rule 9(1)(3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 and section 39 of the Employment and Labour Relations Act [CAP. 366 R.E. 2019], (the Act).

He stated that the arbitrator misdirected herself by requiring the applicant to prove unfairness of termination by reason and its procedure. He then stated that the arbitrator misdirected his mind in holding that misconduct was a valid reason to terminate the employment contract of the applicant. He stated that the arbitrator used rule 12(1)(a)(b) and (2) of Employment and Labour Relations (General Regulations) G.N. No. 47 of 2007 out of context, because that was not the dispute before him.

On the third ground, Mr. Lazaro submitted that the preceding contracts were renewed impliedly as per rule 4(4) and (5) of Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007 and section 36(a)(iii) of the Act, had no prior notice given.

He continued to argue that the applicant signed the contract that commenced on 13th January, 2019 to end on 20th August, 2020. In his view, the applicant signed the contract while in service of the implied contract.

It was his argument that the applicant improperly received a notice not to renew the employment contract contrary to clause 10 of the contract. It was his further submission that, he received it during the weekend and the previous renewals were with no intention to renew. He stated that termination of employment was done by the respondent contrary to section 37(2)(c) of the Act.

To cement his point, he cited the case of **Ibrahim Mgunga and 3 Others v African Muslim Agency**, Civil Appeal No. 476 of 2020, Court of Appeal of Tanzania.

Mr. Lazaro submitted further that the requirement of being given reasons for termination goes to the right to be heard. And so, he added, it is

mandatory to give reasons to an employee regardless of the kind of contract he had with the employer before termination. To support his point, he cited cases of **Sefue Lyimo v A.K. Management & Personell Services**, High Court at Dar es Salaam and **St. Joseph Kolping Secondary School v Alvera Kashushura**, Civil Appeal No. 377 of 2021, Court of Appeal of Tanzania. In his view, the respondent's notice did not prove fairness of the reason for termination and that the only contract that existed was implied and which commenced on 13th July, 2016.

On the second, fourth and fifth grounds, he submitted that the applicant had no new second contract and so the arbitrator erred in holding that the said contract was new by reason that the contract bears a clause of probation. He was of the view that the applicant worked in the same position for more than five years and so could not be under probation.

The seventh ground was argued that, the arbitrator did not consider parties' evidence. He was of the view that, if they were considered, he would have found that the applicant's first contract ended on 12th July, 2016. Therefore, on 13th July, 2016, he added, parties impliedly renewed by default a contract that ended on 12th January, 2019. Reference was made in the case of **Asanterabi Mkonyi v Tanesco**, Civil Appeal No. 53 of 2019, Court of Appeal of Tanzania.

The sixth ground was argued last by the applicant Mr. Lazaro. He submitted that the arbitrator decided the dispute based on extraneous matters. There was no question of misconduct raised and so the application of rule 12 of the Code of Good Practice was uncalled for. He therefore prayed; the CMA award be quashed.

In opposing, Mr. Nkalani submitted on the first ground that, for an employee to claim reasonable expectation of renewal of employment contract successfully, he has to demonstrate reasons for such expectation. In support, he cited cases of **Ibrahim Mgunga and Others v African Muslim Agency**, Civil Appeal No. 476 of 2020, Court of Appeal of Tanzania and **Mama Clementina Foundation v Filemon E. Macha**, Labour Revision No. 18 of 2020, High Court. In his view the onus of proof lies in the applicant.

On the second ground, it was submitted that, the law under rule 4(2) of the Code of Good Practice, provides for a fixed term contract to terminate automatically upon expiration of the agreed period unless it is provided otherwise. He continued to argue that the law does not prescribe the duration of the notice of non-renewal of employment contract. To support his point, he cited the case of **China Civil Engineering Construction**

Corporation v George Danford Mbuly, Revision No. 750 of 2019, High Court.

On the issue of the applicant being given a notice of non-renewal before end of the contract, he cited the case of **Paul James Lutome and Others v Bollore Transport & Logistics Tanzania Ltd**, Revision No. 347 of 2019, High Court at Dar es Salaam. It was stated that the respondent informed the applicant in order to avoid inconveniences.

On receiving a letter during the weekend, he submitted that the applicant did not show how he was affected in receiving a letter in the weekend.

About expectation of renewal, it was submitted that previously renewals are not good reasons for expectation for renewal of employment contract. To cement on this point, he cited cases of **National Oil (T) Limited v Jaffery Dotto Msensemi & 3 Others**, Revision No. 558 of 2016, High Court at Dar es Salaam and **Ibrahim Mgunga and others v African Muslim Agency** (supra).

Submitting on the fourth and fifth grounds, together, he said the respondent did not terminate the applicant's employment contract but rather informed him that his contract was coming to an end. Further, it

was his argument that every contract executed is a new contract either under the previous terms or new terms.

On the second and sixth grounds, Mr. Nkalani submitted that the applicant was not charged with misconduct, but the dispute was dismissed because the applicant failed to demonstrate reasonable grounds for expectation of renewal.

The seventh ground was argued that, exhibit D1 shows, the employment contract was of 30 months and that the 36 months that appeared on the record of judgement is a human error. He then prayed for the CMA award to be upheld.

In rejoinder Mr. Lazaro reiterated what was submitted in chief, but added that termination of employment in fixed contracts depends much on multiple aspects such as the nature of the contract and the nature of the business.

After hearing both parties, I have to start determining grounds raised as follows:

On the first ground, it can be stated that section 39 of the Employment and Labour Relations Act, provides that it is the duty of the employer to prove fairness of termination of the employment. In going through the

CMA proceedings, it shows clearly that the respondent through Dw1 (Jackline Mayo – Managing Director) was the one who started to prove the case. It is the respondent therefore who started to prove the case and not the applicant. The applicant allegation that the arbitrator held that he did not prove his case came from the third paragraph of the award at page 10 that:-

> *"Baada ya kujibu hoja bishaniwa hapo juu nafuu pekee iliyopa baina ya pande zote mbili ni kufukuza – Dismiss mgogoro huu kwakuwa mlalamikaji ameshindwa kuthibitisha madai yake"*

The reason behind this statement as I get it, is because the applicant filed the labour dispute alleging unfair termination which was not proved. This ground for revision fails.

When dealing with the 2nd ground, it is clear that the *CMA* proceeding shows, the applicant stated the nature of his employment contract was of fixed term contract. For easy reference on untyped proceeding: -

> *"...niliusaini mkataba huo mnamo tarehe 26/8/2020 ulikuwa wa miaka 2 na nusu kama ule wa kwanza. Niliusaini na kuendelea na kazi..."*

Exhibit D1 (Employment Contract) shows that the contract commenced on 13th January, 2019, to end on 12th July, 2021.

The notice to show the intention not to renew the employment contract (exhibit D2) was given to the applicant on 30th May, 2021 (43 days before the expiry date). Rule 4(2) of the Code of Good Practice, provides: -

> *"Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise."*

At law therefore, it was correct to hold that the employment contract of the applicant terminated automatically due to expiry. The CMA was right to that effect.

Dealing with the 3rd ground. I have to stated that expectation for renewal is guided by rule 4(3) of Code of Good Practice. It clearly states 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 if the circumstances warrant it. Going by evidence, exhibit D2 shows in certain terms that the applicant was issued with a notice not to renew his contract 43 days before the expiry. This means there were no expectation of renewing the employment contract on party of the employer.

It can be deduced that renewal is not automatic. Since, the employer had expressed his clear intension not to renew it beforehand, I find no reason to expect that there was such enforceable right of renewal on party of the applicant. This ground has no merit.

As to the next ground, the applicant's evidence puts it all. He testified before the CMA as hereunder (untyped proceedings): -

> *"...niliajiriwa 2014 kwa mkataba wa miezi 30 ... nilifanya kazi hadi 2016 kwa mkataba wa nyuma ambao sikusaini ... ulirenew automatic hadi 2019... mnamo tarehe 13.1.2019 nilipewa mkataba mwingine"*

Based in his own words, the applicant confirms that he had more than one employment contracts. When one contract ended, the other one commenced. There was no notice whatsoever to terminate the same or renew it. It was therefore by default. When he was given a new contract, it was an intension on party of the employer to continue working with him. The need for notice was of importance at this time because, without it, it meant there was an expectation of renewal. Because it was given and it was before expiry of the contract, the respondent exercised his rights under the contract not to renew it. This ground also has no merit.

Determining ground five, it is evident that in exhibit D1, it shows there was a probation period. It is only seen under clause 10 that there is a probation period but it did not state how long would it last. For easy reference: -

> ***"Termination of Employment***
>
> *At any time after satisfactory completion of the probation period [where applicable], ..."*

In my view, presence or absence of the probationary clause does not change the fact that the employment contract between the applicant and the respondent was on fixed term of 30 months. That it came to an end automatically and the applicant was informed by the respondent of her intention not to renew the employment contract. I find no merit in this ground as well.

on the ground six, as I have shown before, the decision given by the arbitrator was not contrary to the law, since it is governed by rule 4(2) of the Code of Good Practice. It states that a fixed term contract ends automatically after expiration of the time. Further, rule 4(3) provides renewal by default, which happens when the employee has to continue working after the expiry of the employment contract. In this case the

applicant was given a notice to end the contract as per exhibit D2. This ground has no merit too.

Last ground, it is clear to me that the CMA heard the parties. The evidence was analysed and finally came to the finding that in view of the material submitted before it, justice dictated that the applicant had no good case. It was rightly dismissed. This ground also fails.

Having so held in all grounds, I find no merit in this application. It is hereby dismissed with no order as to costs.

A.K. Rwizile

JUDGE

14.12.2022