

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

REVISION APPLICATION NO. 74 OF 2023

*(Arising from an Award issued on 21/11/2022 by Hon. Mpuila U.N, Arbitrator in Labour
Dispute No. CMA/DSM/ILA/306/2021/110/21 at Ilala)*

ALISTAIR JAMES COMPANY LIMITED..... APPLICANT

VERSUS

ASIMWE MUKOYOGI..... RESPONDENT

JUDGMENT

Date of last order: 26/06/2023

Date of Judgment: 30/06/2023

MLYAMBINA, J.

This judgement is in respect of an application for revision filed by the Applicant who was aggrieved with the Award issued by the Commission for Mediation and Arbitration (henceforth CMA) in *Labour Dispute No. CMA/DSM/ILA/306/2021/110/21* at Ilala dated 21st November 2022.

Briefly, the Respondent was employed by the Applicant for the first time on 11/08/2016 on a one year contract basis in the capacity of an Accountant and she was promoted up to a Senior Finance Manager. She worked with the Respondent on such one year fixed term basis until 31/12/2020 when the Applicant terminated the employment contract while the Respondent was on maternity leave. Being aggrieved with the

termination, as she was expecting renewal of the same, the Respondent filed her complaint before the CMA complaining that she was unfairly terminated as well as discriminated by the Applicant.

In the Referral Form (CMA F1), the Respondent indicated that there was no valid reason and that the procedures for termination were not followed. She claimed 36 months' salary compensation for unfair termination, notice pay, unpaid annual leave for 45.16 days, severance pay for 48 months of service and general damages of TZS 20,000,000/= making a total to the tune of TZS 232,443,428/=.

It was alleged by the Applicant that the Respondent was not terminated rather the employment contract expired as agreed and never renewed, hence he prayed the dispute be dismissed.

On 21st November 2022, Hon. Mpulla, U.N, Arbitrator, having heard evidence and submissions from both sides, held that there was unfair termination both substantively and procedurally. With those findings, the Arbitrator ordered the Applicant to pay the Respondent compensation to the tune of TZS 87,257,854/= and issue a certificate of service.

The Applicant was dissatisfied with the said Award hence this application for revision. The Notice of Application was supported by an

affidavit affirmed by Bashir Mohamed, Applicant's Human Resource Officer. Through the said affidavit, the Applicant is seeking for the Court to revise the said Award on three issues namely:

- 1. Whether the CMA properly evaluated the evidence on record given by the parties.*
- 2. Whether the CMA was proper in her decision which considered a new legal issue which was never among the raised issues by the parties.*
- 3. Whether the CMA was proper in denying admitting Applicant's documents during hearing of evidence.*

In opposing the application, the Respondent filed both the notice of opposition and the counter affidavit which was sworn by Mwang'enza Mapembe, Advocate for the Respondent.

The application was disposed by a way of written Submissions. The Applicant was represented by Mr. Anold Luwoga, Advocate, whereas the Respondent was represented by Mr. Mwang'enza Mapembe, Advocate.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. *Firstly*, whether the Applicant has adduced sufficient grounds for this Court to revise the CMA Award. *Secondly*, to what reliefs are the parties entitled?

In addressing the first issue, two grounds of revision raised by the Applicant will be considered. It should also be noted that, Counsel Anold Luwoga for the Applicant abandoned the third ground of revision in the course of his submissions.

To start with the first ground on whether the CMA properly evaluated the evidence on record, the Applicant's Counsel averred that since the Respondent was under fixed term contract, which started from 01/01/2020 to 31/12/2020 (Exh.P6), according to the law, such contract automatically terminated upon expiration of tenure. Hence there was no unfair termination whatsoever.

The Counsel for the Applicant added that; the Respondent admitted in evidence that she never signed any other contract. Supporting the argument, Mr. Anold cited the provisions of *Rule 3 (3) and (4) of Employment and Labour Relation Act (Code of Good Practice) Rules, GN. No. 42 of 2007*. He argued that the Respondent alleged to be terminated on 11/01/2021 *via* email, however, there was no proof of such assertion.

On the other hand, the Respondent's Counsel averred that, the Applicant failed to renew a contract for the year starting 01/01/2021 to 31/12/2021, hence unfairly terminated the Respondent who had

expectation for renewal of the same. He added that, there were previous renewal of contracts, grant of maternity leave which exceeded the expiry date of the contract. The comfort letter from the Applicant to Stanbic Bank assuring renewal of contracts and the mutual agreement altogether created expectation of renewal on the part of the Respondent.

The Respondent's Counsel was of the view that CMA was right to conclude that Respondent was unfairly terminated by the Applicant. In supporting his assertion, he cited various Court of Appeal cases namely: **Marwa Chacha Kisyeri v. Mwanza Baptist Secondary School**, Civil Appeal No. 366/2019, **Ibrahim Mgunga and 3 others v. African Muslim Agency**, Civil Appeal No. 476/2020, **Muhimbili National Hospital v. Linus Leonce**, Civil Appeal No. 190 of 2018 and **Thato Herman Mabizela v. Commission for Conciliation, Mediation and Arbitration and 2 Others v. Labour Court of South Africa**, Johannesburg Case No. JR2602/17.

In resolving this contention, I found it worth to have a glance at the CMA record to see the contents of the parties' employment contract (Exhibit P3). I noted that under Clause 3 of the contract, the Respondent was employed under fixed term contract. This can be seen under the

contracts signed by the parties on 31st December 2020 (Exh. P6), therefore, bind them. It remains that the terms which guided the Respondent's working terms were the ones under the contract dated 31st December 2020. I would like to borrow the wisdom of the Court of Appeal in the case of **Hotel Sultan Palace Zanzibar v. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004 (unreported), regarding employment contracts 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 situation if employees or employers were left to freely do as they like regarding the employment in issue.

From the above cited case, since parties are bound by their own agreement, this Court draw an inference that started between the contract from 01/01/2020 to 31/12/2020 on the issue of the Respondent being among others impregnated and on maternity leave. The said Contract could never foresee whether the Respondent could have anything to interfere with her works during one year term Contract.

The Respondent being impregnated, it is within her own affairs and plan and never within the ambit and expectation of the Appellant. The

Appellant by providing Respondent with one year (fixed term) contract, it is preliminary and prima facie that the Appellant in her wish has a vested right in that contract to terminate the said contract upon expiration of a one year term as clearly stipulated in the contract.

The Respondent being impregnated, is mere aftermath of which can never hinder the contractual right which the Appellant had it before the Respondent was impregnated. This same view applies on the comfort letter from the Appellant to Stanbic bank (Exh.P11) as the contract of the parties superseded such letter. There was no any other signed contract by the parties to alter their existing contract. The provisions of *Rule 4 of GN. No. 42 of 2007* provides:

- 4 – (1) An Employer and Employee shall agree to terminate the contract in accordance to agreement.*
- (2) Where the contract is the 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 the employee reasonably expects a renewal of the contract may be considered to be an unfair termination.

Again, the provisions of *Rule 4(4) of GN. 42 of 2007* can apply only when *Rule 4(3) (supra)* have proved to exist. The Respondent does not dispute being contacted by the employer on 22/12/2023 before the contract came to an end and informed on the intention of the Applicant not to renew the contract. It is the opinion of this Court that the employer complied with *Rule 4 (3) of GN. No. 42 of 2007 (supra)* as the Respondent did not work after expiry of contract.

The Appellant's act of terminating the Respondent was a mere exercise of her contractual right which has merit and enforceability in the eyes of the law. Again, on the aspect of previous renewal of contracts, the Applicant took trouble to inform the Respondent her intention not to renew the contract. The Applicant went further paying the Respondent gratuity to the tune of TZS 21,156,192 (Exh. P10) but the Respondent apart from conceding to have received the same, never signed the mutual agreement and the records do not show if the Respondent refunded the amount.

It is the findings of this Court that, by implication, the Respondent accepted the purpose of the gratuity which was ending the contract after expiration of the same. The termination was fair according to the law.

The next ground is whether the Arbitrator was right in basing his holding on the issue which was never framed by the parties. It is the opinion of this Court as pointed out hereinabove, the fixed term contract expired and automatically ended on 31/12/2020 (Exh. P6). As a result, it was unjustified for the Arbitrator to rule out that the Applicant unfairly terminated the Respondent basing his reasoning on expectation of renewal which was never proved by the Respondent.

If the Respondent wanted to enjoy her maternity leave (84 days) in full, she could plan to have that pregnancy at early time so as to enjoy it as per the provisions of *Section 33 (6) of the ELRA (supra)*.

It is the findings of this Court that, it was the desire of the Respondent not to enjoy her maternity leave within the tenure of her one year term contract. That is why, the Respondent chose by being impregnated late to the proxime of the end of one year term contract. The law does not provide a female employee to have a right of automatic renewal when impregnated by the time when the contract come to expire.

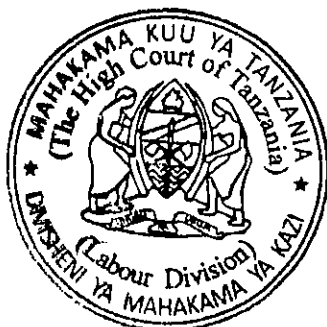
In other words, under fixed term contract, an employer has a right to terminate the contract, even if that contract ended when employee was in maternity leave. Treating the same otherwise, can create double standard to male employees. As pointed out hereinabove, the law provides that a fixed term contract is ended during the time that contract expires. The right to terminate is provided in the contract. As such, the termination was fair as the employment contract expired validly.

In the premises, I hereby allow the application, quash the proceedings and set aside the CMA Award accordingly. Right of appeal explained. It is so ordered.



Y.J. MLYAMBINA
JUDGE
30/06/2023

Judgement pronounced and dated 30th June, 2023 in the presence of Counsel Anold Luwoga for the Applicant and Mwang'enza Mapembe for the Respondent.



Y.J. MLYAMBINA
JUDGE
30/06/2023