IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MTWARA

LABOUR REVISION NO.4 OF 2022

(Originating from the Decision of Labour Dispute No. CMA, MTW/21/2021)

BETWEEN

JOHN ENOTHY MWAKASEGE..... APPLICANT

VERSUS

DANGOTE CEMENT LTD.....RESPONDENT

RULING

6/12/2022 & 19/12/2022

LALTAIKA, J.:

The applicant herein **JOHN ENOTHY MWAKASEGE**, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration for Mtwara delivered on 11/4/2022 by **Hon. A.J. Kweka, Arbitrator** in Labour Dispute No. CMA/MTW/21/2021. The application is made under Section 91(1)(a) and (b), Section 91(2)(a)(b) and (c) and Section 94(1)(b)(i) of the **Employment and Labour Relations Act [Cap.366 R.E.2019]** read together with Rule

24(1),24(2)(a),(b),(c),(d),(e) and (f),24(3)(a),(b),(c),(d) and (d),28(1)(c)(d) and (e) of the Labour Court Rules, GN No.106 2007.

The background of this matter is imperative and is as follows: -the applicant was employed by the respondent as "Fleet Manager" under a fixed term contract for one year which was not subject to renewal. The said agreement was entered between the parties on 01/04/2019 (Exh. KM1) which had a clause of probation of six months. On 01/10/2019 the applicant was confirmed (Exh. KM2) and the contract of employment ended on 31/3/2020. The applicant, therefore, obtained a new fixed term contract which was subject to renewal.

The second contract started running from 01/04/2020 to 31/03/2021 (Exh. KM3). It is on record that during the tenure of employment the applicant was being paid a monthly remuneration of Tshs.1,516,685.18/=. However, upon expiry of the second fixed term contract the applicant continued working for the respondent as he expected another renewal of the contract as previously. That the applicant worked for eight days by signing in a biometric system and also participated in various meetings was evidenced by exhibits KW4 and KW5, respectively.

During those eight days the applicant used to communicate with the drivers of the respondent which culminated into acceptance of communication payment costs by the Country Director. However, the payment was not honored due to the fact that one Ally Mohamed Ally, the Human Resource (HR) of the respondent issued a termination letter to the applicant.

The respondent, on his part, claimed that on 16/03/2021 he issued a letter ending the fixed term contract but since it did not incorporate the notice for renewal, the applicant declined to receive it. That the applicant was required to collect the same at the HR's office on 17/3/2021 unfortunately the applicant did not attend at work. On 19/3/2021 the respondent sent a letter to the applicant vide his official email address. Aggrieved by the decision of the respondent the applicant lodged the labour dispute pegged on termination of employment as per CMA F.1. The CMA dismissed the applicant's claims on the ground that the fixed term of employment had ended and there was no legitimate expectation by the employer to renew the same. In addition, the CMA was satisfied that the applicant was duly and timely notified about the termination. Again being dissatisfied and aggrieved with the CMA's decision the applicant filed the present application seeking to revise and set aside the CMA's award.

When this matter was called on for hearing the applicant was represented by his personal representative, Mr. Watson Mwakasege while the respondent was represented by Mr. Stephen Lekey, learned counsel. At the outset Mr. Mwakasege adopted the Notice of Application, Chamber Summons, Affidavit is support of the application and the attached list of documents relied upon be part of his submission. Furthermore, the applicant submitted that the award being contested was improperly procured as defined by Black's Law Dictionary mean incorrect, unsuitable, or irregular, fraudulent or otherwise wrongful. To support his argument, the applicant referred this court to the case of this court of **Mahawi**

Enterprises Ltd vs Sengereti Breweries Ltd (Misc. Comm. Cause 9 OF 2018) 2019 TZHC, Com. D.159 (Tanzlii).He went further and contended that at the last paragraph of page 4 Fikirini J(as she then was) held that for improper procurement of the award, it is not settled position that this will include elements such as bribe, treating bias, misleading or deceiving arbitrator, employing arbitrator for reward, failure to be impartial. To this end, Mr. Mwakasege stressed that the award was procured improperly because it was based on treated bias since the arbitrator ignored his evidence and her award relied on the arguments and evidence of the respondent.

To that effect Mr. Mwakasege gave some examples. One, when the respondent prayed to tender additional list of documents. He contended that the applicant objected because the respondent failed to provide sufficient reasons for failure to file the same on 5/8/2021 the date which was set for filing documents. He contended that the objection was overruled and the documents were admitted. Two, Mr. Mwakasege submitted that the learned Arbitrator ignored the testimony of the applicant in her award particularly at paragraph of 10 of the awards the Arbitrator stressed that the applicant did not object the evidence that he was informed by the respondent on 16/3/2021. Three, when the learned Arbitrator was admitting exhibit KW3 and KW4 she purposely omitted to state that the same was objected during its admissibility and challenged its weight during cross examination. This is proved at page 15 of the award where the learned Arbitrator stated that the applicant did not object about

the emails sent to him. Based on that argument the applicant submitted that is how biasness is founded.

Again, Mr. Mwakasege contended that the learned Arbitrator wrongly admitted exhibits KW3 and KW4 since there was no lawful justification for the admission which was wrongly applied in reaching the conclusion of the award. The personal representative of the applicant contended that the Arbitrator misdirected herself when she said that there was a meeting on 16/03/2021 between the applicant and DW1. Furthermore, Mr. Mwakasege submitted the in spite of the allegation that they failed to cross examine the witness still the evidence of DW1 was not weighed down to arrive to the award. To bolster his argument, he cited the case of **Kwiga Masa vs Samwel Mtubatwa** [1998] T.L.R. 103.On top of that Mr. Mwakasege argued that the Arbitrator was supposed to analyse the testimony of the applicant who said that he did not meet or communicate with DW1 before the 13/3/2021.

In addition, he contended that the learned Arbitrator purposely decided not to consider the circumstances warranting expectations of renewal of contract the applicant. To cement his argument, he argued that at page 10 of the award the applicant testified that he was expecting renewal based on previous record of renewal which is among conditions under Rule 4(5) of the Government Notice No.42 of 2007 of Employment and Labour Relations (Code of Good of Practice) Rules 2007. To this end, he contended that the learned Arbitrator reached a wrong, illogical and unreasonable award since the alleged letter of 16/03/2021 was even not

tendered during trial. Mr. Mwakasege cited the case of **Marwa Mahenge vs Republic** [1998] T.L.R. 249 and vide the decision of this case he prayed this court to revise the award of the CMA at Mtwara and direct that the applicant was unfairly terminated, and grant leave as claimed in CMA F.1.

In response, Mr. Lekey prayed this court to adopt a Notice of Opposition and Counter Affidavit and be part and parcel of his submission. Furthermore, the learned counsel strongly objected the submission of the personal representative of the applicant. The learned counsel went on and argued that in the Notice of Application, the applicant cited Rule 28(1) of the Labour Court Rules of 2007 G.N. No. 106 of 2007.He further contended that in one of the terms of the Notice of Application particularly number 2(b) that the award is unlawful. The learned counsel submitted that during the trial at the CMA one of the issues raised was whether the CMA had jurisdiction. Mr. Lekey submitted that the issue raised is on jurisdiction which needs attention of this court.

Submitting on the issue of jurisdiction, the learned counsel argued that is centred on two areas. First, the applicant, as per evidence, had worked below six months, 8 days to be precise. The learned counsel further submitted that the applicant worked fully through the first one-year contract that ended on 31st March 2021 peacefully. Mr. Lekey contended that from the applicant claims that he worked for 8 days whereupon he alleges that he was orally terminated. The learned counsel submitted that 8 days are below six months thus he is barred claiming unfair termination as

per section 35 of the Employment and Labour Relations Act [Cap.366 R.E. 2019].The learned counsel insisted that according to this section it does not matter that the applicant worked under several contracts. To buttress his argument, he cited two cases of **Stella Lyimo vs. CFAO Motors (T) Ltd**, Civil Appeal No.378 of 2019 CAT, Dar on page 17 and **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda**, Civil Appeal No.33 of 2018 CAT, Mwanza (Unreported) at page 10.

Submitting on the second argument of jurisdiction Mr. Lekey contended that the applicant was still a probationary employee. He contended that during validity of the first contract as per clause 5, the contract was subject to probationary period of 6 months (exh. KM1). The learned counsel contended that the applicant was confirmed. However, upon expiration of that contract, the applicant was issued with another as per the letter dated on 1/4/2020.The learned counsel argued that the letter directed that the applicant's contract was renewed for one more year ending 31st March 2021 and put clearly that all other terms and conditions of the employment remains unchanged.

The learned counsel stressed that the applicant signified acceptance of the same on the same date. Mr. Lekey stressed by accepting the said letter the applicant accepted the terms and conditions of the previous contract including the clause of probation. The learned counsel submitted that from 1st April 2020 when he accepted the new terms up to 31st March 2021 the applicant was never issued with the confirmation letter. He further submitted that from 31st March to the date the applicant claims

have been terminated, there was no confirmation letter. To this end, the learned counsel contended that a probationary employee cannot claim unfair termination. To bolster his argument referred this court to litany of cases of **Anna M.Kitula vs Sleep Inn Hotel Limited**, Revision No.773 of 2019 HCT, LD Dar es Salaam (Aboud J.), **David Nzaligo vs National Macrofinance Bank PLC**, Civil Appeal No.61 of 2021 also referred in the case of **Ngeleki Malimi Ngeleki vs Dimension Data (T) Limited**, Revision No.890 of 2019 HCT, LD Dar es Salaam (Muruke J.) at page 5.The learned counsel contended that in all the decisions above, courts are in agreement the a probationary employee cannot claim unfair termination and they nullified the proceedings where the CMAs' entertained such matters where the complainants were the probationary employees.

In addition, Mr. Lekey argued that the since the applicant was in the expectation of renewal and thus capable of claim unlawful termination by relying on Rule 4(4) of the Code of Good Practice Rules G.N. No. 42 of 2007 cannot override the parent Act.

Regarding the arguments raised, Mr. Lekey contended that it is not true that the evidence of the applicant was ignored, however, it considered the evidence of both parties. He further contended that the exhibits tendered followed all the procedure and the applicant was given an opportunity to object and the ruling was written. The learned counsel wondered where the bias is because the Court of Appeal directed that CMA conducts its procedures at minimum of legal technicalities. The learned advocate cited the case of **Tanzania Distillers Limited vs Benntson**

Mishosho, Civil Appeal No.382 of 2019 CAT, Dar TANZLII 2022 TZCA 730.To this end, the learned counsel invited the court to make a finding that the admission of the exhibits was legally sound.

Submitting on the objections, Mr. Lekey submitted that objections were raised during admissibility and even during cross examination, representative questioned only the authenticity and legality. The learned counsel stressed that the personal representative never questioned on whether the emails were sent or not. The learned counsel submitted that whether it was proper to challenge authenticity after the document has been admitted.

Mr. Lekey submitted on the claim of the applicant that he was unfairly terminated since he had expectations for renewal based on two things(i) previous renewal and (ii) he worked after his earlier contract expired. To this end, the learned counsel submitted that the onus of proving expectation of renewal was on the side of the applicant. The learned counsel submitted that the applicant failed to discharge this duty. He referred to the case of **Ibrahim s/o Mgunga and 3 Others vs African Muslim Agency**, Civil Appeal No.276 of 2020 CAT, Kigoma page 13.Mr. Lekey submitted that in Mgunga's case the Court indicated criteria of assessing expectation of renewal.

The learned counsel contended that the claim that there was a previous renewal is not enough to prove expectation of renewal. In addition, the learned counsel submitted that before the last day of working, applicant was summoned to meet DW1 who had informed him orally that

an expiration of his contract, it would not be renewed. The learned counsel submitted that the applicant refused to sign a letter of informing his nonrenewal of the contract. Mr. Lekey contended that the applicant never come back on the next day of 17/3/2021 which means he had absconded. In view of that, the learned counsel stressed that abscondment negates expectation of renewal. To fortify his argument, the learned counsel cited the case of **Asanterabi Mkonyi vs TANESCO**, Civil App.53 of 2019 CAT, Dar.

Morover, the learned counsel submitted that the initiatives to inform him were done by KW3 and KW4 which the applicant claims that were improperly procured. The learned counsel argued that the grounds have no merits since DW1 was the one who wrote the email, printed them out and testified at CMA.The learned counsel referred this court to the case of **Tanzania Distillers** (supra).

He further contended that even in absence of the sworn statement (affidavit) is not the only prerequisite since authenticity can be established through other forms like oral evidence. To this end, he referred to the case of **EAC Solutions Ltd vs. Falcony Marines Transportation Limited**, Civil Appeal No.1 of 2021[2021] TZHC 3197.Futhermore, the learned counsel assumed that the emails were wrongly admitted, something that he disagree, the evidence that he was orally informed was not objected especially where the respondent was testifying. The learned counsel contended that the verbal notice was considered a proper notice in the previously cited case of **Ngeleki Malimi Ngeleki** (supra).

On top of that Mr. Lekey submitted that even the second contract was in itself a notice because it states categorically that the contract would expire on 31st March 2021(Exh. KW1).The learned counsel submitted that conducting cross examinations assists the other party to discover the case of the rival party. He went on and argued that objecting a fact during defense case as the applicant purportedly did, is making an afterthought and taking the other party by surprise. Regarding the 8 days, the learned counsel argued that are indeed true that the applicant worked but fully knowing that his contract had expired hence the same with bad intention to justify claiming compensation. To this end, the learned counsel prayed this application be dismissed.

In a short rejoinder, Mr. Mwakasege submitted that as per section 36(a) (ii) of the Employment and Labour Relations Act failure to renew a fixed term contract on same or similar terms if there was expectation amounts to unfair termination. He went on and argued that the rule cited provides that failure to renew a fixed term contract in circumstances where the employee reasonably expects the renewal of the contract may be taken to unfair termination. The personal representative stressed that the rule does not stand in silo but it is read together with sub rule 34(3) renewal by default. More so, Mr. Mwakasege submitted that the rules were made under section 99(1) of the Parent Act. He contended that section 66(1) provides that failure to renew amounts to unfair termination regardless of the number of days the employee worked. Regarding the cited case Mr. Mwakasege submitted they are distinguishable with the present case.

Submitting on the case of Serenity Mr. Mwakasege argued that in that the employee was on three months contract while in the present case the applicant had received confirmation of the first contract. He stressed that when renewal of contract is made with new contract, the contract would be in terms of its own. He went further and argued that it is not the same when the contract is renewed by the letter.

Having dispassionately considered the submissions by both parties, the record of the CMA and grounds for the revision, the issue for the determination is whether there was reasonable expectation of renewal of applicant's contract of employment. Regarding the context of this matter, I think it is important reproduce section 36(a)(iii) of the ELRA which define termination of employment at the scope of fixed term contract of employment as follows:-

> *"For the purpose of this Sub-Part-*
> *(a) "termination of employment" includes-*
> *(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal."*

The above section precludes the application of the concept unfair termination to employment on a fixed contract in case of failure to renew such a contract on the same or similar terms only if it is established that there was a reasonable expectation of renewal. It is known that where such expectation does not exist the concept of reasonable expectation of renewal will not apply. See, **Asanterabi Mkonyi vs TANESCO** (supra). Unfair termination for an employee of a fixed term will only exist where

there are circumstances which the employee will reasonably expects a renewal of the contract. This condition is provided under Rule 4(4) of the Employment and Labour Relations (Code of Good Practice) Rules,2007, G.N. No. 42 of 2007 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."*

The Court of Appeal vide its decision in the case of **Ibrahim s/o Mgunga and 3 Others vs African Muslim Agency** (supra) cited with approval the Southern African case of **Dierks v. University of South Africa** (1999) 201LT 1227 set the criteria for determining whether reasonable expectation of renewal had come into existence thus, the Court of Appeal stated that :-

> *"[133] A number of criteria have been identified as considerations which have influenced the findings of the 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."*

In the present matter, it is apparent clear from the record that the applicant was employed by the respondent on fixed term contract of employment as envisaged by Exh. KM1 (Contract of Employment of

Specified period of time) and Exh. KM3 (Renewal of Employment Contract).On both exhibits time of expiry of the contract was indicated and each party was aware of it. For instance, in Exh. KM1 time of the first contract was provided under Clause 1, that the contract commenced on 1st April,2019 and continued for one year (1) year up to 31st March,2020.The same status exist in Exh. KM3 which provides that the renewed employment contract for another period of twelve months (12) starting from 1st April 2020 to 31st March 2021. Exh. KM3 went further and stated that all other terms and conditions of the applicant's employment remained the same.

However, the evidence of respondent (DW1) shows that applicant was called at the office of DW1 on 16/3/2021 and was informed about the intention of the respondent of not renewing the contract of employment. The evidence of DW1 depicts that the applicant was given a letter although after he had read, he rejected signing it on the ground that it had to be issue one month before 31/3/2021. Seeing that, DW1 made communication with his top leaders for rectification of the letter of including one month salary but the applicant absconded from work on the ground of sickness. That the record of the CMA shows that DW1 took the personal email address of the applicant vide Exh. KW2 (Bio data of employees). It is further noted that on 19/03/2021 at different hours DW1 sent two emails to the applicant vide the official email of the applicant (Exh KW3) and personal email of the applicant (Exh. KW4). Both Exh. KW3 and KW4 bear the same message of referring to their discussion of few days

earlier and the express statement of the employer of not renewing the applicant's contract of employment after coming to an end. Indeed, I am convinced that the CMA was satisfied as to the authenticity of the Exh. KW3 and KW4 as per the ruling delivered on 23/8/2021. However, the applicant on his evidence did not touch the evidence of refusing to sign and receiving email messages sent to him.

Instead, the applicant brought a new evidence which shows that he was at work from 01/4/2021 to 08/4/2021 vide exhibits KM4 (hand written of the meeting attendance),KM5(printout of the bio metric attendance of the applicant) and KM6 (expense reimbursement of air time).On my perusal of the record nowhere the applicant testified as to his absence at work from 17/3/2021 to 31/3/2021 since even exhibit KM4 shows that on 31/3/2021 the applicant was not at work. This is proved by absence of his name on the list of names of employees who attended the meeting on 31/03/2021. With this piece of evidence, I am convinced that it is very true that the applicant after being informed about respondent's intention not to renew his contract of employment he had absconded to work.

With respect, considering the circumstances of the present matter that Exh. KM 3 clearly stated that the renewed contract of employment was of twelve months which started from 1st April 2020 to 31st March, 2021 and with no clause of renewal. Indeed, this signifies that the applicant was aware of the tenure of his contract. Therefore, there was no need of respondent informing him. This is because the law is clear that, where the contract of employment is for a fixed term, the contract expires

automatically when the contract expires unless the employee breaches the contract before the expiry in which case the employer may terminate the contract by having a fair reason to do so. See, **Serenity on the Lake Ltd. vs Dorcus Martin Nyanda**(supra). The act of the respondent through DW1 informing the applicant and giving him the letter of intention not to renew the contract of employment though the applicant had refused to sign the same plus sending the email messages to him. Even if, the applicant did not open or read his emails, that signifies that the message was communicated to the applicant and well informed about the intention of the respondent not to renew the contract of employment.

In fact, all these conducts of the respondent signifies that there was no reasonable expectation from the applicant on the renewal of the contract of employment. Even if the applicant had worked for 8 days after the expiry of the fixed contract of employment which he was aware that had expired does not entitle to claim legitimate expectation of renewal of contract of employment as the previous one and termination of contract of employment. To this end, the evidence of the applicant has failed to prove that he had reasonable expectation that the respondent would renew his contract of employment. I am holding so, because it is the onus of the applicant to prove whether there are circumstances under which legitimate expectation has arisen. See, **Ibrahim s/o Mgunga and 3 Others vs African Muslim Agency** (supra).

Basing on the above observation, the applicant cannot claim on termination of contract as envisaged under CMA F.1 because his contract

of employment had come to end on 31/03/2021 as agreed between them vide Exh. KM3 and KM1.

In the upshot, I find the application with no merit, I hereby dismiss the same and the CMA award is hereby upheld. There is no order as to costs as this is a labour dispute which is not subject to costs.

It is so order.

E.I. LALTAIKA

JUDGE
19/12/2022

Court

This ruling is delivered under my hand and the seal of this Court on this 19th day of December 2022 in the presence of Mr. **Edgar Benedicto Forodha** representing the applicant and in the absence of the respondent.

E.I. LALTAIKA

JUDGE
19/12/2022

Court

The right of appeal to the Court of Appeal of Tanzania is duly explained.

E.I. LALTAIKA

JUDGE
19/12/2022