

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

REVISION APPLICATION NO. 400 OF 2020

BETWEEN

ABDALLAH M. ABDALLAH.....APPLICANT

VERSUS

LAKE CEMENT LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 10/02/2021

Date of Judgment: 07/01/2022

I. ARUFANI, J.

The applicant herein, being aggrieved by the award issued by the Commission for Mediation and Arbitration (hereinafter referred as the CMA) in Labour dispute No. CMA/DSM/TEM/407/2019/165/2019 which was issued in favour of the respondent, he filed the present application in this court to challenge the award on the following grounds:-

- (a) *The Honourable Arbitrator erred in law and fact in confirming the decision of the Commission for Mediation and Arbitration that the applicant was fairly terminated while evidence on the record and the law shows that the termination was unfair.*
- (b) *That the Honourable Arbitrator was wrong to oversight the fact that the applicant was terminated without being given*

reasons for non-renewal of the contract despite of his expectation of renewal.

- (c) The Honourable Arbitrator was wrong for failure to nullify the decision of the employer to terminate his employment based on contracts meant for professionals and staff managerial cadres.*
- (d) That the Honourable Arbitrator's decision to dismiss the complainant was wrong compared to the weight of evidence adduced to support the complaint.*
- (e) That the Honourable Arbitrator failed in law and fact to analyze the documentary evidence submitted before the Honourable Commission.*
- (f) That the Arbitrator erred in law and fact not to grant the applicant's reinstatement, in that the applicant applied for various claims plus wages as per the law, Collective Bargaining Agreement and conditions of service of the respondent.*

The application was challenged by the counter affidavit affirmed by Amina Hamadi Siwa, the respondent's Human Resource Officer. It is on the record of the matter, that the applicant was employed by the respondent as a driver from 1st March, 2016 in a fixed term contract which was renewed several times until 31st August, 2019 being the date of expiry of the last contract. The

applicant was served with a notice of non-renewal of the contract on the last date of the contract.

The applicant felt resentful with the notice and referred the dispute to the CMA where he filed the claims of unfair termination. Upon determination of the dispute the CMA dismissed the application, after finding there was no termination of the contract but the contract came to an end after expiration of the agreed period of the contract. On the second bite the applicant knocked the door of this court and filed in the court the instant application for revision of the award of the CMA. The matter was argued by way of written submission. While the applicant was unrepresented in the matter, the respondent was represented by advocate George Vedasto.

Submitting in support of the application, the applicant abandoned the fourth ground and submitted on the rest of the grounds. On the first ground he identified the types of employment contract as prescribed under Section 14 of Employment and Labour Relations Act (hereinafter referred as the ELRA). The applicant submitted that, he was just a junior staff who was employed as a driver on a fixed term contract and stated he was neither on professional nor on managerial cadre.

He stated that, under that position he could have not make policy on behalf of the employer or be authorized to conclude collective agreements on behalf of the employer. He referred the court to the case of **Denis Kalua Said Mngombe v. Flamingo Cafeteria**, Rev. No. 210 of 2010 (unreported) where it was held that:-

"The law, Section 14 (1) (b) of Employment and Labour Relations Act No. 6/2004 herein referred to as the Act categorically provides that a contract for a specified period of time is for professional and Managerial Cadres. Therefore, the parties entered into a wrong contract from the beginning".

He argued in relation to the second ground that, giving reasons for non-renewal of a contract is of paramount importance. He stated that, before termination of contract, the employer must communicate with the employee on the date when the contract will come to an end and his intention of his non-renewal of the contract. In this matter the applicant was served with a letter of non-renewal of the contract on the date when the contract came to an end. He stated the letter served to him was for handing over the company's properties and directed him to appear before OSHA. Therefore, it cannot be an

excuse for issuing a reasonable notice as provided under section 41 (7) (b) of the ELRA.

As regards to the third ground, it was submitted that Section 14 (1) (b) of the ELRA provides for the contract of specific period which is for professionals and managerial cadres. It was argued by the applicant that, from that position of the law the parties ought to have entered into a contract of unspecified period of time as provided under Section 14 (1) (a) of the ELRA. He referred the book of Labour Law Relations in Tanzania at page 110 to support his argument.

Arguing in relation to the fifth ground the applicant contended that, the arbitrator failed to analyse documentary evidence adduced before the CMA. He argued that, the respondent issued a letter of non renewal of a contract (exhibit AMA 6) contrary to the law which provides for a period of notice of termination of a contract to be not less than twenty-eight (28) days if the employee is paid on monthly basis, referring Section 41 (1) (ii) of ELRA. The applicant cited a number of cases to support his submission including the case of **Vodacom Tanzania V. Zawadi Bahenge & Others**, Revision No.

12 of 2012 (unreported) where it was stated that:-

"Finally, after the expiry of three months the applicant ought to have accordingly issued a proper notice of termination which was to be 28 days as required by law. Moreover, Section 37 (1) of CAP 366 R.E 2019 calls for reasons to be adduced for termination. The purported notice does not provide for any reason."

Concerning the sixth ground, the applicant submitted that, after the arbitrator has found out that termination was fair, he ought to have awarded the applicant benefits that are payable to the applicant as per the parties' agreement of good conditions of service and other payable as per the law. He cited the case of **Eddy Martin Nyinyoo v. Real Security Group and Marine**, Revision No. 114 of 2011 to support his submission. At the end he prayed the court to order the respondent to pay him compensated for unfair termination of his employment as the court may deem fit and proper in the circumstances of the case.

Responding to the applicant's submission, the respondent's counsel raised a point of law that the affidavit in support of the application is defective for want of legal issues arising from material

facts. He cited the case of **James Daniel V. Cats-Net Ltd.**, Revision No. 258 of 2007, HC at DSM (unreported) where it was stated that:-

"In the present case the supporting affidavit only lacks the mandatory contents as prescribed in Rule 24 (3) (c) of Labour Court Rules, 2007 in which, the affidavit does not contain a statement of legal issues that arise from material facts. Suffice to say the supporting affidavit is incurably defective, therefore this ground of objection is sustained".

Submitting in relation to the first ground the counsel for the respondent argued that, the ground has no merit as the applicant have not shown any evidence on record which shows termination of his employment was unfair. He argued that, termination of employment is unfair if the reason for termination is not valid and the procedure for termination were not adhered. He further submitted that the applicant's contract of employment was terminated automatically after expiration of the agreed period of contract on 31st August, 2019 as per exhibit D1.

To support his submission the counsel for the respondent cited in his submission Rule 4 (2) of the GN. No. 42 of 2007 and various cases including the cases of **Dotto Shaban Kuigwa v. CSI Engineering Company Ltd.**, Revision No. 5 of 2020, **National Oil**

(T) Limited V. Jaffery Msensemi 3 Others, Revision No. 558 of 2016, **Giz Deutsche Geseuscht for International Zusammenable (GIZ) GMBH V. Vida Mwasala**, Revision No. 248 of 2019 and **Jordan University Collage V. Flavian Joseph**, Revision No. 23 of 2019 (All unreported) where the court discussed the concept of legitimate expectation of renewal of a contract of employment.

He argued in relation to the second ground that, the applicant's contract was terminated by expiration of the agreed period of the contract and the applicant was notified about the said termination through exhibit D2. He submitted in relation to the third ground that, it is a new issue which was not among the issues determined by the CMA. He further submitted that the applicant professionally is a driver and he was employed on that capacity.

As for the fourth ground the counsel for the respondent argued that, it is true that the notice of terminating contract of employment should not be less than 28 days. However, the counsel for the respondent stated the applicant is confusing about termination of an existing contract and expiration of the fixed contract. He referred the court to the case of **Kinondoni Municipal Counsel V. Maria**

Emanuel Rungwa, Revision No. 375 of 2019 where the issue of termination of fixed term contract by its expiration was discussed. He prayed the court to rule out that the requirement to issue 28 days' notice is not applicable on expiration of a fixed term contract.

Concerning the fifth ground it was submitted by the counsel for the respondent that, the remedy for expiration of a contract is not reinstatement as argued by the applicant. He argued that, after the Arbitrator found termination of the applicant's employment was fair, he was required to award him his terminal benefits provided under the law and under the employer's contract of better condition of service. He stated the arbitrator explained all the claims of the applicant and the reason for not awarding the same. At the end the counsel for the respondent prayed the court to dismiss the application for being devoid of merit.

Before going to the merit of the matter, the court has found worth to start by the point of law raised by the respondent that, the affidavit supporting the application is defective for want of legal issues arising from the material facts of the case. After keenly going through the contested affidavit in support of the application the court has found the material facts of the case are deposed at paragraphs 2, 3,

and 4 of the affidavit supporting the application. The court has also found the legal issues are well deposed at paragraph 5 of the same.

That being the position of the matter the court has failed to see how Rule 24 (3) (b) and (c) of the Rules were violated and how the affidavit supporting the application is defective as argued by the counsel for the respondent. In the premises the court has found the counsel for the respondent has misdirected himself in raising the said point of the law. Consequently, the said point of law is hereby overruled for being devoid of merit.

The court has also found that, as rightly stated by the counsel for the respondent the applicant stated in the first ground that the honourable court erred in law in confirming the decision of the CMA while this court has never confirmed the decision of the CMA. The court has found the same error was repeated at page 2 of the applicant's submission. However, the court has taken that might be an oversight or typing error to state the court erred in confirming the decision of the CMA. The court has come to the above view after seeing in other grounds of the revision the applicant was referring to the honourable Arbitrator and not the honourable court.

Back to the merit of the application the court has gone through the record of the matter and the relevant laws and find that, despite the fact that the applicant raised six grounds in challenging the award of the CMA and argued five grounds out of the said six grounds but the issues to be determined in this matter are whether termination of the applicant's contract of employment was fair and what reliefs the parties are entitled.

Starting with the first ground of revision raised in the affidavit of the applicant the court has found it is undisputed fact that, the parties engaged in a fixed term contract which was being renewable upon its expiration from 2016 when the applicant was employed to 31st August, 2019 when his employment was terminated. The applicant argued that, the said contract was supposed to be nullified by the arbitrator on the ground that, the same was void ab initio because it was meant for professional staffs and managerial cadre in which he is not among them.

The court has found that, although that issue was raised in the closing submission filed in the CMA by the applicant but it was not among the issues framed and determined by the CMA. The court has found that, although the said issue was not among the issues

determined by the CMA but still the court can have a look on it to see whether it has any merit or not. The court has found it is true as argued by the applicant that section 14 (1) (b) of the ELRA states categorically that contract for specified period of time is for professionals and managerial cadre. The issue here is whether the applicant was in the stated category of employees.

The applicant argued he was not in the category of the professional staffs and managerial cadre of the respondent as he was a mere driver. He stated he could have not made any policy on behalf of the employer and he was not authorized to conclude collective agreements on behalf of the employer. The court has found the term professional is defined in the **Black's Law Dictionary**, Eighth Edition at page 1246 to mean *a person belongs to a learned profession or whose occupation requires a high level of training and proficiency*. The same word profession is also defined in the **Academic's legal Dictionary**, to mean *a job requiring special skills and training*. The term Manager is defined in the Black's Law Dictionary to mean *a person who administers or supervises the affairs of a business, office or other organization, including authority of over other managers*.

From the definition of the words professional and manager given in the above dictionaries it is crystal clear that the applicant who was a mere driver who said he didn't attend any training to acquire the said profession he cannot fall into the category of the employees referred under section 14 (1) (b) of the ELRA. Under the stated circumstances and as it was stated by my learned Sister Moshi, J in the case of **Denis Kalua Said Mngombe** (supra) the court is in agreement with the applicant that, the contract he entered with the respondent was void ab initio as it violates what is provided in the above cited provision of the law.

If it will be taken the contract entered by the parties was valid for whatever reason the next issue to consider is whether termination of the contract of employment of the applicant was unfair as the applicant argued he had reasonable expectation of renewal of his contract. The court has found that Rule 4 (2) of the GN. No. 42 of 2007 states clearly that, where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provides otherwise. Rule 4 (5) of the same law provides that, where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal of the

contract, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew.

That being the position of the law the court has gone through the contract of employment entered by the applicant and the respondent which was admitted in the matter as exhibit D1 and find that, his last contract of employment states it would have commenced from 1st September, 2018 and it would have come to an end on 31st August, 2019. There is nowhere in the said contract stated the contract would have been renewed after expiration of the said contract.

The court has found in trying to demonstrate the requirement provided under Rule 4 (5) of the GN. No. 42 of 2007 the applicant stated his employment commenced on 1st March, 2016 and from that date his contract of employment had been renewed until 31st August, 2019 when the respondent notified him his contract would have not been renewed. The court has found it is true as stated by the applicant that his contract of employment was been renewed from 2016 when he was employed until 31st August, 2019 when the respondent notified him his contract would have not been renewed.

The court has found the copies of the contracts of employment adduced before the CMA and admitted in the matter as exhibit D1 shows the parties entered into specified period of employment contracts for the following periods; 01/03/2016 - 30/05/2016, 01/06/2016 - 31/08/2016, 01/09/2016 - 31/08/2017, 01/09/2017 - 31/08/2018 and 01/09/2018 - 31/08/2019. It is the view of this court that, under that circumstances it cannot be said the applicant would have not formed a reasonable expectation that his contract of employment would have been renewed as it was done in the previous contracts.

Although it was stated in the case of **National Oil (T) Limited** (supra) that previous renewal of employment contract is not an absolute factor for an employee to create a reasonable expectations that the fixed term contract would have been renewed but to the view of this court and as provided under Rule 4 (5) of the GN No. 42 of 2007 the renewal of the previous contracts of employment of the applicant was a clear demonstration that the applicant had been made to form a reasonable expectation that his contract of employment would have been renewed.

The court has found the applicant argued further that, termination of his employment was unfair as he was not given the reason for terminating his employment. The court has found this argument is without merit because the letter of non-renewal of contract issued to him on 31st August, 2019 and admitted in the matter as exhibit D2 states clearly that, the contract would have not been renewed when the period of contract would have expired. The mentioned letter referred Rule 4 (2) of the GN. No. 42 of 2007 which states the fixed term contract is supposed to terminate automatically when the agreed period expires. That shows the applicant was informed the reason for termination of his employment was expiration of the period of his contract employment.

The court has also found the applicant argued further that, termination of the contract of his employment was unfair as he was not given notice for termination of his contract of employment. The court has been of the view that, although Rule 4 (2) of the GN. No. 42 of 2007 states the fixed term contract terminates automatically when the agreed period expires but under the circumstances of the employment of the applicant there was a need for the respondent to

issue an earlier notice to the applicant to inform him his contract would have not been renewed after expiration of its period.

The court has arrived to the above view after seeing that, as the contract of employment of the applicant had been renewed for the whole period from when he was employed by the respondent until when he was informed his contract would have not been renewed there was reasonable expectation on the part of the applicant that his contract would have been renewed as it was being renewed in the previous period. Under the stated circumstances there was a need of giving the applicant earlier notice that his contract would have not been renewed. The court has also arrived to the above finding after seeing that, even the last contract they had entered states clearly that their contract would have been terminated by either side to give the other side one month notice.

Although their contract had come to an end after expiration of the agreed period but the respondent ought to have notified the applicant earlier that his contract would have not been renewed and not to keep quiet until the last date of the contract to inform him his contract would have not been renewed. To the view of this court, it was not proper to give the applicant notice of non-renewal of the

contract of employment on the date of expiration of the agreed period of the contract.

Coming to issue of the reliefs the parties are entitled, the court has found that, as the parties' contract was a fixed term contract, then as stated in the case of **Msambwe Shamte & 64 Others V. Care Sanitation and Supplies**, Revision No. 154 of 2010 (unreported) the principle of unfair termination cannot be invoked in the case to move the court to grant the applicant the reliefs provided by the law for unfair termination.

The court has considered the argument by the applicant that after the Arbitrator found termination of his employment was fair, he was entitled to be awarded the benefits provided under the employer's contract of better condition of service but find the Arbitrator stated categorically in the award that the said claims were not proved and this court has no reason to fault the finding of the Arbitrator.

In the premises the court has found in addition to the terminal benefits paid to the applicant by the employer, the reliefs the applicant was entitled if it was not paid to him is a payment of one month salary in lieu of notice as he was not given reasonable notice

of non-renewal of his contract of employment. Consequently, the application is partly allowed to the extent stated herein above. The court is ordering the respondent to pay the applicant one month salary in lieu of notice of non-renewal of his contract of employment if it has not been paid to him and issue to him a certificate of service if it has not been issued to him. It is so ordered.



I. Arufani

JUDGE

07/01/2022

Court: Judgment delivered today 07th day of January, 2022 in the presence of the applicant in person and in the presence of Mr. Ditrick Mwesigwa, advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

07/01/2022