IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 832 OF 2018

BETWEEN

PATRICK MBOMBO ..... APPLICANT

VERSUS

DKT INTERNATIONAL TANZANIA ..... RESPONDENT

JUDGMENT

Date of Last Order: 05/05/2020

Date of Judgment: 02/06/2020

S.A.N. Wambura, J.

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant **PATRICK MBOMBO** has filed this application under the provisions of Sections 91(1)(a), (2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as ELRA]; Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007 praying for Orders that:-

1. *This Honourable Court be pleased to call for the records, revise the proceedings and set aside the whole award of the Arbitrator of the Commission for Mediation and Arbitration at Dar es Salaam (Kinondoni) in Labour Dispute No. CMA/DSM/KIN/R.1075/16/1019 delivered by Hon. Kweka A.J (Arbitrator) on 04th October, 2018.*
2. *Any other relief(s) this Honourable Court may deem fit and just to grant.*

The application is supported by his sworn affidavit.

With leave of this Court the matter was disposed of by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

The brief facts of this matter are that the applicant is alleging he was employed as of 29/08/2014 to 30/10/2016 as a Graphic Designer. He continued working even after the probation period which was between 01/09/2014 to 28/02/2015 was over believing that he had been permanently employed. However on 12/07/2016 the respondent changed the terms of employment and terminated the applicant. Aggrieved the

applicant filed a dispute at CMA which found in favour of the respondent. Dissatisfied, he has now knocked at the doors of this Court on the grounds that:-

(i) *That Honourable Arbitrator error in law and fact for to decided that lapse of employment contract and applicant to continue to work did not mean that change.*

(ii) *That Honourable Arbitrator error in law and facts to decide that there was breach of contract by agreements without to consider that respondent breach employment contract without to make consultation with applicant.*

(iii) *Ground number (iii) That Honourable Arbitrator error in law and facts to allow respondent to tender documents which was differ from their filling previous.*

(iv) *That Honourable Arbitrator error in law and facts to allow respondent to tender documents which was differ and filling before.*

(v) *That Honourable Arbitrator reached her decision with doubt.*

In response the respondent **DKT INTERNATIONAL TANZANIA** submitted that:-

1. On 29th August, 2014 the applicant and the respondent entered into individual consultancy agreement which was of three months with the possibility of extension to six months if the respondent was satisfied with work of the consultant. There was no offer which was made by the respondent to offer the applicant a full-time employment. What existed between the parties is the consultancy agreement which was automatically renewed after every six months. This is well elaborated under Rule 4(3) of the Employment and Labour Relations (Code of Good Practice) GN No. 42.

That Section 61 of Labour Institutions Act, No. 7 of 2007 is inapplicable. That they intended to treat their relationship as one of consultancy and that the applicant never claimed for employment from the respondent. That is why the applicant kept on submitting invoices every month. The applicant never claimed for contributions to NSSF, PAYE, an ID card, nor health insurance, annual leave, monthly salary, and any other benefit which otherwise all other people who were employees of the respondent were benefiting.

2. Rule 2(a) of the Employment and Labour Relations (Code of Good Conduct) GN 42 of 2007 provides for termination of a contract by agreement. The Rule provides:-

> *"Rule 2 A lawful termination of employment under common law shall be as follows:-*
>
> *(a)Termination of employment by agreement."*

The law of Evidence Act specifically under Section 147(4) gives power to the Arbitrator to recall a witness for further examination, the Section provides:-

> *"Section 147(4) The* ***Court may in all cases permit a witness to be recalled*** *either* ***for further examination-in-chief*** *or for* ***further cross-examination****, and if it does so,* ***the parties have the right of further cross-examination and re-examination respectively.***"
>
> *[Emphasis is mine].*

The respondent did not tender documents which were different from the one which were filed before at CMA. That being the case the Arbitrator

ruled out that the objection on the evidence has no merits. The respondent thus prayed for this Honourable Court to dismiss this ground of revision for being supported by baseless arguments.

The applicant and the respondent held several meetings to discuss on the changes of the terms and conditions of a contract as evidenced in Exhibits D6. That during the said meetings the applicant proposed for termination of his contract a proposal which was accepted by the respondent and later the contract was terminated as agreed by both parties.

It was thus submitted by the respondent that the termination of the applicant contract was procedural and substantive fair, as the respondent followed all the procedures as provided under the labour laws.

They prayed for the application to be dismissed in its entirely for lack of merits.

CMA found that there was a consultancy agreement between the parties which was mutually terminated due to the change in the laws of the country as per Exhibits D1, D4 and D6 which was in conformity with Rule

4(1)(2) of ELRA Code of Good Practice, GN No. 42/2007, so issued an award in favour of the respondent.

There is a major complaint in respect of the evidence adduced at CMA. I find no reason to resolve the same because under Section 35 of ELRA, contracts of less than six months are not covered by the ELRA. Section 35 provides that:-

> *"Section 35 The provision of this sub-part* ***shall not apply to an employee with less than 6 months' employment with the same employer whether under one or more contracts."***
>
> *[Emphasis is mine].*

The same was so held in the case of **Neema Mkaima Chibule V. Halmashauri ya Manispaa ya Morogoro**, Rev. No. 28/2019 (unreported). This Court held that:-

> *"Since the applicant was on a contract of a monthly basis, she is not covered by the provisions of ELRA. Therefore the issues of valid reasons for termination and*

the issue of adhering to the procedures upon termination do not arise."

Again in the case of **Mtambua Shamte & 64 Others Vs. Care Sanitation and Suppliers**, Rev. No. 154/2010 at Dar es Salaam, the Court held that:-

".....Explained the principles of unfair termination do not apply to specific tasks or fixed term contracts which come to an end on the specified time or completion of a specific task. Under specific tasks or fixed term, the applicable principles apply under conditions specified under Section 36(a)(iii) of the Employment and Labour Relations Act, No. 6/2004 read together with Rule 4(4) of GN 42/2007."

Now the applicant who was on a consultancy agreement as per Annexture "AP"2 and was even not an employee for that matter, can definitely not be covered by the provisions of the ELRA.

Under the circumstances, I quash the proceedings and award of CMA and dismiss the application herein filed for want of merit.

S.A.N. Wambura
JUDGE
02/06/2020

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DKT INTERNATIONAL TANZANIA ..... RESPONDENT

Date: 02/06/2020

Coram: Hon. S.R. Ding'ohi, Deputy Registrar

Applicant: } Absent
For Applicant: }

Respondent:

For Respondent: Mr. Safari Kimboka Advocate

CC: Lwiza

COURT: Judgment delivered this 02nd day of June, 2020.

S.R. Ding'ohi
DEPUTY REGISTRAR
02/06/2020