IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 324 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. REF: CMA/DSM/KIN/690/2020, Faraja, J.L.: Arbitrator, Dated 10th April, 2022)

MSUMBI ESTATE LTD..... APPLICANT

VERSUS

ESTHER CHARANGA..... ...RESPONDENT

JUDGEMENT

4th -28th April 2023

OPIYO, J

The applicant prayed for this Court to call, revise and set aside the proceedings and the award of the Commission for Mediation and Arbitration (CMA) in a Labour Dispute No. CMA/DSM/KIN/690/2020 by Faraja Johnson (Arbitrator) dated 10th April, 2022.

Its background is; the respondent was employed by the applicant under a fixed term contract in a term of one year commenced on 04th August,

2019. The contract ended on 03rd August, 2020. On 01st July, 2020 the respondent was served with a notice of non-renewal of employment contract. Again on 29th July, 2020 she was served with the reminder to non-renewal of employment contract. Dissatisfied the respondent filed for a labour dispute at CMA claiming for unfair termination on operational requirement (retrenchment) and discrimination due to pregnancy at work. The matter was heard and the award was in favour of the respondent. The applicant was ordered to pay the respondent TZS. 23,537,724/= for unfair termination, discrimination, salary areas and unpaid leave. The applicant was aggrieved, hence the birth of this revision application.

This application is supported with the applicant's affidavit sworn by Happyness Minja, Human Resource Officer of the applicant having grounds for revision that there was no unfair termination as the employment contract ended automatically and there was no discrimination as the employer did not know if the respondent was pregnant.

The hearing was conducted orally. Both parties were represented by Learned Advocates. Mr. Adrian Mhina represented the applicant and Mr. Mhalami Chuma was for the respondent.

Mr. Mhina submitted that there was a contract of one year starting from 4th August 2019 which was supposed to end on 3rd August, 2020 (exhibit D1). The respondent was given non-renewal notice (exhibit D2) on 1st July, 2020, so she had no expectation. To support his point, he referred the case of **Asante Rabi Mkonyi v. TANESCO** Civil Appeal of 53 of 2019, CA. for the authority that being served with non-renewal notice is a proof that there was no expectation of renewal of contract.

He stated further that an employee has a duty to proof expectation of renewal of contract. In his understanding the respondent been given non-renewal notice, proves that there was no expectation for renewal of contract. He also referred to the case of **Ibrahim Mganga and Others Vs. African Muslim Agency Civil Appeal No. 476/2020 Court of Appeal of Tanzania.** In his view, the expectation for renewal to be legitimate must be created by employer. He submitted that, in this case the employer did not do that rather, he gave the respondent a non-renewal notice.

He continued that this case involved a fixed term employment in which it unlawful termination does not apply as per rule 4(4) of The Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42. He contended that in their case the respondent was served with a non-renewal of contract and so there was no any expectation to renew a contract and so there was no unfair termination.

In regard to discrimination, Mr. Mhina submitted that as per exhibit D1 (employment contract) item 10.1 it is clear that female's employee had a mandatory obligation to give notice to employer concerning her intention to take maternity leave at least three months before delivery supported by medical certificate. He stated that, the respondent during cross examination narrated that she was blessed with a child on 21st August, 2020 while her contract ended on 3rd August, 2020. In his view, the respondent was in better chance to notify her employer but she refused to do so on personal reasons.

Mr. Mhina submitted further that there was no any medical report or clinic card tendered to prove respondent's allegation that she was pregnant as per section 100 of The Evidence Act [CAP. 6 R.E. 2019] which states that

one who alleges must prove. He was of the view that the respondent alleged that she was pregnant but she failed to prove it.

He submitted further that the respondent testified that there was Mama Nicky who was aware of her pregnancy. But, the respondent failed to describe Mama Nicky's position in the company. He continued that, PW1 testified that the management was not aware of her pregnancy, hence, there was no any discrimination to the respondent over something the management was not aware of.

On the issue of unpaid leave, he submitted that in the award it was not started that there was unpaid leave. Her leave payment slip was not disputed by the respondent and all alleged unpaid leave was fully paid by the applicant. For him, the unpaid salary amounting to 621,924/= was not proved by respondent during trial. He finalized by stating that, there is no unfair termination, no discrimination, no legitimate expectation and no non-payment to the applicant justifying award by the CMA.

Mr. Chuma in rebuttal submitted that, the respondent was unfairly terminated. He stated that the respondent was employed since 2013 by

one-year contract renewable yearly (exhibit D1). He continued that, the contract was renewed 7 times, so even in 2020 she was in a reasonable expectation of renewal as per previous ones. In his view the respondent had reasonable expectation because had there been no expectation of renewal, contract would expire automatically. To support his point by citing the case of **Dar es Salaam Baptist Secondary School v Enock Ogala, Revision No. 53 of 2009.**

He submitted further that, rule 4(4) of GN 42/2007 states that it is trite law that it amounts to unfair termination if employee had reasonable expectation of renewal of her contract. For him, even in this case, given the several previous renewals of the respondent's fixed term contract the failure to renew this contract amounted to unfair termination.

He submitted that the affidavit stated that Covid 19 led to close of all coffee shops in Dar es Salaam including the one which was being served by the respondent. But, the CMA records shows that the respondent was the only one whose contract was not renewed on that ground of Covid 19 and that the coffee shop she used to serve was not at all closed as she visited there and found a new employee. He stated further that, the respondent bought some coffee and was issued with EFD receipt (exhibit

P4) to prove that the shop was not closed. Mr. Chuma submitted that, this fact was not cross examined upon during trial. He argued that, it is a trite law that failure to cross examine on material facts amounts to acceptance of the truth, to support it, he referred the case of **Kilanya General Supplies Vs. CRDB Bank and 2 other**, Civil Appeal No. 1/2018 Court of Appeal of Tanzania.

In his view, termination on basis of Covid 19 was retrenchment based on operation requirements. But no procedure for retrenchment was involved. He argued that procedure for retrenchment is well stated under S.38 of Labour Relations Act read together with rule 23(4) G.N. No. 42 of 2007 which requires consultation and series of meetings between employees and employer to see the best way to remedy the situation including offering an alternative job or leave without pay.

He submitted that during hearing at CMA through DW1 it was testified that they offered respondent with another offer but refused. However, he continued no evidence was given on such offer. He stated, it is elementary that one who alleges must prove to the required standard, to that he referred the case of **Wambura N.J Waryumba Vs. PS Ministry of Finance and another**, Civil Appeal No. 320/01 of 2020.

On the second ground of discrimination, Mr. Chuma submitted that, during trial the respondent proved discrimination based on her pregnancy. He continued that, she received a phone call from fellow employee to the effect that her boss is in knowledge of her state of her pregnancy and that the boss was angry on hearing such news from a third part. In his view, immediately after that respondent's employment was ceased and she was the only one who was terminated from employment when news of her pregnancy reached her bosses. He continued that, the respondent was equally not cross examined on that and in the same coffee shop the applicant assigned another person and the shop was not closed due to Covid 19 as alleged. For him, this was discrimination based on her pregnancy in contravention of section 7(4)(j) of CAP. 366 R.E. 2019 which prohibits discrimination of any nature towards employee by the employer.

Mr. Chuma submitted further that the advocate for the applicant mentioned exhibit D1 that there was mandatory obligation to the respondent that at least 3 months to report to the employer of her state of pregnancy while the same person told this court that the management was not aware of the respondent's state of pregnancy. In his view the applicant

being aware of the state of pregnancy of the respondent came with defence under item 10.1 of employment contract.

On the issue that there was no proof of reliefs awarded, Mr. Chuma submitted that once CMA is satisfied that the termination was unfair and since the respondent proved the existence of discrimination done by her employer, the CMA correctly awarded her general damages as per section 40 of CAP. 366 R.E. 2019. He stated that, it is a trite law that general damages are awarded at the discretion of the court as held in the case **Hamisi Abdallah Shomvi Vs. Charles Nicholaus and others** Civil Application No. 211 of 207 High Court Dar es Saalam.

He submitted further that, exhibit D5 is a leave payment slip and at CMA there was no exhibit called as leave payment slip. The exhibit D5 was not leave payment slip rather a non-renewal notice. He then prayed for the application to be dismissed for lack of merit.

In rejoinder Mr. Mhina submitted that exhibit D5 is for leave pay, that the case of **Hamisi Abdallah Shomvi** is irrelevant to respondent's situation. He continued that on the issue of the respondent receiving a phone through her fellow employee that her boss is aware of her pregnancy and

was angry was hearsay evidence and that the employee was not called as witness and also there was no proof of such conversation. He continued that the issue of retrenchment raised by respondent's advocate is irrelevant to the case. He submitted further that the issue of EFD receipt that was admitted, they refuted its admission. That, the respondent's testimony that she was the only one terminated, remains the allegation was not proved during trial and so it is an afterthought. He submitted further that the advocate for the respondent did not dispute that the respondent was served with non-renewal notice. He then reiterated what has been submitted in the submission in chief.

Having gone through of the ground for revision, parties' submission and CMA's proceedings, this Court comes up with two issues for determination. One is as to whether the respondent was unfairly terminated? In this issue there will be two sub issues which are whether the respondent was discriminated and whether there was an expectation for renewal). Second is to what reliefs each party is entitled to.

Starting with the first issue in arguing the advocate for the applicant stated that the respondent was not discriminated, but rather her term contract ended automatically. On the other side the advocate for the respondent

stated that when the applicant heard that respondent was pregnant decided to terminate her.

Having gone through CMA records and exhibits therein it is not disputed that the respondent was employed by the applicant under a fixed term contract. Exhibit D1 (renewal of contract) proves that the respondent's employment contract was renewed time after time. It also shows that the employment contract was of one year period started on 04th August, 2019 and supposed to end on 03rd August, 2020. Rule 4(2) of G.N. No. 42 of 2007 provides that: -

> *"Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provides otherwise."*

As exhibit D1 shows that, the employment contract of the respondent was supposed to end on 03rd August, 2020 and on 29th July, 2020 the applicant informed the respondent of the ending of her employment contract (exhibit P2).

From the above factual truth, the respondents claim of unfair termination lacks merits. The allegation of being discriminated on the reason of pregnancy could have legal stand, if the respondent had been terminated before the expiring date of her employment contract. On such circumstance, the allegation of discrimination lacks legal stands on the reason that respondent's employment contract terminated automatically after its duration period expired.

Regarding the allegation of expectation for renewal the advocate for the applicant stated that the employment contract ended automatically and the respondent was informed one month before it came to its end. While the respondent emphasized that the respondent had expectation for renewal as her previously employment contracts were renewed.

In answering the disputed question, this Court find worth to consider rule 4(5) of G.N. No. 42 of 2007 that: -

> *"Where fixed term contract is not renewed and the employee claims a 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."*

This means previously renewals cannot be claimed without the employee establishing reasons for such expectations. In the case of **Remigious Scarion Muganga Vs. Greenlight Planet Tanzania Ltd**, Labour Revious No. 21 of 2020, High Court of Tanzania at Tabora at page 8 it was held that: -

> *"For the foregoing reason, the court finds that the applicant was dully informed of the non-renewal of the contract 17 days prior to the expiry of the contract of employment ... Further, it is this court's finding that the applicant has failed to demonstrate a reasonable expectation of contract renewal."*

Records shows that the employment contract of the respondent was supposed to come to its end on 03rd August, 2020, the applicant on 01st July, 2020 issued a notice of non-renewal of employment contact (exhibit D2) informing the respond of his intention of not to renew the employment contract with the respondent. This happened one month before the date of the end of the employment contract.

In court's determination the respondent's expectation was invalidated by a notice of non-renewal issued to her one month before the expiration of the contract. For that matter this ground also lacks its legal stand.

Dealing with the second issue of reliefs to be granted; this Court found that at CMA the respondent among other things was awarded annual leave and unpaid salaries. I fault the arbitrator on these awards as exhibit D5 shows that the respondent was paid her outstanding leaves allowances for year 2019 and 2020 and so she had nothing else to claim.

For unpaid salaries, the CMA F1 shows that the respondent claimed for unpaid leave from 01st August, 2018 up to 02nd August, 2019 while filled for this application on 31st August, 2020 (one to two years latter). The law under rule 10(2) of Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 provides for time limit to file for a labour dispute at CMA. It states all other disputes must be referred to the Commission within sixty days from the date when the dispute arose.

This prayer was made out of time and so the arbitrator could not have dealt with it without an application for condonation as provided under rule 11(2) of G.N. No. 64 of 2007.

On this Court's determination, it is its finding that there was no expectation for renewal of the respondent's employment contract; thus there was no unfair termination as claimed. Therefore, this application is meritorious the

decision of the CMA is accordingly revised. So I quash and set aside the CMA award. This being a labour matter I order no costs to either party.

M. P. OPIYO,

JUDGE

28/4/2023