IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 38 OF 2023

BETWEEN

RAJABU SWAIBU..... APPLICANT

VERSUS

KRIA TANZANIA LTD..... RESPONDENT

JUDGEMENT

Date of last Order: *21/03/2023*
Date of Judgement: *31/03/2023*

MLYAMBINA, J.

The Applicant alleges to have been permanently employed by the Respondent since 01/01/2016 as an Assistant Supervisor. He also claims to have been unfairly terminated from employment on 01/07/2021. Aggrieved by the termination, the Applicant referred the matter to the Commission for Mediation and Arbitration (CMA) where it was found that the Applicant was unfairly terminated. Following such findings, the CMA awarded the Applicant a total of TZS. 480,000/= being, one-month salary as payment of notice in lieu of termination and salary of fifteen days as remaining period of the contract.

Again, the CMA's decision dissatisfied the Applicant. Hence, he filed the present revision application by raising five grounds reproduced hereunder:

i. *Whether an Arbitrator was proper to reject or refuse to accept a document titled "employee termination voucher" as an exhibit.*

ii. *Whether exhibit D1 relates with the Applicant or not.*

iii. *Whether the Applicant's contract was a fixed term contract or not.*

iv. *Whether the Applicant was terminated while under fixed term contract or not.*

v. *Whether the Applicant is not entitled for compensation as prayed in CMA F1.*

The application was argued orally. Before the Court, the Applicant was represented by Mr. Denis Mwamkwala, Personal Representative, whereas, Mr. Mussa Rashidi Lilombo, Respondent's Company Secretary appeared for the Respondent.

Arguing in support of the application, Mr. Mwamkwala adopted the affidavit of the Applicant sworn on 26/1/2023 to form part of his submission. His submission centered on the second, third and fourth

grounds while the remaining grounds were not argued. He submitted that; the main contention by the Arbitrator was that the contract was a fixed term contract as per exhibit D1. Thus, exhibit D1 was in respect of Mohamed Rajabu Swaibu while the Applicant is Rajabu Swaibu. The representative submitted that; the Applicant objected such contention at the CMA where he disclosed information by showing his National Identity Card (NIDA). That, the identity Card shows his name is Rajabu Swaibu Mohamed and not Mohamed Rajabu Swaibu.

Mr. Mwamkwala argued that; *Section 15(1) of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019] (to be referred as 'ELRA')* requires the employer to write proper names of the parties. He contended that; the Applicant disputed the signature in exhibit D1, employment contract on the following reasons: *First,* that the Applicant signed both side of the contract pages which had three pages. *Second*, the name does not belong to the Applicant. *Third*, he thumbs printed and signed every page.

It was further submitted that; the Applicant was not given a copy of his contract. Mr. Mwamkwala strongly submitted that the Applicant had a permanent contract since 2016. At several times, he demanded his copy of contract orally since he was employed in 2016. However, the

Respondent denied him such copy of the contract. He submitted that; the employer terminated the Applicant's contract through termination letter dated 30/06/2021 (exhibit D2). Thus, the said exhibit reflects the proper name of the Applicant as Rajabu Swaibu.

It was further submitted by Mr. Mwamkwala that; the proper name of the Applicant is that reflected in the NIDA card. He contended that; there was no dispute that the one who was terminated is Rajabu Swaibu Mohamed. Mr. Mwamkwala strongly submitted that; the Applicant was a supervisor by the time of termination, the fact which was also stated by the witness of the Respondent.

Mr. Mwamkwala argued that *Section 14(1) of ELRA* stipulates three types contracts: (1) Permanent Contracts (2) Specific Period Contract "Professional or Manager" (3) Specific Task Contracts. He contended that since the Applicant was employed as a Supervisor, he does not fall within fixed term contract. He added that; a supervisor is neither Professional nor Managerial.

Mr. Mwamkwala further argued that; as per *Section 15(5) of the ELRA*, the Respondent has a duty to keep all records of the employee for five years from the date of termination. He added that; under *Section 15(6) of ELRA*, it is the employer who have the duty to prove

information required under *Section 15(1) of ELRA*. He therefore prayed for this Court to set aside the decision of the Arbitrator.

In response to the application, Mr. Lilombo also adopted the Respondent's counter affidavit affirmed by himself to form part of his submission. He stated that; exhibit D1 was one of the issues before CMA. He said, they had enough time to deliberate on it. He conceded that *Section 15(5) of ELRA* imposes a duty to the Employer to keep records. He added that *Section 15(1)(a) of ELRA* also requires employment contract to have names. He submitted that; in this case, the Applicant thumb printed and signed written employment contract.

Mr. Lilombo went on to submit that; when writing the contract, the surname started, then given names which is a normal practice. He stated that; the tendering of exhibit D1 was not objected. The representative argued that once a document is admitted, it forms part of the records. To support his submission, Mr. Lilombo cited the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Ltd** (2006) TLR 343. He added that, the Applicant admitted that he signed every page of the contract but exhibit D1 is only signed at last page.

It was further argued in reply by Mr. Lilombo that; *Section 61 of The Evidence Act [Cap 6 Revised Edition 2019] (to be referred as 'TEA')* is clear that proof of written document cannot be done orally. One cannot amend a written document orally. He submitted that; since the Applicant disputes exhibit D1, he was supposed to bring another document to counter the same. He added that; it is not true that the Applicant demanded copy of the contract several times. Thus, the representative contention that the contract required him to sign two copies of contract implies that one copy was meant for him. Mr. Lilombo further questioned if the Applicant demanded the contract such so long time, why did he not complain before the Court?

Placing reliance on the decision of **Daniel Apael Urio v. Exim (T) Bank**, Civil Appeal No. 185 of 2019, Court of Appeal of Tanzania at Arusha (unreported) p.17 para 3, Mr. Lilombo argued that; the yardstick of proof in Civil cases is the evidence available on record and whether it tilts the balance one way or the other. He argued that; departing from this yardstick by requiring corroboration as the trial Court did, is going beyond the standard of proof in civil cases.

Mr. Lilombo submitted that; since exh. D1 was in record, CMA could not consider oral testimony. As to the Applicant's prayer of not

considering exhibit D1, he urged the Court to invoke *Section 4 of the Written laws Misc. Amendment Act No. 3 of 2018* to rule that the technicalities of starting with surname not to override justice. He added that; the Applicant has been enjoying through exhibit D1 for the whole period on many aspects including salaries, house and his personal office at Masaki. It was further argued by Mr. Lilombo that; under *Rule 4(3) of Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 (to be referred as 'GN. No. 42/2007'),* the Applicant's contract was renewed by default.

Regarding the allegation that the Applicant was employed as Assistance Maintenance Supervisor, Mr. Lilombo submitted in reply that, this issue was not raised in CMA Form No. 1. He added that; it was also not raised in his opening statement. It is an elementary law that parties are bound with their pleadings, Mr. Lilombo argued. The issue raised at this stage requires evidence. He contended that the Applicant was required to testify if he was professional or not and the Respondent be afforded opportunity to counter such evidence. To bolster up his submission, Mr. Lilombo referred the Court to the case of **Hotel Travertine Limited and Two Others v. National Bank of Commerce Limited** (2006) TLR 133. It was added that; acceptance by

conduct is a matter that could not be raised on appeal. That, even his position of Assistant Maintenance Manager is Managerial as he was supervising many people. He therefore prayed for the entire application to be dismissed for lack of merit.

In rejoinder Mr. Mwamkwala submitted that; page 11 of the impugned Award shows that the Applicant disputed tendering of exhibit D1. It further reveals that the issue whether the Applicant was employed in Managerial Position or not was discussed. He maintained that; the Applicant was employed as Assistant supervisor and terminated as Assistant Supervisor. The representative insisted that the point of name is fundamental. It is not a technical issue. He further urged the Court to grant the application.

I have dully considered the rival submissions of the parties, CMA and Court records as well as the applicable laws. I find the Court is called upon to determine only one issue; *whether the Applicant was under fixed term or permanent contract*.

The Applicant strongly alleges that he had a permanent contract. On his part, the Respondent maintained that the Applicant had a fixed term contract. He also tendered the contract of employment as exhibit D1. The Applicant disputes the said contract on three grounds: *First*,

that he signed both sides of the contract which had three pages. *Second*; that the name in the said contract does not belong to him; and *Third*; that he thumbs printed in every page of the contract.

After going through the CMA proceedings, when the said contract was tendered the Applicant stated as hereunder quoted in verbatim:

> Huu mkataba page mbili za mwanzo sio original kwani niliweka sahihi kila page na sioni sahihi zangu page moja tu ndio original.

The above quotation can be loosely translated as *in this contract, the first two pages are not original as I signed each page and I don't see my signatures. Only one page is original*. From such quotation, it is crystal clear that the Applicant only disputed the two pages of the contract because his signature did not appear thereto. The allegation as to the name appears in the said contract was raised during his testimony. But not at the time of tendering the said exhibit. During cross examination, the Applicant was further questioned if the signature appeared in the said contract belonged to him. He admitted that it is his signature as confessed at page 42 of the CMA hand written proceedings.

Notwithstanding the Applicant's objection, the Arbitrator proceeded to admit the employment contract as exhibit D1. I therefore

join hands with Mr. Lilombo that once a document is admitted, it forms part of the records as was held in the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** (supra). The Applicant objected the admitted contract of employment without tendering any exhibit to counter the same. He wants this Court to believe that he had a permanent contract without any proof. Therefore, his mere words cannot supersede the written contract available in records.

In his testimony, the Applicant testified that; he was officially employed by the Respondent 01/10/2016. Exhibit D1 shows that the same was signed in 16/10/2017. However, the same commenced on 16/07/2017. The Applicant further contended that; he demanded his contract several times without being supplied with the same. It is my view that, such allegation lacks proof. There is no any letter or document proving that the Applicant was not given his employment contract and that he demanded the same.

I have also noted the Applicant's contention that fixed term contract is for professionals and managerial cadre. As rightly submitted by Mr. Lilombo, the said contention was not raised at the CMA. Even in this Court, the same was not pleaded in his affidavit. It is a trite law that

parties are bound by their own pleadings, the position which has been highlighted in range of Court decisions including the cases of **Yara Tanzania Limited v. Ikuwo General Enterprises Limited**, Civil Appeal 309 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Makori Masoga v. Joshua Mwaikambo & Another**, (1987) TLR 88. In the **Makori Masoga's case** (supra), it was held that:

> In general, I think it is elementary, a party is bound by his pleadings and can only succeed according to what has averred in evidence. He is not allowed to set up a new case.

In the event, this Court cannot proceed to determine as to whether fixed term is for professionals or managerial cadre alone as the same does not form part of the records. Therefore, on the basis of the evidence available on record, I am satisfied that the Applicant was under a fixed term contract of one year commencing on 16/07/2017 and ended on 15/07/2018 in the position of Assistance Maintenance Supervisor as evidenced by exhibit D1 which he dully signed. As submitted by Mr. Lilomo, the contract was renewed by default after its expiry.

It is undisputed fact that the Applicant was terminated on 30/06/2021 as indicated in the notice of termination (exhibit D2). Since the contract was renewed by default, the last contract commenced on 16/07/2020 and it was supposed to end on 15/07/2021. On such analysis, it is apparent the remaining period of the Applicant's contract was fifteen days (15) as rightly found by the Arbitrator.

On the basis of the foregoing analysis, I find the present application has no merits. It is dismissed accordingly. The CMA's award is hereby sustained.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

31/03/2023

COURT

Judgement pronounced and dated 31st March, 2023 in the presence of Mr. Denis Mwamkwala, Personal Representative of the Applicant and Mr. Mussa Rashidi Lilombo, Company Secretary for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) Labour Division DIVISHENI YA MAHAKAMA YA KAZI

Y.J. MLYAMBINA

JUDGE

31/03/2023