IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 18 OF 2021

SUNDAY KIDIFU ..... APPLICANT

VERSUS

FROSTAN LTD ..... RESPONDENT

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

(Lemurua : Arbitrator)

Dated 11th December, 2020

in

REF: CMA/DSM/KIN/311/2020/185

JUDGEMENT

04th July & 19th August, 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/673/20/289. This Court has been asked to examine the proceedings and the subsequent award in order to satisfy itself on the appropriateness of the same, revise and set aside the award.

The brief history to this case is; the applicant was an employee of the respondent. He started working on contract from 25th January, 2016 as an accountant until 31st March, 2020 when he was terminated.

In March, 2018 the respondent issued a proposal of changing employment contract from unspecified period of time to a fixed term. The applicant did not sign the said proposal. Sometimes later, the applicant referred the matter to the Labour Officer who ordered the respondent to comply with the terms and conditions of its agreement with the applicant. On 10th February, 2020 the respondent paid the applicant the January 2020 salary of TZS 1,796,984.00. On 26th February, 2020 and 31st February, 2020, the applicant was issued with a notice of ending the contract and termination of the employment. On 22nd April, 2020 the respondent filed a dispute to the CMA and the award was in his favour. The applicant was not satisfied with the decision, hence this application.

The application is supported by the affidavit of the applicant, he advanced the following grounds: -

1. *The arbitrator erred in law and fact in failing to find that the applicant had a valid employment contract of unspecified period which never changed to a contract of specified period of time.*
2. *The arbitrator erred in law and fact by failing to find that the proposed contract required discretion of the applicant to express his consent of acceptance of terms and conditions by signing.*

3. *The arbitrator erred in law and fact by failing to find that the respondent expressed and communicated to the applicant that since the latter rejected the terms and conditions of a proposed contract, the respondent upheld the terms and conditions of the contract that existed, thus the contract of unspecified period of time dated 25th January, 2016.*
4. *The arbitrator erred in law and fact by failing to find that the salary increment of TZS. 1,796,984.00 was an increment that the applicant had been receiving even before the proposed contract.*
5. *The arbitrator erred in law and fact in finding that the acceptance of terms and conditions of a proposed contract was by way of conduct.*
6. *The arbitrator erred in law and fact in failing to find that the applicant's refusal to sign or to accept was a discretion of the employee provided for under the proposed contract and therefore he failed to find that there was a dispute upon refusal to accept the terms and conditions.*
7. *The said award does not conform to the legal requirements of an award as it falls short of reasons of the finding and failed to analyse the evidence.*

8. The trial arbitrator erred in law and fact in failing to hold that the applicant was unlawfully dismissed from his employment.

The hearing was by way of written submissions. The applicant was represented by Mr. Kheri Kusekwa, Legal Officer (TEWUTA) whereas the respondent enjoyed the service of Mr. Patrick Mhina, learned Advocate.

Mr. Kusekwa argued all grounds together. It was argued that Dw1, Dw2 and Pw1 testified that the applicant had a permanent contract with the respondent as seen in exhibit D2. He continued to argue that based on exhibit D3, the respondent proposed to the applicant the new contract which was a fixed term. He added, the applicant did not sign, he therefore refused the proposal. He stated further, that the applicant continued to be paid his salary based on his permanent contract as evidenced in exhibit D2.

Mr. Kheri cited section 14(1)(a) and (b) & (2) of The Employment and Labour Relations Act [CAP. 366 R.E. 2019] (ELRA) which provide that employment contracts should be in writing. He then stated that the parties did not enter into the new contractual relations as proved in exhibit D6. He cemented his submission by stating that the salary increment was paid to the applicant before the proposed contract. In his view, the arbitrator erred by holding that he was supposed to file a dispute in 2018 when he

refused to accept the proposed contract contrary to the terms of the contract which was not a dispute at all.

Mr. Kusekwa submitted further that changes to the employment contract should be effect upon consultation. He said, parties agreed to restore the terms of the contract signed by them on 26th January, 2016. In his view, the respondent failed to prove existence of consultative meeting between them under section 15(1)(4)(5) and (6) of ELRA.

Mr. Kusekwa further said, exhibit D5 was tendered but witnesses were not called to testify. He continued to argued that neither Dw1 nor Dw2 who tendered previous contracts to help the CMA to reach at a just decision. Furthermore, it was his argument that exhibit D6, letters dated 28th January, 2020 and 04th February, 2020 proved that there was no meeting between the parties. According to him, the respondent failed to prove that termination complied to rule 9(3) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, section 37(2)(a), (c) and 39 of the ELRA.

On whether the arbitrator failed to analyse the evidence tendered by the parties. Mr. Kusekwa attacked the arbitrator's reliance on exhibit D5, because the witness did not come to testify.

He then stated that exhibit D3 and D6 proved that parties were bound to the terms of the contract and that it was the applicant's right to accept or decline the proposed contract.

Mr. Kusekwa finally asked this court to set aside the award but order, compensation of 36 months salary as under section 40(1)(c), one month salary in lieu of notice as per section 44(1)(d), accrued leave in line with section 44(1)(c) and severance pay as per section 44(1)(e) of ELRA.

In reply Mr. Mhina submitted that the grounds in the applicant's written submission did not match with the ones stated in the affidavit. He said there were two new grounds raised in the submission, which are *whether the arbitrator failed to analyse the evidence tendered by the parties and whether the applicant had a valid contract of unspecified period and not specified period employment contract.*

He stated that the grounds to be relied upon during the hearing ought to have been averred in the affidavit in support of the application as held in the case of **Tanzania Broadcasting Corporation (TBC) v John Chidundo Mbele**, miscellaneous Application No. 146 of 2013. The learned counsel also cited rule 24(3) of the Labour Institutions (Mediation and Arbitration) Rules 2007. This court was asked to consider grounds in the supporting affidavit.

Responding to the grounds raised, Mr. Mhina submitted that the applicant enjoyed new remuneration of the new contract since April, 2018 to February, 2020, the salary of TZS. 1,796,984.00 per month. In his view, the applicant, when accepting benefits of the new contract, by implication, he accepted the terms of it.

He stated that as exhibits D3, D4 and D5 proved, the meeting was held between the respondent and his employees. According to him, due to financial instability elaborated at the meeting, there were no hesitation from either party on the commencement of the new contract from April, 2018. He supported his submission by citing section 8 of the Law of Contract Act [CAP. 345 R.E. 2019] which provides that acceptance of terms of the contract may be by accepting conditions or receiving consideration as held in the cases of **Norvatis SA(Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518(SCA), **Brogen v Metropolitan Railway Co. LTD** [1987] L R2 APP 6D 686 and **Smith v Hughes** [1871] LR 6 QB 597.

On the second ground, the counsel held the view that Dw1 and Dw2 tendered contracts of other staff which changed from permanent to fixed term contract. He stated that there is no rule of law that the unsubstantiated testimony cannot be accepted. To cement his

submission, he cited rule 32(3) of G.N. No. 64 of 2007. He stated that the evidence presented by the parties were analysed properly by the arbitrator and that a number of witnesses is not considered but the quality of evidence is taken into account.

Further, Mr. Mhina insisted that the award was logical and concise, it complied with rule 27(1) of Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007. The learned counsel asked this court to dismiss the application.

In a rejoinder, Mr. Kusekwa reiterated his submission in chief but elaborated that, the respondent, if he considered there was something wrong in the submissions and affidavit supporting this application could challenge the same by a preliminary objection, not through reply submission. He cited the case of **Emanuel Talalai v Cocacola Kwanza Ltd**, Revision No. 24 of 2019, High Court at Mbeya (unreported). In his view, the case of **Tanzania Broadcasting Corporation (TBC) v John Chidundo Mbele** (supra) is irrelevant as the issues raised in the submissions were not in the affidavit. He continued to argue that rule 24(3) is irrelevant. On the point of signing of the proposal, he cited the case of **British American Tobbaco Kenya Ltd v Mohan's Oysterbay**

Drinks Ltd, Civil Appeal No. 209 of 2019, Court of Appeal at Dar es Salaam at pages 19, 20 and 21.

After going through the pleadings, I think I have to determine *which contract that governed the parties and if terms of the same were breached*

There is no dispute that the applicant was the employee of the respondent. The applicant, it was not disputed either that he was first employed under permanent employment contract. The disputed fact came after the proposal to have a new contract of fixed term of two years. By going through exhibit D2, a contract of employment, item one states that: -

> *This contract shall start on Monday 25.01.2016 and continues until lawfully terminates. ..."*

This means, if there is a need, termination has to follow the law. Further, under item 16. It states: -

> *Apart from the probation period referred to (5) this contract may be terminated by either party by giving the other a one-month notice.*
>
> *Notice shall be given in writing than the minimum period specified stating the reasons of termination and the date on which the notice is given.*

There is evidence that applicant did not sign a new contract changing terms of the previous contract. This is also proved by the letters which were admitted as exhibit D6. Looking at the second employment contract, it provided the applicant had to sign two copies. He did not and it is therefore clear to me that the evidence of not accepting terms of the new contract is apparent.

Going through both employment contracts, exhibit D2 (first contract) shows that the applicant was paid TZS. 700,000.00 and when asked during cross examination, he stated that he was not given any letter of salary increment or promotion. But by exhibit D4, the gross salary which was paid to the applicant in May, 2018, January, 2019, September, 2019 to February, 2020 is TZS. 1,796,984.00 which is the amount stipulated in the second contract dated 30th March, 2018. It was communicated to the applicant in the following terms before it was paid to him.

> *"Compensation Package: Under this contract, your salary falls under Job Level 3 and Pay Grade B2 with Basic Salary of TZS 1,796,984/= per month..."*

The above shows, on the one hand, the applicant did not sign the second contract but on the other hand he received the salary proposed in the second contract. The applicant continued to work for two years (from 30th

March, 2018 to 31st March, 2020) enjoying terms of the second contract salary.

In my considered view, failure to sign the contract but quietly enjoying terms of the same as it is in this case the salary, impliedly proves that the applicant agreed to the second contract.

Going to the second issue, exhibit D3 was a contract of two years from 30th March, 2018. The notice to end the contract at its lapse was issued as shown hereunder;

> *"RE: NOTICE CONTRACT END*
>
> *This letter is to notify you that your current contract is coming to an end effectively on 31st March 2020. Please consider your last working day at Frostan Limited will be 31st March 2020."*

It is clear to me, that the applicant's contract ended automatically due to lapse of time. The contract itself stated clearly when it comes to an end and the employee will be paid severance allowance. For that matter the applicant ought to be paid severance allowance for the years worked which is the sum of TZS. 967,606.76. But there is evidence that the same was paid as per exhibit D6, the sum of TZS. 376,923.08. This shows there

is a gap of TZS. 590,683.68 which should be paid. Otherwise, the application has no merit. It is dismissed with no order as to costs.

A. K. Rwizile

JUDGE

19.08.2022