IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 215 OF 2021

SALMON RYOBA SALMON..... APPLICANT

VERSUS

MARA CREDIT COMPANY LTD .....RESPONDENT

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

(Massawe: Arbitrator)

Dated 03rd May 2021

in

REF: CMA/DSM/ILA/19/393

==========

JUDGEMENT

14th February & 16th May 2022

Rwizile J

This application emanates from the decision the Commission for mediation and arbitration (CMA). This court is asked to revise the award dated 3rd May 2021. The applicant as the record shows, was an employee of the respondent. He worked as a customer service personnel. Until his termination date, the applicant was a branch Manager at the Branch of Gairo.

When his last one-year contract ended in 2016, he got an extension of 6 months. Before it came to an end, he was terminated for misconduct.

Being aggrieved by termination he filed a dispute before the CMA. It was found that his termination was unfair. He was awarded terminal benefits of an expired term of the contract. The CMA also went further and ordered payment of the loan he owed to the respondent from the terminal benefits. The applicant was again not satisfied, hence this application. In the affidavit supporting this application, the applicant advanced three grounds for revision. They are coached in the following terms;

i. Whether the Arbitrator was right to hold that the applicant was to pay and deduct the Awarded sum while there is no valid contract less than 12 months in Tanzania law since 2017 February.

ii. Whether it was right for the Arbitrator to ignore other claims and legal right set it the CMAF1 and law without stating the valid reason.

iii. Whether the arbitrator was fair and right not to record the adduced fact by the applicant about salary and purported loan

and to be silent without questioning the applicant who is the lay person as directed by law.

The application was heard by way of written submissions. The applicant was not represented and argued his application as following; That, the commission did not take into account his evidence. He said, he was paid TZS 1,000,000.00 per month, and was paid the same through M-pesa. In his view, his evidence was enough to prove that the amount of TZS 342,000.00 was only stated in the contract. Therefore, he said, the Commission ignored actual evidence he tendered before it.

The applicant further submitted that he was to be paid a salary of September 2019, leave, notice, severance pay, compensation for breach of contract, and repatriation allowance as per section 41(1)(ii), 42 (1)(a), and (c) of the Employment and Labour Relations Act (ELRA). The applicant added that since the applicant was terminated at a place other than where he was recruited from, then he was to be paid as per section 43 of the ELRA. He was supported by the decision of this court in the case of **World Vision Tanzania vs Zahara Rashid**, Revision No. 17 of 2015. The applicant further submitted that the award did not show how he arrived at the decision. In his view, this is not proper and asked this court to refer to the

case of **One Product & Bottler Ltd vs Juma A Wanyama**, Application No. 223 of 2013.

The applicant further submitted that it was wrong for the Commission to hold that the contract of six months dated 1st July 2019 was not illegal, since it contradicts section 14(1)(b) of the ELRA and Rule 11 of GN 47 of 2007. According to the law, he argued, the fixed term contract should not be less than 12 months. He argued that, the applicant was to be paid 9 months of the remaining term of the contract, three months awarded is illegal. He said, the award contradicted rule 28(2) and (3) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN 67 of 2007. He therefore asked this court to set aside the award.

Mr. Rajabu Mwinyi learned advocate for the respondent argued that the evidence produced by the respondent proved that the applicant was paid as per contract exhibit D1, the monthly salary of TZS 380,000.00. The respondent, according to him, did not dispute the terms of the contract.

He said, the one who alleges must prove as per section 110(1) of Evidence Act, as it was held in the case of **Lesikari Sailevu vs Ngilort Sainevunye**, Misc. Land Case Appeal No. 20 of 2018.

Further, he said, the CMAF1 is what was based to grant reliefs. What the applicant applied for, he submitted, is not what the law provides. He said, unfair termination has its remedies under section 40(1) of ELRA. It was further submitted that in the case of **World Vision Tanzania** (supra) as cited by the applicant, there was evidence for repatriation which is not in the case at hand.

As to the issue of illegality, it was submitted that, it was an afterthought since it was not raised before the CMA. In this, he referred to the case of **Philipo Joseph Lukonde vs Faraji Ally Said**, Civil Appeal No. 74 of 2019. It was held, parties are bound by their contracts. It was further argued that, the decision, of the CMA did not conflict rule 28(2) and (3) of GN No. 67 of 2007. The learned advocate further argued that the applicant instituted his claims through one Maulid Hassan who he later dismissed. The applicant therefore proceeded to prosecute the case on his own and has not shown how, there was failure of justice. He said, the proceedings were held in Kiswahili, so is the award. Therefore, it was argued, he was afforded a change to present his case. In the view of the learned counsel, the illegalities and irregularities are not in the face of the record and so should be ignored

as held in the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015.

By way of rejoinder, the applicant reiterated his submission in chief but added that in the CMAF.1, among the claims, is repatriation costs and payment of substance allowance as well as transport package. He said, the case of **Ngaro Godwin** (supra) is irrelevant. He asked this court to grant compensation of 9 months at the tune of 1,000,000.00 TZS.

Having considered the submissions of the parties, I have to determine the issues as raised by the applicant.

Dealing with the first issue, the applicant complained of the contract which is exhibit D1. It is from it that the applicant had an extension of 6 months from the previous contract which had expired before. There is evidence therefore that before termination, the applicant had worked with the respondent in other renewable contracts. It is clear therefore, this last contract was not the first. I therefore agree with the applicant that fixed term contracts should not be less than 12 months. The purpose for which the law was enacted is to prevent short term contracts. It could not be proper therefore to enter contracts for the period less than that specified by law.

Upon perusal of the record and submission of the parties, it is pertinent to hold that the applicant's submission has merit on this point. But going by evidence procured before the Commission, the applicant was clear that he was employed in 2014. He had according to him, fixed term contracts that were being renewed. Although, the respondent disputed that and said, he was employed on 2017. This court is therefore convinced that the applicant was in an extended contract. It should be not that the law does not allow entering into contracts that are for less than 12 months.

But when parties agree to an extension of the contract, the terms of that extension are binding on the parties. The applicant was therefore bound by the terms agreed. The first issue therefore has no merit. It is dismissed.

On the second point, it is clear to me that when termination is found unfair. The law is clear on what are the remedies. Under section 40 of the ELRA the law provides for either reinstatement, re-engagement, or payment of terminal benefits such as remuneration not less than 12 months. This, it has been held, happens when the cause of action is termination of employment. To apply section 40 of the law, the cause of action has to stem from breach of contract. The applicant was employed on fixed term contract. The

character of fixed terms contract, they are renewable on agreement or terminated based on the terms stated therein.

The applicant as alleged was terminated due to misconduct. Upon termination, the CMA found that there was breach of contract. The CMA was therefore right to award the remaining part of the contract. As I have held before, the contract breached was based on the extension of 6 months. I have nothing to fault the award in this respect. The second issue is therefore dismissed.

Lastly, the applicant complained of two things, first that since the applicant was not represented, the arbitrator did not take his role of assisting the applicant in presenting his case contrary to the rules, second that his evidence in respect of the salary payable was ignored by the arbitrator.

Starting with role of the arbitrator when there no representation. The law is clear as to the role of the arbitrator. It is to strike at the balance between the parties so as to reach the ends of justice.

The applicant was indeed not represented. There were no claims before the commission that the same did not properly hear his case. He did not complain that arbitrator mistreated him or acted contrary to the ethical

standards so applicable. The same has come now, at the stage of revision. This in my considered opinion is an afterthought as it was submitted by the respondent.

On the question of ignoring physical evidence of the applicant. I have gone through the record. There are key things that prove the salary payment. One is the contract if written and specifying the amount of salary. Second may be evidence of pay slip or bank statement showing how much has been paid to the employee on monthly basis. The respondent tendered the contract exhibit D1 while, the applicant brought the bank statements. As held by the CMA, it was found that the applicant was paid in all, TZS 342,000.00 tax, from the sum of TZS 380,000.00 as salary in several occasions. This was in both, the contract tendered by the respondent and the exhibits tendered by applicant, including exhibit C1.

It was therefore the duty of the applicant to call for evidence that would prove he was paid an amount of 1,000,000.00TZS. Simply alleging that he was paid the other amount through M-pesa for purposes of avoiding tax was not proved. I think, he has not proved this issue too. I therefore have nothing to fault the decision of the commission in this respect too. Having said what I have said, I dismiss the last issue as having no merit.

When concluding, I have to say, that the Commission, ordered the applicant to pay the loan through his terminal benefits. I do not think this is proper. It is not proper because, a loan is not a labour dispute. The applicant did not admit, he had not paid the said debt if, it indeed existed. It was in itself another private arrangement between the parties. The evidence ought to have been called to prove that the same existed and it was to be paid in the manner the parties agreed. That being the case then, this application is partly allowed. It is only to the extent of using terminal benefits to settle the claims between them. Otherwise, the application is dismissed with no order as to costs.

A.K. Rwizile

JUDGE

16.05.2022