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

REVISION APPLICATION NO. 141 OF 2022

(Arising from an Award issued on 28th June 2022 by Hon. Gerald, Arbitrator, in Labour dispute No. CMA/ILA/R.53/17/80 at Ilala)

SHABAAN ROBERT SECONDARY SCHOOL.....APPLICANT

VERSUS

GODFREY FESTO.....1ST RESPONDENT
JOHN FLORIAN.....2ND RESPONDENT
EMMANUEL KIMOLO.....3RD RESPONDENT
KWELI MSANGI.....4TH RESPONDENT
ALLY JUMANNE MASUNGA.....5TH RESPONDENT
DANIEL ELINAFIKA.....6TH RESPONDENT
OMARY SAID NYANGA.....7TH RESPONDENT
JOHN JOHN JOEL.....8TH RESPONDENT

JUDGMENT

Date of Last Order:26/09/2022
Date of Judgment: 10/10/2022

B. E. K. Mganga, J.

Respondents successfully filed Labour dispute No. CMA/ILA/R.53/17/80 before by the Commission for Mediation and Arbitration (CMA) at Ilala complaining that they were unfairly terminated. Being aggrieved with the award, applicant filed this application imploring this court to revise and set aside the said award.

Brief facts relating to this application are that respondents were employed by the Dar es Salaam Secondary Education Society (herein to

be referred as Society) for a one-year fixed term contract commencing from January 2017 to 31st December 2017. In the said fixed contracts, respondents were employed as teachers save for the 6th Respondent who was employed as a Lab Technician. Respondents worked for the applicant until 21st November 2017 when they were served with a notice of non-renewal of their employment contract. On 21st December 2017, after applicant has failed to renew their contracts, respondents decided to knock the CMA's door where they filed labour dispute No. CMA/DSM/ILA/R.53/17/80 claiming that they were unfairly terminated by the applicant.

Having heard evidence of both parties, arbitrator found that respondents' contracts were unfairly terminated as they had reasonable expectation to renew. With those findings, the arbitrator ordered applicant to reinstate respondents without loss of remuneration from the date they were terminated to the date the award was issued namely, 42 months salaries. Applicant was dissatisfied with the award as a result, she filed this application. In support of the Notice of Application, applicant filed the affidavit of Rosemen Bhallo.

In opposing the application, respondents filed the Counter affidavit of Godfrey Festo, their personal representative.

With consent of the parties, the application was disposed by way of written submissions. In the said written submissions, applicant enjoyed the service of Jerome Joseph Msemwa, learned advocate while respondents enjoyed the service of Oresto M. Njalika, learned advocate.

In his submissions, Mr. Msemwa learned advocate for the applicant consolidated his grounds into three grounds namely: -

i. *Arbitrator's failure to evaluate evidence on record*
ii. *Arbitrator's failure to evaluate the terms of the employment contract, and*
iii. *Respondent's great expectations termination and redundancy*.

On regard to the first ground namely that arbitrator failed to evaluate evidence on record, Mr. Msemwa submitted that, arbitrator did not properly evaluate evidence before him so as to establish who was the respondents' employer. He argued that arbitrator issued the award against the applicant who was not the respondent's employer. He further submitted that according to exhibit SR1, respondents were employed by Dar es salaam Secondary Education Society who owns Shaban Robert Secondary school namely the applicant. Counsel argued further that the society who was the respondent's employer was not sued, hence respondents sued a wrong party. To bolster his submissions, he referred the court to the case of ***Temeke Municipal***

Director vs Nixon Njolla &another, Rev. No. 564 0f 2019 [2020] TZHCLD 78.

On the 2nd ground namely that arbitrator failed to evaluate terms of the employment contract, counsel for the applicant referred the court to clause 7.1 of the employment contract (exhibit SR1) which states: -

> *"At any time before three months of the expiration of the contract, the teacher may, by notice in writing duly delivered to the society apply to the society for renewal of this contract for a further period and the society may at its discretion renew the same. The response of the society on the teacher's notice should be served on the teacher one month before the expiry of the period of service.*

Counsel for the applicant submitted further that, contracts of the respondents were expiring on 31st December 2017 and that it is only the 6th and 2nd respondent who complied with the requirement of clause 7.1 by issuing three months' notice before the expiry of the contract of employment. Counsel argued that 1st ,3rd,4th, 7th, and 8th respondents did not comply with the said clause as their notice were not written within three months as required by the contract and that the 5th respondent did not even write a notice of renewal of the contract. Counsel added that despite that, the arbitrator failed to properly evaluate evidence adduced and terms and conditions of the contract as per clause 7.1 and went on

finding that all respondents complied with the requirement of clause 7.1. Counsel for the applicant strongly submitted that with that failure to properly evaluate evidence, arbitrator wrongly concluded that applicant terminated employment contract of the respondents.

Submitting on the 3rd ground, Mr. Msemwa, counsel for the applicant argued that arbitrator misdirected himself as he found that respondents had reasonable expectation of renewal of their contract after they have complied with the procedure for renewal of their contracts. Counsel went on that applicant complied with clause 7.1 of the contract as she wrote a letter dated 23rd November 2017 to the respondents expressing her intention of non-renewal of contracts of the respondents. He submitted further that arbitrator erroneously awarded respondents to be paid TZS. 524,304,77/= while there was no basis for them to be awarded 24 months compensation. Counsel for the applicant concluded his submissions by praying the application be granted.

In rebuttal, Mr. Njalika, counsel for the respondent argued the first ground submitting that contracts of the respondents were unfairly terminated as applicant had ill will to the respondents' contracts. He submitted that on 23rd November 2017 while respondents were on leave, applicant issued a notice of termination of their contracts contrary

to the provisions of section 41(4), (a), (b) of the Employment and Labour Relations Act, Cap.366 R.E. 2019. Counsel for the respondents further submitted that the notice issued by the applicant was contrary to section 41(2) of Cap. 366 RE. 2019(supra) which requires equality of the notice given to parties to the contract. He added that Clause 7.1 of the fixed term contracts was introduced in the contract to humiliate the respondents. In this matter, respondents were required to issue three months' notice in writing while applicant was supposed to issue a one-month notice of non-renewal prior expiry of the period of leave. With that, counsel for the respondents submitted that contracts that were signed by the parties was contrary to labour laws.

Responding on the 2nd ground, Mr. Njalika learned counsel for the respondent submitted that respondent that respondents had expectation that upon expiry of their contracts, the said contracts would be renewed based on previous renewals. On argument that respondents had expectation that their contracts will be renewed, Mr. Njalika, learned counsel for the respondents cited Rule 4(4), (5) of Employment and Labour Relations (Code of Good Practice), GN. No.42 of 2007. He maintained that all respondents wrote letters for renewal of the contract (exhibit SR3). Counsel went on that based on the nature of work,

applicant still needed respondents as there was no success plan prepared for the respondents and there were no disciplinary matters against the respondents.

As regard to the 3rd ground, Mr. Njalika, learned counsel for the respondents submitted that, Shaban Robert Secondary School with Registration No.S.63 and Dar es Salaam Secondary Education Society are legal entities which can either be sued jointly or separately. He submitted further that applicant is a legal entity with capacity to sue or be sued. He added that, under clause 1.1 of the employment contract (SR1) applicant agreed that the society shall be managed under the name and style of Shaban Robert Secondary School under the terms and conditions of the contract. Therefore, all communication concerning renewal and termination of contracts of the respondents were done by the applicant. Counsel for the respondents concluded his submissions by praying that the application be dismissed for want of merit on ground that the award was issued in accordance with the law.

In rejoinder, Mr. Msemwa reiterated his submission in chief. He added that respondents failed to establish reasonable expectation of renewal of their contracts. He referred the court to the case of ***Ibrahim***

s/o Mgunga & 3 others vs. African Muslim Agency, Civil Appeal No. 476/2022.

After carefully consideration of submissions made on behalf of the parties, affidavits for and against the application, and relevant laws, I have opted to dispose the grounds of revision in this application seriatim.

On the 1st ground, it was submitted by Mr. Msemwa, advocate for the applicant that arbitrator issued the award against the applicant herein who is not the respondents' employer and that respondents sued a wrong person. On the other hand, respondent submitted that Dar es Salaam Secondary Education Society shall be managed under the name and style of Shaban Robert Secondary School and that the dispute was properly filed.

I have cautiously gone through the employment contract (exhibit SR1) and find that it is true that Dar es Salaam Secondary Education Society is the respondents' employer, and that applicant herein is the place where respondents were stationed to perform their duties. This is clearly stated under clause 1.1 of the contract, which provides: -

> *"The Society shall employ the **lab technician** and the **lab technician** shall serve the Society in the capacity of the **lab technician** in the Non-Government Secondary School established*

and managed by the society in Dar es salaam under the name and style of ***the Shaaban Robert Secondary School upon*** *the terms and conditions herein contained*."

It is my considered view that, the issue of the applicant's name is not fatal. It can be resolved by applying the Doctrine of finger litigation or misnomer. The said doctrine was applied by the court of appeal in the case **Christina Mrimi vs. Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011, [2012] **TZCA 1**, the Court of Appeal endorsed the holding in the case of ***Evans Construction Co. Ltd. vs. Charrington & Co. Ltd. and Another*** (1983) I All E R 310 where it was held: -

"...*As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd., and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued...it would be just to correct the name of the respondent..."*

I have carefully examined the CMA record and find that applicant neither raised an objection nor testified that respondents filed the dispute against a wrong person. More so, exh SR3 that was authored by the applicant informing the respondents that their letters for renewal will be tabled to the management committee bears the name "SHABAN Robert Secondary school". I therefore hold that respondents had a right

to file the dispute against the applicant. I am of the firm opinion further that the said error as to the names of the applicant is nothing when there is certainty of the person who was an employer. It is undisputed in the application at hand that applicant was established and is managed by the society. Therefore, there is no way the two can be separated. Failure to include the name of the society at CMA cannot be a ground to allow this application because respondents were teaching at the applicant school. It is my view therefore that applicant is not a wrong party as alleged by applicant's counsel. I therefore dismiss the 1st ground of revision.

On the 2nd ground relating to Arbitrator's failure to evaluate the terms of the employment contract, Mr. Msemwa contended that arbitrator failed to interpret clause 7.1 of the employment contract (exhibit SR1) and ended up finding that all respondents complied with the said clause while its only two respondents who complied with the same. On the other part Mr. Njalika argued that the said clause humiliated the respondents as the same was contrary to Section 41(2) of Cap.366 R.E.

2019(supra) which requires Notice by agreement to be equal to both employer and the employee.

As submitted by Mr. Njalika learned counsel for the respondents, Section 41(2) of Cap.366 R.E 2019(supra) provides that parties may agree on a longer notice than that required under subsection 1, provided that the notice period is of equal duration for both employer and the employee. In the application at hand, it is undisputed that parties agreed that respondents shall issue a three months' notice for renewal of the contract and that applicant/employer shall issue one month if she intended to renew the contracts of the respondents. It is my opinion that, Counsel for respondent misdirected himself by referring to Section 41(2) of Cap.366 R.E. 2019(supra) because the said section provides for the notice of termination of the contract and not on renewing a contract. I therefore find that clause 7.1 of the contract of employment entered by the parties is valid and that parties are bound by the terms of their agreement as held by Court of Appeal in the case of **Hotel Sultan Palace Zanzibar Vs. Daniel Leizer and another**, Civil Appl. No. 104 of 2004 (unreported) where it was held that: -

> *'It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affair if employees or employers were left to freely do as they like regarding the employment in issue'.*

Mr. Msemwa alleged that arbitrator failed to evaluate the evidence on record as he found that, the applicant terminated the respondents contract while the respondents had complied with the requirement of clause 7.1. I have examined letters (exhibit SR2) referred to by the applicant showing that respondents intention to renew their contracts and find that the 1st respondent's letter is dated 2nd October 2017 while that of the 2nd respondent is dated 27th September 2017. I have found also that the letter for the 3rd respondent is dated 03rd October 2017 and that of the 4th respondent is dated 6th October 2017. I have further noted that the 6th respondent's letter is dated 03rd October 2017 and that of the 7th respondent is dated 02nd October 2017. It is apparent therefore, that all letters were written in early October save for the 2nd respondent who wrote in September 2017. It is my view therefore that the contention by applicant's counsel that there was no compliance of the abovementioned clause is misconceived as all letters were written in early October hence complied with the three months period.

It was the findings of the arbitrator that applicant unfairly terminated employment of the respondents after issuing a notice of non-renewal of contracts. It is my view that the arbitrator misdirected

himself in that finding. The mere fact that respondents issued their notice of renewal of the contract as agreed in their contract of employment, does not bound the employer to renew their employment contract. The employer is at liberty whether to renew the same or not depending on various factors. It is my view, respondents expression of intention to renew their contract was not a guarantee of acceptance of such a renewal. Since applicant timely responded to the respondents of his intention of non-renewal of the employment contract as per exhibit SR4, then, there is no contract which was terminated by the applicant. I therefore hold that the arbitrator erred in finding that the applicant's failure to renew employment contracts of the respondents amounted to termination.

As regard to the 3rd ground, it was the arbitrator's finding that, having served notice of renewal of the contract as per clause 7.1 of their contract, the respondents had reasonable expectation of renewal of the same and that applicant's failure to renew the contracts amounted to termination of the same. Based on that finding, arbitrator awarded the respondents to be reinstated and be paid forty-two (42) months' salary. Rule 4(5) of the Employment and Labour Relations (Code of Good Practice) GN.No.42 of 2007 imposes the duty to the employee to prove

the basis of their reasonable expectation of renewal of the contract. The said Rule provides: -

> *"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****".* [Emphasis added]

In the application at hand, respondents alleged that there was previous renewal of the contract of their employment. It has been held by this court in the case of that ***National Oil (T) Ltd. v. Jaffery Dotto Msensemi & 3 others,*** Revision No. 558 of 2016 [2018] TZHCLD 20 that previous renewal alone does not stand as a reasonable expectation of renewal of the contract. In the above cited case this court held: -

> *"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."*

For the legitimate expectation of renewal to exist, some conditions have to be met. In ***Onesphory J. Mbina & 2others V. Tanzania Youth Alliance (Tayoa)***, Revision Application No. 222 of 2020

(unreported) this court quoted a South African case of ***Armscor Dockyard vs CCMA and 2 others***, case No. ***C853/15*** and held: -

"…that the expectation must be reasonable in the objective sense. The question that one has to ask is whether the circumstances were such that any reasonable employee would, in the circumstances, have expected the contract to be renewed …here the court has to conduct a two-stage enquiry. The first stage is to determine what the applicant's subjective expectation actually was in relation to renewal. This is a question of fact. Once the subjective expectation has been established…the court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstance…"

The court went on to state that: -

"…The law does not protect every expectation but only those which are legitimate. The requirements for legitimacy of expectation include the following: -

(i)The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification'. The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing of which they act at their peril.

(ii) The expectation must be reasonable.

(iii) The representation must have been induced by the decision maker and

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate."

There is no doubt that there was previous renewal of contracts of the respondents and that respondents wrote letters indicating their intention to renew their employment contract. However, discretion of renewing the contract lies on the applicant. Respondents were informed through exhibit SR4 that applicant had no intention of renewing the contract as requested by the respondent. As pointed hereinabove, that letter is in conformity with the requirement of 1 month notice as provided for under clause 7.1 of contracts of the respondents. I there conclude that claim by the respondents that they had reasonable expectation of renewal of their contracts is baseless. Consequently, I fault the arbitrator's finding that respondents had reasonable expectation of renewal of their contract and that applicant unfairly terminated the same.

I have examined the CMA F1 and find that respondents indicated therein that procedures for retrenchment were not followed but nothing was stated in evidence of PW1 the only witness for the respondents relating to retrenchment. In my view, arbitrator erred in law and fact in

holding that applicant failed to prove reasons for retrenchment and that procedures were not followed when he held: -

> *"…mlalamikiwa ameshindwa kuithibitishia Tume juu ya uhalali wa sababu na utaratibu alioutumia katika kuwapuguza kazi walalamikaji na amekaidi matakwa ya kifungu cha 37(2) cha sheria ya ajira na Mahusiano Kazini…* "

It is my view that it was not open to the respondents just to mention in their pleadings namely the CMA F1 that procedure for retrenchment was not followed without substantiate that claim with evidence. Unfortunately, the arbitrator swallowed that claim undigested and concluded that the procedure for retrenchment was not followed.

Following his finding that respondents were unfairly terminated, the arbitrator ordered applicant to reinstate the respondents without loss of remuneration. i.e., each respondent be paid salaries for the 42 months when they were out of employment. I have found that there is no basis of awarding 42 months'. In CMA F1, respondent claimed to be paid not less than 24 months', but they were awarded 42 months'. It should be recalled that some had one-year fixed term contract and others 2 years fixed term contract. Therefore, in no way they were supposed to be awarded for 42 months' because even if it can be assumed that they were unfairly terminated of which there is no

evidence, they were entitled to be paid salaries for the remaining period that does not exceed twenty-four months'.

Having found that there was no termination of the contracts of the respondents, rather, that employment contracts expired on 31st December 2017, I hereby allow this application, quash, and set aside the CMA's award.

Dated in Dar es Salaam on this 10th October 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 10th October 2022 in chambers in the presence of Salha Mlilima, Advocate for the Applicant and Godfrey Festo and Ally Masunga, the 1st and 5th respondents.

B. E. K. Mganga
JUDGE