IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 60 OF 2022

BETWEEN

FEZA PRIMARY SCHOOL ..... APPLICANT

VERSUS

LWIMIKO MWANJALI ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

This application beforehand is challenging the decision of the Commission of Mediation and Arbitration ("CMA") delivered on 28/01/2022 in Labour Dispute No. CMA/DSM/KIN/33/21/122/21. The applicant is urging the court to revise and set aside the CMA's proceedings, order and subsequent award on the reasons which will be apparent hereunder. The application is supported by the affidavit of one Omary Dudu Hamisi dated 28th February, 2022. On the other hand, the respondent vehemently challenged the application by filing a notice of opposition together with t counter affidavit.

A brief background of the dispute is that the respondent was employed by the applicant as a Swahili Teacher in a fixed term contract of one year since 01/01/2018. The contract had been renewed several times and the last contract renewed by the parties, which is the subject

matter of this application, commenced on 01/01/2020 and was agreed to end on 31/12/2020. Under clause 10 of the disputed contract, the parties agreed that if the employer (applicant) did not wish to renew the said contract, he had to issue one month notice of non-renewal of the said contract. It is alleged that contrary to the parties' agreement, on 27/12/2020, the applicant issued the respondent a notice of non-renewal of the disputed contract. After being served with the said notice, the respondent felt aggrieved alleging to have been unfairly terminated from employment. He therefore referred a dispute at the CMA. The conclusion of the arbitration issued an award with a finding that the respondent was unfairly terminated. Consequently, the respondent was awarded a total sum of Tshs. 12,504,000/= being twelve months' salaries as compensation for the alleged unfair termination. Dissatisfied by the CMA's award, the applicant filed the present application on the following grounds:-

i. That the Arbitrator erred in law for her failure to endorse the exhibits tendered during arbitration rendering the entire proceedings a nullity.

ii. That, it was irregular and legally unjustified for the learned arbitrator to hold the view that the respondent had reasonable

expectation of renewal of his employment contract without objectively analysing the circumstances of this matter and the evidence on record.

iii. That, it was irregular and improper for the learned arbitrator to entertain the respondent's complainant while the complaints in form CMA F1 were different from those on record.

iv. That, whether the learned arbitrator was legally justified to dismiss an application for setting aside an ex parte award in terms of Rule 30(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007

The matter proceeded by way of written submissions. Before this court the applicant was represented by Mr. Ashiru Hussein Lugwisa, Learned Counsel whereas Mr. Mlyambelele Abedinego Ngw'eli, learned Counsel appeared for the respondent.

In his submission to support the application Mr. Lugwisa abandoned the fourth ground of revision and argued the remaining grounds. Staring with the first ground, on what is alleged to be the arbitrator's failure to endorse the exhibits tendered during arbitration rendering the entire proceedings a nullity; Mr. Lugwisa submitted that

failure to properly mark or endorse exhibits received by a court or any tribunal which is authorised to receive evidence is fatal rendering the entire proceedings nullity. He submitted that the rules governing CMA's proceedings does not provide for procedures of admission of documents or exhibits, he hence urged the court to adopt the procedures provided under Order XIII Rule 4 of the Civil Procedure Code, [Cap 33 RE 2019] ("CPC"). He then argued that endorsement of exhibits is important in order to do away with tempering with admitted documentary exhibits. To support his submissions, he cited the case of **A.A.R Insurance T. Ltd vs Beatus Kisusi (Civil Appeal 67 of 2015) [2016] TZCA 191 (31 May 2016)**; where the same position was held.

Mr. Lugwisa went on to submit that the entire CMA proceedings should be annulled for failure to comply with Order XIII Rule 4 of the CPC. The counsel pointed the exhibits which were in contravention of the law as a letter requesting for leave (exhibit AP1) and notice of non-renewal of employment contract (exhibit AP2).

As to the second and third grounds Mr. Lugwisa submitted that at the CMA, the Arbitrator raised two issues relating to two distinct causes of action, to wit issues of unfair termination and that of breach of contract. He argued that the respondent only claimed for termination of

employment thus the Arbitrator wrongly determined the issue of breach of contract suo motto. He stated that the issue was determined without affording the parties the right to be heard which is fundamental, and any decision arrived in its violation is a nullity. To support his submission, he cited the case of **Selcom Gaming Limited v. Gaming Management (T) Ltd and Gaming Board of Tanzania [2006] TLR.**

Mr. Lugwisa went on to submit that the fact that the respondent was informed to report to work after lapse of his contract does not reasonably create expectation to renew. That the evidence on record proves that the applicant communicated with the respondent about his intention not to renew the contract and that there was no expectation of renewal in this case. He therefore urged the court to revise and set aside the CMA's proceedings and the subsequent award.

In reply, Mr. Ngw'eli first prayed that the court adopt the respondent's counter affidavit to form part of his submissions. Responding to the first ground of revision, he submitted that the contested exhibits were properly admitted at the CMA without objection from the applicant. He alternatively submitted that if the court finds that the said exhibits were not properly admitted, he pleaded for the oxygen principle to apply. To support his position, he cited numerous Court of

Appeal decisions including the decision in the case of **Princess Nadia (1998) Ltd vs Remency Shikusiry Tarimo & Others (Civil Appeal 242 of 2018) [2021] TZCA 249 (09 June 2021)** in which the Court of Appeal rejected the applicant's prayer to find the omission fatal.

As to the third ground, Mr. Ng'weli strongly disputed the allegation that the Arbitrator raised her own issues suo motto. He submitted that the issues were properly framed based on the parties claims and the applicant did not challenge the issues at the CMA. Regarding the second ground Mr. Ngw'eli submitted that the applicant created reasonable expectation of renewal of the disputed contract. That on 24/11/2020 the respondent received annual leave letter which permitted him to begin his statutory leave on 19/12/2020 to 31/12/2020 (exhibit AP1). That the letter further instructed him to resume work on 05/01/2021 hence granting the respondent automatic renewal of the contract.

Mr. Ngw'eli continued to submit that exhibit AP1 which justifies expectation of renewal was never opposed by the applicant therefore the CMA reached to a just decision. He therefore urged the court to dismiss the application for want of merits.

After considering the parties submissions and the records of this application, I find that there are issues of substance of the evidence and

procedural issues. The procedural issues lies on the first ground of revision that the arbitrator erred in law for her failure to endorse the exhibits tendered during arbitration rendering the entire proceedings a nullity. The applicant is contending that leave letter (exhibit AP1) and a notice of non-renewal of the contract (exhibit AP2) were not properly endorsed and marked in accordance with Order XIII Rule 4 of the CPC. The counsel urged the court to adopt the procedures of admitting exhibits provided in the cited provision and resort such procedure because the same is not provided in the labour laws. He prayed that the proceedings of the CMA be annulled. In reply, Mr. Ngw'eli submitted that the contested exhibits were properly admitted at the CMA without objection from the applicant. He alternatively urged the court, it I find that the said exhibits were not properly admitted, to apply oxygen principle citing the case of Princess Nadia (1998) Ltd (Supra). I need not be detained much by this ground, as submitted by Mr. Ngw'eli, the documents were submitted at the CMA without any objection and this is what the records also reflect. The issue will only remain if such an omission is fatal. In the same cited case of Princess Nadia (1998) Ltd (Supra), while dealing with the issue of non-endorsement of the exhibits had this to say:

"Apparently, there is no dispute that the documents referred to as exhibits in the trial court's judgment were not admitted as such. It baffles our mind that it is the appellant rather than the respondents complaining of lack of endorsements of her own documents. Without further ado, we reject the appellant's prayer which takes us to the merits of the appeal."

As for the case at hand, it is on record that on the 18/12/2021, the respondent herein prayed for the admission of the documents and there was no objection from the respondent who is applicant herein. Furthermore, the applicant is not challenging the authenticity of the document, just the fact that they were not endorsed. Since the labor laws are silent on this issue, I cannot rely on the CPC because the matter that is being challenged happened at the CMA and not this court. There is no law which expressly provides for the use of CPC at the CMA, unlike the Labour Court Rules, G.N. No. 106/2007 which provides the use of CPC where there is a lacuna in those rules. Generally, the labour laws are designed to empower the Arbitrator to deal with substantive merits of the dispute with minimal legal formalities as it is provided under section 88(4) of ELRA. That being the case and in the light of the

above cited case, since the authenticity of the documents is not in question, this ground lacks merits and it is hereby dismissed.

As to the third ground, the applicant alleges that the Arbitrator raised two issues to two distinct causes of action. He strongly submitted that the respondent's cause of action was termination of employment contract thus the issue of breach of contract was suo motto raised by the Arbitrator hence infringed the parties the right to be heard. In the matter at hand in the referral form (CMA F1) the respondent sued for unfair termination. In my view the disputed issues were framed based on the CMA F1 and opening statements of the parties. In his opening statement the respondent alleged breach of contract. In the matter at hand on the date of framing issues Mr. Ngw'eli was present and he had no objection on the issues framed. I have also examined the CMA records; the evidence was adduced with respect to the issues framed. Thus, the allegation of infringement of the right to be heard lacks merit.

Turning to the last issue as to whether the respondent had reasonable expectation of renewal. Pursuant to Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 ('the Code'), a fixed term contract shall terminate automatically upon expiry of the agreed term unless the contract provided otherwise.

It follows that in a fixed term contract, notice of termination of the contract is not mandatory as the contract itself serves as a notice. This position was held by this court in the case of **Tunakopesha Ltd v. Moses Mwasiposya, Labour Revision No. 17 of 2011** (unreported) where it was held that:-

> *"... if the contract had indeed been for a fixed specific period, there would have been no need for notice of termination."*

In the matter at hand, the parties agreed that if the applicant decides not to renew the contract, he shall serve one month notice to the respondent or pay him one month salary in lieu of notice. This is pursuant to clause 10(ii) of the employment contract (exhibit D1) which provides as follows:-

> *"If The school management decides that the contract will not be extended, the employee shall be given one-month notice or be paid in lieu of notice. Apart from that, no other claims can be made and no compensation shall be paid."*

The applicant alleges that the respondent was served with notice of non-renewal on 27/11/2020, however there is no evidence on record to prove that fact. On his part, the respondent tendered the alleged

notice (exhibit AP2) which shows that he received the same on 27/12/2020. Therefore, the notice of non-renewal was served on 27/12/2020 which is in breach of the agreed term of the contract.

I have also noted the respondent's allegation that he had reasonable expectation of renewal of the contract. In cases where the employee alleges reasonable expectation of renewal, the burden shifts to the employee to prove the basis of his expectation. Rule 4(5) of the Code provides as hereunder: -

> *"where fixed term contract is not renewed and the employee claims reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew."*

It is also the position of the court that previous renewal alone does not stand as a reasonable expectation of renewal of the contract. In the case of **National Oil (T) Ltd. v. Jaffery Dotto Mseseni & 3 others, Revision No. 558 of 2016** (unreported) it was held that; -

> *"I must say, the question of previous renewal of employment contract is not an absolute factor for an employee to create a reasonable expectation, reasonable expectation is only created*

where the contract of employment explicit elaborate the intention of the employer to renew a fixed term contract when it comes to an end."

In this case the respondent's basis of expectation is based on the letter of approval of leave (exhibit AP1 collectively). I had a glance of the alleged letter, the respondent's leave was approved for thirteen (13) days from 19/12/2020 to 31/12/2020, the date of expiry of his contract. In the alleged letter the respondent was further informed to resume work on 05/01/2021. In my view such information would have created reasonable expectation if the respondent was not served with the notice of non-renewal of the contract. However, as held earlier, the respondent was served with the notice of non-renewal of the contract on 27/12/2020 before expiry of the same. Therefore, reasonable expectation cannot stand in this case.

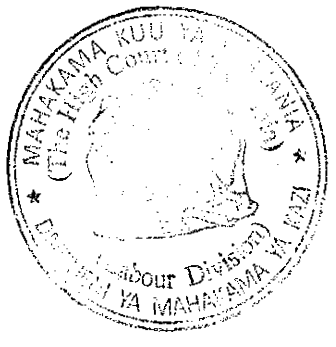
Furthermore, the contract itself entered by the parties demanded the parties to have mutual agreement on renewal of the contract as it is provided under clause 1 of the employment contract (exhibit D1). In absence of the mutual agreement by the parties, I find the respondent's allegation not to be substantiated. At this point, I revise the Arbitrator's

findings that there was reasonable expectation of renewal of contract in this case since there was none.

On those findings, the application has merit and the Arbitrator's award is hereby revised and set aside to extent explained. The award of compensation of Tshs 12,504,000/- as compensation for unfair termination is hereby set aside. Instead, the applicant is ordered to pay the respondent a sum of Tshs. 1,042,000/- as one-month salary in lieu of notice for failure to serve the respondent notice within the agreed time.

It is so ordered.

Dated at Dar es Salaam this 20th July, 2022.



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S.M. MAGHIMBI
JUDGE