IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 31 OF 2022

(Arising from Labour Dispute No. CMA/ARS/ARB/156/21/70/21)

HUSNA MAGANGA .....APPLICANT

VERSUS

SIOUXLAND TANZANIA EDUCATIONAL

MEDICAL MINISTRIES..... RESPONDENT

JUDGMENT

24/08/2022 & 02/11/2022

MWASEBA, J.

The Applicant hereinabove filed this application seeking for revision of an award made by the Commission for Mediation and Arbitration ("CMA") at Arusha in the Employment Dispute Number CMA/ARS/ARB/156/21/70/21 the decision that was delivered on 28th February, 2022. It was supported by an affidavit sworn by learned Advocate John S. Massangwa who appeared for the Applicant. On the other side the Respondent who was represented by learned Advocate

Hillary Shedafa filed a notice of opposition to the application together with the counter affidavit sworn by Narola Mollel the Respondent's legal representative.

In brief, the Applicant was employed by the respondent as a Chief Financial Officer under a fixed term agreement from 1st April, 2020 to 31st March, 2021 as per Exhibit P1. Before the Applicant's employment came to an end non-renewal of Applicant's agreement notice was issued dated 23rd February, 2021 and John Lidgett, the Respondent's executive officer from United States of America (USA), signed the same. The Applicant disputed the legality of the notice and refused to leave her work place until the letter dated 12th April, 2021 (Exhibit P4) to vacate office and handover was issued to her by the Arumeru District Commissioner. After the trial, the Arbitrator analyzed evidence and testimony presented by parties and decided that the notice of termination was legally proper and thus the case was meritless and consequently the same was dismissed.

Being aggrieved by the CMA decision, the applicant knocked the door of this court armed with six legal issues as per paragraph 4 (a) up to (g) of the affidavit supporting the application that:

a) *The Honourable Arbitrator erred in law for issuing the final decision incongruent to the law and thus the decision is improperly procured.*

b) *That, Honourable Arbitrator erred in law and facts by not considering the evidence presented by the Applicant.*

c) *The Honourable Arbitrator erred in law and facts by denying proper and appropriate legal issues propose by the Applicant.*

d) *That Honourable Arbitrator committed misconduct by breaching rules of fair trial and hearing.*

e) *That Honourable Arbitrator erred in law and facts by bringing and adjudicating on issues not presented by any party during trial.*

f) *That the Honourable Arbitrator erred in law and facts by creating witness statements, which were never stated during trial.*

g) *That the Honourable Arbitrator erred in law by admitting and gave weight to evidence incongruent to the law and rule of evidence.*

When the application was called for hearing on 20/07/2022, Mr Gospel Sanava, learned advocate appeared for the applicant and Mr Hillary Shedafa assisted by Ms Narola Mollel, both leaned counsels represented the respondent, they both agreed that the application be disposed of by

way of written submission. I commend both parties for their adherence to the schedule.

In his submission the Applicant's counsel requested to abandon ground 'f' which is hereinabove indicated as ground number vi, and requested to argue the remaining grounds in chronological order.

Submitting on the first ground, the Applicant's counsel faulted the arbitrator on the ground that the decision delivered was against the law. Armored with **Section 88(11) of the Employment and Labour Relations Act**, Cap 366 R. E. 2019 (ELRA) the Applicant's counsel argued that what the CMA delivered was a ruling and not the award as required by the law and the same is incurable as it touches the title of the legal document because **Section 88(11) of the ELRA** dictates that the CMA shall issue an award with reasons signed by the arbitrator. He prayed for the court not to order a trial *de novo* on the basis of this legal anomaly because doing that will jeopardize the Applicant's case as the Respondent will build his case.

Arguing on the second ground, the Applicant's counsel faulted the arbitrator for ignoring her evidence adduced during trial. He went on to argue that the evidence presented was not considered on its entirely. He

further submitted that the Applicant's employment contract (Exhibit P1) shows that the person who signed the employment agreement was the in-country director named Tony Tailor. And she was reporting to him as per the Applicant's job description (Exhibit P2). He added further that as per Exhibit P3, particularly clauses 26.4 it is the Respondent's board members who have authority over the Respondent's employment affairs. The Applicant's learned counsel went on to argue that since the Respondent is a non-governmental organization registered under the **Tanzanian Non-Governmental Organization Act,** 2002 which is a legally independent entity, therefore, its affairs run as per the dictates of its constitution and Tanzanian laws. He prayed for the court to look at the Respondent's constitution which was admitted as Exhibit P3 whereas he suggested that Clauses 26.2 and 26.4 give the Respondent's board members the authority to handle all employees' affairs. More to that the Applicant was given a notice of non-renewal of her employment contract by John Lidgett who signed the same as an executive director whose authority does not appear in Exhibit P3, the Respondent's constitution. The said notice was neither sanctioned by the Respondent's board

members nor supported by a resolution from the Respondent's board meeting for issuance of the notice to the Applicant.

It was his further submission that, DW1 (Lemaika Ngeseyan Kivuyo) and DW2 (Steve Meyer), an American citizen, confirmed during cross-examination that John Lidgett is an American citizen and had no work permit or resident permit. He added that **Section 26(1) of the National Employment and Promotion of Services Act**, Cap 243, R.E. 2002 bar employment to foreigners and also prevent foreigners from engaging in employment except they acquire requisite permits. To compliment this position, he cited **Section 9(1)(a) of the Non-Citizens (Employment Regulations) Act**, 2015 and **Regulation 3(1) of the Non-Citizens (Employment Regulation) Regulations**, 2016, which denies foreigners from engaging in any paid, reward or non-profit work unless they acquire a valid work permit. See the case of **Rock City Tours Ltd VS. Andy Nurray**, Revision Number 69 of 2013 (Unreported). In the end he prayed for the notice to be declared nullity for contravening the law.

As for the third ground the Applicant's counsel faulted the Arbitrator on the fact that CMA refused the Applicant's proposed issues during the

hearing at the trial commission and the choice of legal questions used to determine this case misdirects the truth. He further added that because the focus was on John Lidgett who issued a notice of non-renewal of the Applicant's employment, the issues ought to have been drafted to seek answers to that question. He asked the court to fault the arbitrator in this irregularity as well.

Coming to the fourth ground where the applicant complained that the CMA's trial was not fair. The applicant's counsel submitted that during trial, rules of fairness were completely ignored to the detriment of the Applicant hereinabove contrary to **Article 13(6)(a) of the Constitution of United Republic of Tanzania**, 1977 (as amended) which provides for such right. He supported this position by citing the case of **Emmanuel Bernard Thadeo VS. Republic**, Criminal Appeal No. 36 of 2019 (Unreported) which cited with approval the Court of Appeal of Tanzania's decision of **Kibula D/O Luhende VS Republic**, Criminal Appeal No. 281 of 2014 CAT, (Unreported) which declared that the right to fair trial is the center of a just society.

Lastly the Applicant's counsel, on the seventh ground, argued that the arbitrator erred by failing to appreciate rules of admissibility of evidence

and rules of giving weight to evidence tendered during trial. This is on the fact that the notice for non-renewal of the Applicant's employment, which was admitted as Exhibit D1, was submitted as a photocopy and not an original letter. He continued by arguing that **Section 66 of the Tanzania Evidence Act**, Cap. 6, R.E. 2022 (TEA) mandatorily requires all documents to be proved by primary evidence unless as directed for by the exceptions found in **Sections 67(1) (a-g) and 68 of the TEA**. More to that if Exhibit D1 was electronic evidence, then it ought to have been subjected to the tests prescribed by **Section 18(2) (a) to (c) of the Electronic Transactions Act**, 2015 which requires the proponent of evidence to establish that a piece of evidence is reliable by proving the manner in which the document was generated, sored and communicated, the manner in which the integrity of the document was maintained and the manner in which the originator of the evidence was identified. It was his submission that none of these standards were complied with. He went on to say that the witness, DW1, who tendered Exhibit D1 was the farm manager and that it is in record that this document was never sent to him. Further, he is not a custodian of Respondent's documents or Respondent employees' documents and this

makes him incompetent to tender this document. He cited the case of **Arusha City Council and Another VS M/S MIC (T) Limited**, Civil Case No. 45 of 2018 (Unreported) and argued that the same presented three principles on admissibility and weight of evidence. In the end, he prayed for the application to be allowed.

Opposing the application, the Respondent's counsel replied that, the Applicant counsel's argument regarding the title of the legal document is irrelevant if the content of the document is as prescribed by the law. He averred that the decision delivered by CMA in this dispute has the contents of an award because the document contains the required content of an award prescribed by **Rule 27(3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules**, G. N. No. 67 of 2007 (Rules). He continued his line of argument by citing the case of **Jaffari Sanya Jussa and Another Vs Saleh Sadiq Osman**, Civil Appeal Number 54 of 1997, CAT sitting at Zanzibar (unreported). He submitted further that the said errors can be cured under **Section 33(1) of the Rules**, which allows parties or arbitrator on his or her discretion to make correction on clerical mistakes or errors in the award from any incident slip or omission. On top of that, the same can be

cured by the overriding objective principle, which was brought by **the Written Laws (Miscellaneous Amendments) Act**, No. 8 of 2018, requiring courts to deal with cases justly and fairly.

Coming to the second, fifth and seventh grounds in a consolidated manner, he submitted that the complaint regarding the issue of the notice to the Applicant is baseless and an afterthought. He went on to argue that the Respondent is an International Organization which operates around the world with Tanzania being one of its branches. He submitted further that the Applicant received directives straight from its headquarters/head office in the United States of America. He further argued that page 4 and 7 of the CMA decision shows that the Applicant was communicating with the Board of Directors of the Respondent based in the United States of America. He further added that the notice for non-renewal of the Applicant's employment was not issued when the said John Lidgett was in Tanzania so there was no need for a work permit.

He further argued that the Applicant's employment was terminated in accordance with the terms of the agreement (Exhibit P1), which prescribed that the employment shall be from 1st April, 2020 to 31st

March, 2021. Thus, the notice of non-renewal was issued on 23rd February, 2021, more than one month before the expiration of the Applicant's employment agreement.

It was his further submission that the notice for non-renewal of the Applicant's employment was not even necessary because the Applicant's employment agreement served as a notice. He went further to cite **Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules**, G. N. No 42 of 2007 which provides that a fixed term contract terminates automatically when the agreed period expires unless the same agreement provides to the contrary. More to that the Applicant has failed to prove legitimate expectation that the Respondent would renew the employment agreement for another term. He cemented this point by citing the case of **Ibrahim S/O Mgunda and Another VS African Muslim Agency**, Civil Appeal No 476 of 2020, CAT sitting at Kigoma (Unreported), which established a point that the test of legitimate expectations is objective, and depends on peculiar circumstances of the case and such expectation must arise from the impression created by the employer.

Arguing on the third and fourth issues together the Respondent's advocate stated that parties were given a fair chance to argue the case in accordance with **Rule 22(1)(2) of the Rules** and prayed that the Applicant's revision be dismissed for want of merit.

Having gone through the rival submissions made by learned counsels as well as the CMA' s record, the issue for determination before this court is Whether the decision of the trial arbitrator that there was no breach of contract was justifiable in law.

Starting with the 1st legal issue, where the counsel for applicant challenged the heading of the award which was written "Ruling" instead of an award, this court is of the view that the same is just a typing or clerical error which can be cured by **Section 33(1) of the Rules**. More to that, as it was well submitted by the respondent's counsel, the applicant could have applied at the commission for the change of title of the document to cure the said error instead of jumping to the higher court.

On the 4th Legal issue of fairness during the trial, having gone through the records of the trial Commission this court noted that the trial was fairy conducted since each party was given a right to be heard and

nothing strange was seen which jeopardized the rights of the applicant herein. More to that the contents of the award were prepared according to **Rule 27(3) GN 67 of 2007**.

As for the 3rd and 4th legal issue the applicant's counsel complained that their raised issues where not considered by the Commission. Having gone through the records particularly the record of 04/08/2021 this court noted that there were two issues that were raised on that day in the presence of Mr John Massangwa, learned counsel for the applicant and Mr. Selemani Godfrey Sandi, learned counsel for the respondent and there was no objection from both parties. Thus, I find no merit on the raised claims.

Coming to the 7th legal issue, the counsel for the applicant challenged the admissibility of exhibit D1 for the reason that it was admitted contrary to **Section 66, 67 and 68 the law of Evidence Act**, cap 6 and **Section 18 (2) (a), (b) and (c) the Electronic Transaction Act**, 2015. He added that even the person who tendered the same had no capacity since he was neither a maker nor a custodian of the said document.

Upon revisiting the record of the commission, this court noted that on 16/09/2021 when DW1 prayed to tender exhibit D1 as exhibit, the counsel for the applicant raised an objection that procedures for tendering a document particularly electronic evidence was not followed. But the Commission overrule the objection based on **Section 88 (4) of ELRA**. And this court, do concur with the submission of the counsel for the applicant that since it was electronic evidence the criteria under **Section 18 of ETA** was supposed to be complied with and the same cannot be cured by **Section 88 (4) of ELRA**. Thus, the said error moved this court to expunge exhibit D1 from the record and proceed to determine the application based on the evidence adduced by the parties and the pleadings. I have perused the record and found that in an opening statement of the applicant particularly at Paragraph 7 she pleaded that she was issued with a notice of non-renewal of the respondent's contract. Thus, there is no dispute that the notice was issued to her prior to the end of the contract.

Coming to the 2nd legal issue, the counsel for the applicant submitted that, there was a breach of contract based on the argument that the notice of non-renewal of the contract was signed by a person who does

not have a work permit to work in Tanzania as he was a foreigner. He also cited the provisions that prohibit a person without a valid working permit to work in Tanzania including **Section 9(1)(a) of the Non-Citizens (Employment Regulations) Act**, 2015 and **Regulation 3(1) of the Non-Citizens (Employment Regulation) Regulations**, 2016, and also, he cited the case of **Rock City Tours Ltd Vs. Andy Nurray**, (supra) to buttress his point.

On his side, the respondent's counsel submitted that, the Respondent is an International Organization who operates around the world and had its branch in Tanzania. More to that the Applicant was receiving directives straight from its headquarters/head office in the United States of America then the argument that he was given notice by a person without a valid working permit is baseless and an afterthought.

This court do concur with the argument raised by the respondent's counsel for the reason that although the respondent has its branch here in Tanzania it operates together with the USA head office as it is shown in their constitution under Article 7 titled "Head Office" that:

> *"The head office of the Organization shall be in Nebraska St., Sioux City USA and in Tanzania Shall be Arusha City,*

Mbuguni Ward, Arumeru DC, nearby Mbuguni Primary School, Arusha, P.O.Box 11054, Arusha."

Thus, the issue of working permit as alleged by the counsel for the applicant is just baseless since they even failed to prove that the said John Liggett was in Tanzania when he signed a notice of nonrenewal.

Apart from the said arguments of a notice to be valid or not, it is undisputed fact that the applicant was employed under a specific contract of one year and when she was issued with a notice for non-renewal she was still working with the respondent until the expiry of her contract. More to that, the evidence revealed that the applicant proceeded with her work after the expiry of the contract until when the District Commissioner interfered and removed her from the office.

Further to that, even if this court finds a notice of non-renewal of the contract was not properly issued what are the remedies of the specific contract under such circumstance? It is the position of the law as it was held in the case of **Dar es Salaam Baptist Sec School v. Enock Oaala,** Revision No. 53 of 2009 HC Labour Division at Par es Salaam (Unreported) Rweyemamu J, (as she then was) that;

".....Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise or there was no expectation of renewal, the contract would have expired automatically with no need to write a termination letter."

Being persuaded by the cited authority even if the respondent could have not issued a notice of non-renewal the said contract could have come to an end automatically when its period expires. More to that, the applicant could have not relied on the principle of expectation of renewal since the contract for employment under Clause 1 stated that:

"The present contract will have effect from April 1, 2020 until March 31st 2021. A new contract can be made after the termination of this one if both parties; employer and employee, are satisfied with the work relations between them."

Thus, the action of the respondent to issue a notice of non-renewal of the contract proves that they were not expecting to extend the contract with the applicant herein. For those reasons, one cannot rely on the expectation of the renewal of the contract in such circumstances. As it was held in the case of **Paul James Lutome And 3 Others Vs**

Bollore Transport & Logistics Tanzania Ltd, Revision No. 347 Of 2019 (Unreported) that:

> *"If the respondent created any expectation of renewal to the applicants those expectations were rebutted by the notice of non-renewal."*

In light of the foregoing, I find that applicant's employment contract was legally terminated after expiration of the period of the employment contract.

For the reasons stated herein, I do not legally see any reason to fault the decision of the Commission for Mediation and Arbitration, consequently, the application is hereby dismissed for want of merit. Since this is a labour matter, I make no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 2nd day of November 2022.

N.R. MWASEBA

JUDGE

02/11/2022