

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

REVISION NO. 199 OF 2021

Arising from an award of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala, in Labour Dispute No. CMA/DSM/ILA/R.443/2018 (Hon. Faraja J Arbitrator) dated 10th February 2020

FIVE STAR PRINTERS LIMITEDAPPLICANT

VERSUS

KENETH LUSEKELA & ANOTHERRESPONDENTS

JUDGMENT

K. R. Mteule, J.

18 August 2022 & 2 September 2022

This is an application for revision where the applicant is seeking for this court to call for the record of the CMA in Labour Dispute No. CMA/DSM/ILA/R.443/2018 from the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA) to satisfy itself as to the legality, propriety, rationality, logic and correctness and set aside the award therein.

From what I gather from the CMA record, the affidavit and counter affidavit of the parties, the Respondents has a fixed term employment contract which ended in April 2018. The Respondents, feeling to have been unfairly

terminated with no reason, filed the aforesaid labour dispute in the CMA. The Respondents claimed for notice, severance payment, 12 months compensation and leave payment for unfair termination. The arbitrator found no unfair termination but a breach of contract and awarded the Respondents ten months salaries which were remaining in the said breached contracts. Being dissatisfied by the decision of the arbitrator, the Respondent preferred this application for revision.

In the affidavit in support of this application, the Applicant raised 3 grounds which can be paraphrased as follows:

1. Arbitrators's did not afford to the Applicants a right to be heard.
2. That the arbitrator erred in finding unfair termination in a contract which had already expired.
3. Arbitrator's failure to to consider and evaluate the evidence tendered.

The Application was heard by oral submissions where the Applicant was represented by his Legal Officer Mr. Shilinde Swedi while the Respondent was represented by Denise Mwamkwara Personal Representative of the respondents.

In his submission, Mr. Shillinde statrted to address the first gound of revision where he approched the issue as to whether the applicant was

afforded right to be heard, Mr. Shilinde claimed that the Applicant was not given right to be heard because the witness was not given the instructions to do so. He stated that DW1 was not a responsible person to deal with the labour dispute in their office and she did not have sufficient information on the dispute.

On the second ground as to whether the Respondent has valid contract with the Applicant, Mr. Shilinde claimed that on 9/4/2018, the relationship between the Applicant and the Respondent came to an end and on 12/4/2018 the Respondents were given letters to end their relationship with the applicant so that they can be paid any dues. According to Mr. Shilinde, they were surprised that on 16/4/2018 after being paid all their dues, the Respondents went to file the impugned labour dispute while knowing that their contract had already expired with no legal force.

With regards to the third ground Mr. Shilinde addressed the issue as to whether the arbitrator misdirected himself by relying on the Respondents statements that they were entitled to compensation. According to him, the Respondents did not have employment relationship with the applicant. He submitted that since the Respondents were already paid all their dues, the CMA erred in awarding the dues which were already paid.

Mr. Shilinde therefore prayed for the Court to consider his submission, quash and set aside the CMA award.

In reponse, Mr. Mwamkwala, Applicant's personal representative, starting with the first issue, referred to page 1 of the CMA award, and stated that the applicant was represented by Advocate Clara Madaraka and that he brought a witness DW1 Nafisa Juma, who according to para 3 at page No. 2 of the award, the said witness was recorded. This means the applicant was given right to be heard since no where is it indicated that the counsel and the witness were chased away from the court room.

Mr. Mwamkwara added that the matter in the CMA was heard inter party and not ex-parte. In his view, the argument that DW1 did not have instruction to testify is unfounded as she was the applicant's witness who was there under **Rule 25(1)(a)(1) of G.N 67 of 2007** which provides that the duty to bring a witness is on the person who is required to prove the case. He challenged the applicant's denial to her witness at this staagge.

Addressing the second issue, Mr. Mwamkwara submitted that the Respondents had fixed term contract which commenced on 1/3/2017 and expired on 28/2/2018. That after the expiry of their contracts, the Respondents continued to work until 12/4/2018 which is apparent on

Exhibit D1 (termination letter) at paragraph 2 where it was stated that they will be paid for the working days of that month.

According to Mr. Mwamkwara the act of the Respondents to continue working until 12/4/2018 meant that they were continuing with another contract according to **Rule 4(3) of G.N 42 of 2007** which provides that an employee who remains in the work after expiry of a fixed term contract will be entitled to automatic renewal. It is Mr. Mwamkwara's view that, the Respondents had valid contract.

Mr. Mwamkwara stated that, the Respondents were expecting to have their contract ending on 28/2/2019 and that terminating it on 12/4/2018 meant that they were unfairly terminated without 28 days notice as per paragraph 2(k) of the contract which means that the procedure of termination of contract was not followed.

Submitting on the third ground concerning compensation, Mr. Mwamkwara contended that since the contract was valid but terminated without following the procedure, there were 10 months which remained before the expiry of the contract. On this reason the CMA was right to award 10 months compensation. It is our further submission that Notice was not paid so the award was less than expected. We therefore pray for the application to be dismissed.

Mr. Shilinde made a rejoinder in which he reiterated the submission. He maintained that the Respondent did not have a valid contract because a valid contract must have an offer and acceptance but this was not done to justify existence of contract.

From the rival submissions, the issue is whether there is sufficient ground to revise the decision of the CMA. It is not disputed that parties had a one year fixed term contract. From the said contract (Exhibit D1) the term commenced on 1/3/2017 and was to expire on 28/2/2018. The Arbitrator found a one-month extended stay in the work after the expiry of the contract. She took note of previous renewal of former contracts for more than two years consecutively which she considered to constitute a renewal by default on the reason that the Respondent continued to provide labor which the Applicant accepted and paid for it.

The Arbitrator was guided by the decision of this court in **Peter D. Nene versus Chine New Error International Engineering Cooperation, Application No 29 of 2013, High Court Labor Division, Revision.** She further referred to **Rule 4 (1) to (5) of the Employment and Labour Relations Act, (Code of Good practice) Rules, GN No. 42 of 2007.**

For purpose of clarity, I quote the relevant provision of **Rule 4 (1) to (5)** of **GN 42 of 2007**;

"4-(1) An employer and employee shall agree to terminate the contract in accordance to agreement.

(2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

(3) Subject to sub-rule (2), a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it.

(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstance where employee reasonably expects a renewal of the contract may be considered to be an unfair termination."

The above cited provision, is clear at **sub rule (3)** 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 circumstances warrants it. The Applicant's claim that since there was no offer and acceptance, then there could be no contract renewed after the expiry of the fixed term, in my view holds no water. The situation where the employees offered labour which was accepted by the employer and remuneration paid thereon, this created reasonable renewal expectation as per **sub rule (4)**. What now follows is the answer to the grounds of revision.

In ground No. one, the Applicant claim to have been denied right to be heard because the witness who testified was not appointed by the Applicant to provide the testimony. I agree with Mr. Mwamkwala that calling of witness is not the business of the court but a duty of a party who wants to prove a case in its favour unless circumstances create a need which make the court desirous to call a court witness for a specific fact. The applicant opted to disregard her right to be heard if she sent inappropriate witness to testify on her behalf. This argument holds no water.

Regarding the second issue as to whether the arbitrator erred in finding unfair termination in a contract which had already expired, it is already found that the Respondent extended their working term for one paid months. In line with **sub rule (3) of Rule 4 of GN 42 of 2007**, the contract was renewed by default. In this respect, the arbitrator was correct to hold that there was another one year fixed term contract in existence. Since it is not disputed that the applicant ended the respondents' employment after that extended time, this constitute unfair termination. The arbitrator was correct.

Finally on the 3rd issue asserting the arbitrator's failure to consider and evaluate the evidence tendered, I have gone through the submission but I

could not comprehend from the Respondent's submission which evidence was disregarded by the arbitrator and which one was wrongly analysed. I find this argument unfounded.

From the foregoing, it is my finding that the framed issue as to whether there is a sufficient grounds adduced to warrant this court to revise and set aside the CMA is answered in the negative. Consequently I find this application devoid of merit.

From the above findings, the Application is hereby dismissed and the decision of the CMA is hereby upheld. No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 2nd Day of September 2022



KATARINA REVOCATI MTEULE

JUDGE

2/9/2022