

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)
CIVIL APPEAL NO. 366 OF 2019
MARWA CHACHA KISYERI APPELLANT
VERSUS
MWANZA BAPTIST SECONDARY SCHOOL RESPONDENT
(Appeal from the Ruling and Order of the High Court of Tanzania, Labour
Division at Mwanza)

(Matupa, J.)
dated the 9th day of February, 2019
in
Labour Revision No. 88 of 2017
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JUDGMENT OF THE COURT

29th November & 5th December, 2022

NDIKA, J.A.:

The appellant, Marwa Chacha Kisyeri, was employed by the respondent, Mwanza Baptist Secondary School, on a contract commencing 1st January, 2005. Although he claimed before the Commission for Mediation and Arbitration ("the CMA") and the High Court of Tanzania, Labour Division at Mwanza ("the High Court") that his engagement was on permanent terms, it was found at both instances that his employment was on a fixed-term contract. What was at issue then, and still is now before us, was whether the respondent's refusal to renew the employment

contract that was due to end on 3rd May, 2015 constituted unfair termination and if so, what relief is the appellant entitled to.

At the hearing of the appeal before us, the appellant was self-represented whereas Ms. Happyness Robert, learned counsel, represented the respondent.

It is necessary to begin with what we consider to be the essential facts of the case. On 2nd April, 2015, the respondent served the appellant with a letter (non-renewal notice – Exhibit D7) intimating that his employment contract due to end on 3rd May, 2015 would not be renewed. The appellant replied to the respondent vide a letter also dated 2nd April, 2015 indicating his wish that the contract be renewed. In the operative part of that letter, the appellant stated that he reasonably expected the contract to be renewed as it happened with the previous contracts and that non-renewal of the contract would constitute unfair termination of the employment. For clarity, we excerpt the said part of the appellant's letter thus:

"I still claim a reasonable expectation of a renewal of the contract so long as there is [an] objective basis for the expectation such as the previous renewals as contrasted to your letter with no possible justification for the decline of the renewal of my contract, Ref. No. MBSS/MZA/160/577/205, dated 2/4/2015.

"The failure to renew my contract – that your action will amount to unfair termination of my contract and [therefore] I shall claim for (sic) unfair termination remedies."

It is imperative to observe, at this point, that considerable argument and time was spent in the CMA and the High Court on the question on the nature of the appellant's employment with the respondent. We dare say that the matter was strictly a non-issue. For the appellant clearly stated in his referral form (CMA Form No. 1) that the basis of his cause of action was *"unfair termination arising from the employer's failure to renew the employment contract without any reasonable justification contrary to the employee's expectation from the previous years' renewals of the contract."* As the age-old principle of law goes, parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored – see **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161. See also **Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others**, Civil Appeal No. 56 of 2012; **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Ltd. v. Jacob Muro**, Civil Appeal No. 357 of 2019 (all unreported).

When queried by this Court on the issue during the hearing, the appellant, seemingly unwittingly if not disingenuously, rehashed the claim that he was engaged on permanent terms. We wish to state at once that apart from his claim being at war with what he pleaded in the referral form as already pointed out, the above excerpt from his letter exposes the falsity of his claim. Furthermore, we are satisfied that the rest of the evidence on record is so overwhelming that he served his employer on several fixed-term contracts as found by the CMA, a finding which the High Court upheld. To illustrate the point, we extract the High Court's reasoning thus:

"The foregoing evidence clearly shows that the applicant [now the appellant] was serving a term of two years and this was renewable. It was renewed at least in 2006 when the respondent paid him his gratuity. In terms of section 14 of the [Employment] and Labour Relations Act, the applicant had a fixed-term contract. Since [then] he was in employment for eight years up to 2013 and he continued to be in employment for the period thereafter even without renewal of the contract. The contention by the applicant that he was on a permanent contract is belied by his own pleadings."

Having established that the appellant had been on a fixed-term contract, the CMA dismissed the claim on the grounds that the contract had run its full course without any renewal and that the appellant fell within the categories of employees excluded from coverage by the fair termination provisions of section 37 of the Employment and Labour Relations Act, Cap. 366 ("the ELRA").

Discontented, the appellant approached the High Court seeking revision of the CMA's award on four grounds. The court (Matupa, J.) took the view, rightly so, that the crucial issue in the matter was whether the respondent's non-renewal of the contract ending 4th May, 2015 was justified. Matupa, J. dealt with the issue as follows:

"My understanding of the relationship of the parties was that, it was possible for the employment agreement to be renewed even orally as it was done in 2013. Otherwise, the employer would have taken action against the applicant in 2013 when he failed to renew the contract. From this conduct, whereas I don't agree with the applicant that he had a permanent contract, rather he had a renewable contract, I don't agree with the respondent that the contract had expired. The holding by the Commission on this aspect is not, therefore, borne out by evidence."

In the premises, the court vacated the CMA's finding that the employment contract had ended at the time the dispute arose. Based on that finding, the court, then, addressed the question whether on the evidence on record there was reasonable expectation by the appellant of renewal of the contract. The court answered the question as follows:

"This issue can be approached from the history of the discourse by the parties, [which shows] that there was more to the termination than the lapse of the term. That notwithstanding, still, the applicant was retained orally, for a term of two years. This conduct of the respondent created a reasonable expectation of renewal of the contract, which the employer could not terminate but with due process."

Consequently, the court allowed the application, quashed the CMA's award, and directed that *"the contract of employment of the applicant be renewed"* for a single two-year term from 2015 to 2017. It is apparent that the aforesaid directive was inexecutable because at the time it was made (9th February, 2019) the term contemplated by the court had already expired.

The appellant initially cited seven grounds of appeal but during hearing he abandoned Grounds 4, 5 and 6. The essence of the remaining grounds is as follows:

- 1. That the learned High Court Judge erred in law in failing to hold that the appellant was entitled to statutory reliefs for unfair termination.*
- 2. That the learned High Court Judge erred in law in failing to order payment of not less than TZS. 291,148,000.00 as compensation for unfair termination.*
- 3. That the learned High Court Judge erred in law in failing to decide key legal issues left undecided by the CMA and pleaded again in paragraph 21 (a) and (b) of the appellant's affidavit supporting the application for revision.*
- 4. That the learned High Court Judge erred in law for failing to direct that the renewal of the contract for two years was to take effect on 9th February, 2019 when it was issued*

At the hearing of the appeal, the appellant and Ms. Robert embraced their respective written submissions and the list of authorities for and against the appeal.

Ahead of considering the substance of the appeal, we wanted to satisfy ourselves as to whether Matupa, J.'s finding that there existed a reasonable expectation of renewal of the contract was soundly based in law and on properly evaluated evidence. We were concerned that the said

finding manifestly exhibited an error material to the case and that it would be remiss of us not to satisfy ourselves of its legality and soundness before proceeding to resolve the other issues presented in the appeal. In doing so, we acted within our mandate pursuant to section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (“the AJA”) vesting us with the power of revision as well as the power, authority, and jurisdiction of the court from which the appeal is brought, all these powers being for purposes of and incidental to the exercise of the Court’s appellate power stipulated by section 4 (1) of the AJA.

In the premises, it became apparent that the appeal turned, in the first place, on the issue whether the respondent’s refusal to renew the employment contract that was due to end on 3rd May, 2015 constituted unfair termination. Corollary to that issue if it is answered in the affirmative, it must be determined what relief for unfair termination the appellant is entitled to.

Since it is unassailable that the appellant was employed on fixed-term contracts, the last one being the contract that supposedly ended on 3rd May, 2015, section 36 (a) (iii) of the ELRA defining the phrase “termination of employment” in respect of a fixed-term contract is pertinent to this matter. It provides 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.***

(iv) NA

(v) NA"[Emphasis added]

The above provision must be read along with rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, Government Notice No. 42 of 2007 ("the Code"), which stipulates as follows:

"4.-(1) – (2) NA

(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 warrant it.

*(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 unfair termination.***

(5) 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, [and] employer's undertakings to renew.
(6) and (7) NA.”[Emphasis added]

While we have purposely emboldened the above part of the text of sub-rule (4) of rule 4 of the Code to underscore its restatement of the essence of section 36 (a) (iii) of the ELRA, we have also supplied emphasis to sub-rule (5) placing the onus on the employee to prove on an objective basis the existence of reasonable expectation of renewal of contract. What then does the phrase “reasonable expectation of renewal” mean?

Admittedly, the ELRA does not define the above phrase. In view of that, in **Asanterabi Mkonyi v. TANESCO**, Civil Appeal No. 53 of 2019 (unreported) the Court cited with approval the decision of the Labour Court of the Republic of South Africa in **Dierks v. University of South Africa** (1999) 20 ID 1227, which restated some of the factors that had been considered in various cases in determining whether a reasonable expectation of renewal has come into existence in terms of section 186 (b) of the Labour Relations Act 66 of 1995. The Court observed, in Para. 133 of the judgment, that:

"[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeal 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."

In **Ibrahim s/o Mgunga and Three Others v. African Muslim Agency**, Civil Appeal No. 476 of 2020 (unreported) relied upon by Ms. Robert, we cited with approval the decision of the Supreme Court of Zimbabwe in **Médecins Sans Frontiers (MSF) Belgium v. Vengai Nhopi and Eleven Others**, Civil Appeal No. SC.278/16 holding that in order for an employee to discharge his burden of proof he must show that the employer acted in a manner upon which he formed a legitimate expectation to be re-engaged. In so holding, the Zimbabwean apex court approved an observation by a Zimbabwean author, Prof. Lovemore

Madhuku in **Labour Law in Zimbabwe**, Weaver Press, 2015, at page 101, 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.**"*[Emphasis added]

In the light of the foregoing discussion, we now determine whether the appellant demonstrated that he reasonably expected a renewal of the contract.

In his extensive written submissions in support of the appeal, the appellant anchored his expectation of renewal mainly on the fact that his employer rolled over all his previous contracts. He contended that his situation involving over ten years' service was incomparable to that of the appellants in **Ibrahim s/o Mgunga** (*supra*) whose employment spanned no more than a year. He, therefore, implored us to disregard the said decision. He also claimed that his letter of 2nd April, 2015 in response to the non-renewal notice sufficiently expressed his expectation of renewal.

On the other hand, Ms. Robert strongly disagreed with the appellant. She countered that the appellant led no evidence to establish the alleged

expectation. As regards the letter of 2nd April, 2015, she said that it was of no consequence because it was issued after the respondent had chosen not to renew the contract and notified the appellant accordingly.

Having dispassionately considered the competing arguments on the issue at hand, we are unpersuaded that the respondent as the employer gave impressions that would have created reasonable expectation on the part of the appellant that his contract would be extended beyond 3rd May, 2015. Admittedly, the number of times the contract was rolled over was an important consideration. When a contract is renewed for a third or fourth time, the employee may develop a legitimate expectation that the employer will continue to roll over the contract on the same or similar terms after its expiry. However, in the instant case there are, at least, three other factors that militated against any expectation of renewal of the contract. **First**, it is not correct that the appellant's contract was always smoothly rolled over. It is on record that it was once renewed upon a directive made by the CMA in 2007 following a heated disagreement between the parties. **Secondly**, it is in the evidence that the appellant's service with the respondent was dominated by endless wrangling, which culminated in the appellant refusing to sign and return to his employer his last contract even though he did not withhold service. At the height of

these wrangles, the appellant suggested in writing that he did not even know who his employer was. More significantly, the appellant led no evidence that at any material time his employer made any undertaking or representation that the contract would be extended. **Thirdly**, the respondent gave sufficient notice of non-renewal to the appellant thwarting whatever hope the latter might have had of a further extension of the contract. As rightly submitted by Ms. Robert, the appellant's letter in response to the notice could not constitute any basis for anticipation of renewal. For the respondent had clearly impressed upon the appellant his intention not to roll over the contract. This was coupled with the employer's undertaking to pay the appellant all his dues as terminal benefits to formally end the contractual relationship. We are disconcerted that the appellant considered the notice as unfair termination of the employment without any sound legal basis.

In view of the foregoing, we find that the appellant failed to demonstrate that there was any objective basis for his alleged expectation that his employment contract would be renewed and extended beyond 3rd May, 2015. There is no doubt that the High Court's finding to the contrary was made upon a complete misapprehension of the evidence on record. It cannot be left to stand. Given the circumstances, the appellant was

neither entitled to the order for renewal of his employment contract nor did he deserve any statutory compensation for unfair termination. On this basis, the appellant's four grounds of appeal are rendered irrelevant, and we dismiss them all. Accordingly, we quash the court's ruling and set aside the corresponding order for renewal of the employment contract from 2015 to 2017.

In conclusion, we find no merit in the appeal, which we hereby dismiss. We make no order on costs because this matter, being a labour dispute, is not amenable to any award of costs.


DATED at MWANZA this 3rd day of December, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on 5th day of December, 2022 in the presence of the Mr. Marwa Chacha Kisyeri, appellant in person and Ms. Happiness Robert, learned counsel for the respondent, is hereby certified as a true copy of the original.


C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL