IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 476 OF 2020

1. **IBRAHIM S/O MGUNGA**
2. **MAULID S/O KARUTA**
3. **MWINYIALLY S/O MRIDI**
4. **KUDRA D/O HASHIRY IBRAHIM**

..... APPELLANTS

VERSUS

AFRICAN MUSLIM AGENCY ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Kigoma)

(Mugeta, J.)

Dated the 28th day of July, 2020
in
Labour Revision No. 01 of 2020

.....

JUDGMENT OF THE COURT

3rd June & 13th, 2022

KENTE, J.:

The appellants were employed by the respondent African Muslim Agency on fixed-term contracts running from 1st January to 31st December, 2018. Whereas Ibrahim Mgunga, Maulid Karuta and Mwinyially Mridi who are respectively the first, second and third appellants were employed as teachers, the fourth appellant Kudra

Hashiry Ibrahim was employed in the capacity of the office cleaner. Immediately before their contracts came to an end, they went on leave. Whereas the first and second appellants were on leave commencing on 5th December, 2018 and ending on 6th January, 2019, the third and fourth appellants' leave commenced on 7th December, 2019 and were respectively scheduled to end on 6th and 7th January, 2019. Upon realising that the appellants' leave would extend beyond the specified period of their contracts, the respondent wrote them a notification specifically informing them that; **one;** their employment contracts would end on 31st December, 2018, **two;** that effective from 31st December, 2018 they would cease to be her employees and lastly that they should hand over their employer's properties before receiving their benefits.

After expiry of their employment contracts and on finishing their annual leave, apparently aggrieved by the respondent's notification letter, they lodged a claim with the Commission for Mediation and Arbitration ("the CMA") accusing the respondent for unfair termination of their employment contracts.

After hearing the parties, the CMA ruled in the appellants' favour holding that indeed they were unfairly terminated as they had a

reasonable expectation of renewal of their contracts. As to why the appellants had such expectations, the CMA reasoned that there had been previous renewals and that the appellants were given annual leave which extended beyond the contract period. Accordingly, the respondent was ordered to pay them twelve months salary as compensation within thirty days from the date of delivery of the award in accordance with section 40(1)(c) of the Employment and Labour Relations Act, Cap 366 (R. E. 2019) (hence forth the "ELRA") and to issue them with certificates of service.

Dissatisfied with the decision of the CMA, the respondent successfully applied to the High Court (sitting at Kigoma) seeking revision of the said decision. In allowing the application, quashing and setting aside the award by the CMA, the High Court (Mugeta, J.) was of the view that, the contracts between the parties had automatically come to an end and therefore there was no termination properly so called. Aggrieved, the appellants appealed to this Court citing seven grounds of complaint. Before us the appellants were ably represented by Mr. Sadiki Aliki, learned Advocate while Mr. Ignatius Kagashe, also learned Advocate appeared for the respondent.

On a careful consideration, the seven grounds of appeal are centred on two major complaints which are inextricably interwoven. **One,** that the appellants' contracts were unfairly terminated and **two,** that they had reasonable expectations that their fixed-term contracts would be renewed.

Submitting in support of the appeal, Mr. Aliki contended that the appellants had reasonably expected and sincerely believed that upon expiry, their contracts would be renewed. According to Mr. Aliki, the appellants' expectation was based on the undisputed fact that there had been previous renewals. He also argued that, given the nature of the respondents business which was to run an education institution, it was not proper for the respondent to keep on changing teachers such as the first, second and third appellants every after one year. The learned counsel submitted further that, going by the evidence on the record, it appears that the respondent was still in need of the appellants' services as immediately after termination of their contracts he went on and hired other teachers. With regard to the observation made by the first appellate Judge that the appellants had deliberately delayed to apply for their annual leave leading to its lengthening beyond the contracts period, the learned counsel submitted that, had

the appellants intentionally delayed to apply for annual leave as held by the learned Judge, the respondent would not have approved their applications for leave. As for the complaint that the appellants were terminated from service and not just reminded of the nearing expiry of their contracts, Mr. Aliki faulted the first appellate Judge for treating the notification written by the respondent to the appellants (exh. P2) as a mere reminder rather than a notice of termination of their employment contracts. Once the Judge had found that the parties had enterred into a fixed-term contract which expires automatically upon expiry of the contract period, he ought to have found that a fixed term contract with no reasonable expectation of renewal does not require the employer to issue a notice of termination to the employee, so argued the learned counsel. According to Mr. Aliki, the respondent's act of writing a notification to the appellants notifying them that their contracts were about to come to an end and that he was not intending to renew their contracts, was uncalled for. He argued that this signified that the respondent knew that, after their leave, the appellants would report back to work and therefore, he had to issue a notice much earlier terminating their contracts. He relied on the case of **Denis Kalua Said Mngome v. Flamingo Cofetena** [2011 – 2012] LCCD 49 to

underscore the position of the law that, in any case of a fixed term contract with no reasonable expectation of renewal, the employer is not required to issue a notice of termination to the employee as fixed term contracts expire automatically upon expiry of the contract period.

In resisting the appeal, Mr. Kagashe maintained in the first place that the appellants were not terminated from service but rather, before they went on leave, they were reminded that their contracts would come to an end on 31st December, 2018. He emphasized that, even if the respondent had not issued the contested notification, the appellants' contracts would still come to an end on the specified date. As for the contention that the appellants had reasonably expected renewal of their contracts, Mr. Kagashe challenged them for not demonstrating the basis of their expectations and for not leading evidence with the view to showing how their contracts used to be renewed. For instance, the learned counsel argued, the appellants did not tender their employment contracts before the CMA to show not only the terms of their contracts but also what they used to do for their employer to renew their contracts. The learned counsel blamed the appellants for pretending to be on tenterhooks about their fate and rushing to the CMA to lodge a complaint rather than coming to terms

with the fact that their contracts had come to an end which fact, as it turned out, appears to have been a bitter pill for them to swallow.

Submitting on the argument that the appellants had reasonably expected their contracts to be renewed after they were allowed to go on leave for a number of days which would extend beyond their employment contracts, Mr. Kagashe firmly maintained that, rather than being a reason for the appellants' misconceived expectation, the extension of their annual leave beyond the contract period was due to their belated application for annual leave. All in all, the learned counsel was of the strong view and he accordingly submitted that the appellants had failed to establish the basis of their expectation that upon expiry, their employment contracts would be renewed. With regard to the complaint that other teachers were immediately hired to replace the 1st, 2nd and 3rd appellants, Mr. Kagashe never saw the least malice in what the respondent did as the said teachers were hired not immediately after expiry of the appellants' contracts but sometimes in February, 2019.

In his brief rejoinder submission, Mr. Aliki reiterated his position that the appellants were in fixed-term contracts which they believed would be renewed and that they had advanced the factors which, like

the CMA, the learned High Court Judge ought to have taken into account as being sufficient to support their expectation for renewal of their contracts. The learned counsel also emphasized that, as opposed to Mr. Kagashe's contention, other teachers were hired immediately after termination of the appellants' contracts which signifies that in terminating their contracts, the respondent was not acting in good faith.

We have carefully gone through the record of appeal as well as Mr. Aliki's written submissions and oral arguments expounding on them. We have also considered Mr. Kagashe's oral submissions against the appeal. Given the uncontested fact that the appellants were employed by the respondent on fixed term contracts, it is necessary to have recourse to section 36(a)(iii) of the ELRA which defines the phrase "termination of employment" thus;

> *"36 for purposes of this sub-part (a) "termination of employment" includes*
>
> *(i) NA*
>
> *(ii) NA*

(iii) a failure to renew a fixed term contract on the same or similar terms ***if there was a reasonable expectation of renewal."***

[Emphasis added]

Going by the above – reproduced provision of the law, it is certainly clear that, an employer may be held liable for unfair termination if he fails to renew a fixed term contract where there was a reasonable expectation of renewal. Coming to the instant case, the question is whether or not, the High Court judge was entitled to find that the appellants were not unfairly terminated as they failed to lead evidence showing that they had a reasonable expectation of renewal of their fixed-term employment contracts. That is the question with which we shall grapple in the ensuing part of this judgment.

Notably, the appellants gave two reasons in an attempt to demonstrate that indeed there was a reasonable expectation of renewal of their contracts. First, that there had been previous renewals and secondly that, while knowing that their contracts were due to expire on 31st December, 2018, the respondent went ahead and approved their annual leave which extended beyond the 31st December, 2018, the date of expiry of their contracts. Obviously in contending so, Mr. Aliki

had in mind the provisions of rule 4(4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, Government Notice No. 42 of 2007 (here in after ("the Code") which provides that:

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

However, as we held in **Asanterabi Mkonyi v. Tanesco,** Civil Appeal No. 53 of 2019 (unreported) to which we were ably referred by Mr. Aliki, the principles of unfair termination do not apply to fixed term contracts, unless it is established that the employee had reasonably expected a renewal of the contract. The question that arises in the context of the present case is whether or not, it could be said that by renewing the appellants' contracts once in the past, and approving their annual leave while knowing or having reason to know that it would extend beyond the contract period, the respondent gave the appellants the impression that their contracts would be renewed and, if yes, was this expectation based on good judgment and therefore fair and practical as the word "reasonable" connotes in common parlance?

Having found in **Asanterabi Mkonyi** (supra) that the ELRA does not define the phrase "reasonable expectation of renewal" we sought inspiration from the South African case of **Dierks v. University of South Africa** (1999) 20ILT 1227 in which, though not specifically defining the phrase, the court set the criteria for determing whether a reasonable expectation of renewal had come into existence pursuant to section 186(b) of the Labour Relations Act 66 of 1995. In that case it was held that:

> *"[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeals Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business."*

As stated earlier, the appellants complaint to the CMA was based on two factors which they claimed to have established reasonable

expectation for renewal of their contracts. To recapitulate, these were the previous renewal and the respondent's approval of their annual leave while knowing that the said leave would go beyond the contract period.

With due respect to the appellants, we do not subscribe to their argument. While we entirely agree that indeed, in determining the existence of a reasonable expectation of renewal of a fixed term contract, the number of times the contract has been renewed is one of the factors to be considered, we do not think, in the circumstances of this case that, the one or two-times renewal of the appellants' contracts by the respondent in this matter, would be sufficient reason to establish that there was reasonable expectation for another renewal of their contracts. We deliberately mentioned earlier in this judgment that immediately before going on leave, the respondent issued the appellants with a notification informing them that their employment contracts were due to expire on 31st December, 2018 and that they should return their employer's properties in their possession. We used the term "notification" advisedly because it is the said notification which the appellants subsequently claimed to be a notice of termination of their contracts.

Going by the evidence given before the CMA, we entirely agree with the learned High Court Judge that, although the respondent was not bound under the law to serve the appellants with the notice of non-renewal of their contracts (as we do not know if that was a requirement under their contracts), he did so out of courtesy to remind them that their contracts would expire prior to the expiry of their annual leave. Bearing this in mind, it follows in our judgment that, the appellants having failed to adduce threshold evidence in support of the proposition that the said letter was a notice of termination of their fixed term employment contracts, it is difficult if not impossible for us to reach to the conclusion that their contracts were unfairly terminated. In so holding we are alive to section 39 of the ELRA which imposes the onus of proof on the employer to prove fairness in the termination of the employee's contract. However, in the circumstances such as the ones obtaining in the instant case, where an employee challenges the fairness of termination on the grounds of reasonable expectation of renewal of a fixed term contract, in terms of rule 4(5) of the Rules, it is the employee who assumes the duty to prove the basis of his expectation and this cannot be said to be a shift of the burden of proof as it is an elementary principle that he who alleges is the one

responsible to prove his allegations. In the South African case of **Ferrant v. Key Delta** (1993) 14 I L J 464 (IC), which was cited by the Supreme Court of Zimbambwe in **Medecins Sans Frontiers (MSF) Belgium v. Vengai Nhopi and Eleven Others,** Civil Appeal No. SC 278/16, in which the issue was whether an employer's invitation to his former employee for an interview for the same post that the employee held during the subsistence of the fixed contract was a conduct which the employee could act on to form a legitimate expectation of re-employment by the employer, the court held that, the onus of proving reasonable expectation rests on the employee. Spreading out wider, yet in another South African case of **Fedhlife Assurance Ltd v. Wolfaardt** (2001) 22 11J 2407 (SCA), the court was categorical that, to discharge that onus, the employee must prove that he or she actually expected the contract to be renewed and that only then would the question whether the expectation was reasonable arise. In **Médecins Sans Frontiers** (supra) the court was emphatic that, the employee has to show that despite the contract of employment having been one for a fixed term, the employer had acted in a manner upon which the employee could have formed a legitimate expectation to be re-engaged. Instructively, the court sought to fortify its position and

quoted with approval the observations made by Prof. Lovemore Madhuku a Zimbambwe-an Politician and Professor of Law at the University of Zimbambwe in his book, **Labour Law in Zimbabwe,** Weaver Press, 2015 at page 101 where he states that:

> *"The test for legitimate expectation is objective: would a reasonable person expect re-engagement? This requires an assessment of all the circumstances of the case. To be legitimate, the expectation must arise from impressions created by the employer."*

Did the appellants in the instant case lead evidence establishing the basis of existence of a reasonable expectation of renewal of their contracts and therefore the conclusion that, by issuing them with a notice of non-renewal, the respondent had unfairly terminated their contracts?

We thought it necessary to pose the foregoing rhetorical question because of putting emphasis on the position which we have already taken. Having demonstrated that the appellants had subjectively created their own expectations that their fixed-term contracts were going to be renewed, we are with respect in agreement with Mr. Kagashe in his submissions that this appeal has no merit. We are reinforced in this view by the evidence on the record as weighed in

view of the various statutory provisions, the jurisprudence and legal literature to which we think we have amply referred.

In the result and for the above stated reasons, we find the appeal to have no merit and dismiss it in its entirety with no order as to costs, this being a labour dispute.

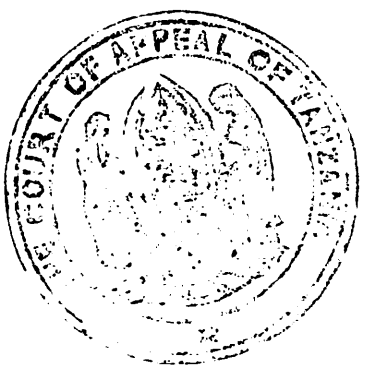
DATED at **KIGOMA** this 10th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2022 in the presence Mr. Sadiki Aliki, learned counsel for the Appellant and Mr. Sadiki Aliki holding brief Mr. Ignatus Kagashe, learned learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL