IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION APPLICATION NO. 98 OF 2018

(Arising from Labour Dispute, CMA Arusha zone in CMA/ARS/ARB/108/2018)

HAPPY WATOTO HOMES AND SCHOOLS..... APPLICANT

Versus

EDWARD MWOLOLO..... RESPONDENT

JUDGMENT

29/07/2021 & 09/09/2021

KAMUZORA, J.

The respondent instituted a labour dispute against the applicant claiming for unfair termination. Briefly, the facts of the case reveals that, the respondent Edward Mwalolo was employed by the applicant Happy Watoto sometimes in 2010 as a head teacher. In 1st October, 2013 they renewed and entered three years contract which was to end up on 30th September, 2016. This time, the respondent was promoted to position of a Managing Director.

On September 2016 the respondent sent an email to Mr. Dick Molman who was among the board members living abroad. The email was to remind him on the contract between the respondent and the applicant which was ending and therefore proposing for the extension of two years contractual term. Following such proposal, Mr. Dick Molman informed the respondent that the proposal was subject to discussion by Board members on the meeting which was soon to be convened.

Fortunately, the contract was extended for only three months up to 1st January, 2017 pending such Board members' discussion.

However, during the Board meeting, the proposal by the respondent to extend contract for two years stood aborted. After receiving a letter regarding the Board's decision refusing to renew the contract, the respondent filed the complaints to the CMA claiming that he was unfairly terminated by the applicant without following the proper procedure. The decision of the CMA was in favour of the respondent as the CMA in its award dated 7thSeptember, 2018 found out that, the termination of the respondent's employment was unfair. The applicant was ordered to pay compensation of twelve months salaries at the tune of 14,400,000/= quantified from a monthly salary of 1,200,000/= and € 6180. The amount was ordered to be paid within twenty-one days. Aggrieved by the decision, the applicant stepped into the room of this Court application for revision on the following prayers;

1. *THAT, this honourable Court be pleased to invoke its revisionary powers to call upon the records of Commission for Mediation and Arbitration in Labour Dispute No. CMA/ARS/ARB/108/2017 between Edward Mwololo and Happy Watoto Homes and Schools.*
2. *THAT, this honourable Court be pleased to inspect the said records, vary or overturn the decision of the honourable arbitrator and give such direction as it may deem necessary.*
3. *THAT; this honourable court may be pleased to grant the prayers as sought by the applicant herein in the Commission for Mediation and Arbitration.*

4. THAT; this honourable court be pleased to grant any other order(s) as it may deem just to grant.

This matter was heard ex-parte after the respondent for reasons best known to himself failed attend. The applicant was represented by Mr. Timothy Maeda learned Advocate.

In his submission in chief Mr. Maeda faulted the award by the CMA as being unmaintainable. He submitted for the first ground that, the arbitrator erred by holding that there was unfair termination. Mr. Maeda contended that, by October 2017 when the complaint was referred to CMA, the respondent was still an employee of the applicant and he was still receiving salaries. The applicant was of the view that, there was no termination and the complaint was prematurely lodged before the CMA.

Arguing on ground two Mr. Maeda submitted that, it was quite unbecoming for the learned Arbitrator allowing the foreigner, a Kenyan citizenry (the respondent) to testify without having a valid licence permit of work. He said, the respondent during the proceeding handled the passport which showed that he was allowed only to stay in Tanzania for non-commercial activities for a period not exceeding six months. Mr. Maeda added that, the respondent was contravening section 16(2) of the immigration Act, [Cap 54 R.E 2019] which requires a foreigner to engage in business only if, he has a valid permit to do so.

On the third ground Mr. Maeda submitted that, the learned Arbitrator disregarded the applicant's submission entirely and left vital information to the provision of the award. The counsel for the applicant prayed for the final submission to be considered in this revision. What he referred as vital information pointed out in the submission are that;

one, the employment contract between parties was a fixed term contract which commenced on 1st October 2013 to 30th September, 2016. Referring Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules No. 6 of 2004, Mr. Maeda submitted that, the fixed term contract terminate automatically when the agreed period expires. That, as the applicant and the respondent had a fixed term contract, upon the expiry of contractual terms, the applicant was not obligated to give reasons for terminations or notice of termination as the contract terminated automatically. That, as the contract was for fixed of term, the date for termination was known by both parties. That, the applicant pointed out in their submission that the complainant never tendered the employment contract which showed the contrary. **Two**, that, the applicant pointed out that the respondent herein could not have claimed legitimate expectation of renewal of contract as nothing was done by the applicant to insinuate that they were going to renew the contract. That, it was clear that the contract was renewed for three months and after the Board meeting the decision was not to renew the contract beyond those three months. **Three**, that, the applicant pointed out that the complainant filed a complaint indicating the termination date to be 24th October, 2016 while the Board meeting was conducted on 25th October 2016 and it is on that date when the respondent was notified that the contract will not be renewed beyond the three months extension.

On the fourth ground Mr. Maeda submitted that, the evidence was not properly tendered. That, the Arbitrator relied upon the purported contract which was not even submitted to the CMA during the hearing of the dispute. That, CMA was not in a position to properly ascertain the

facts presented by respondent to CMA. Mr. Maeda referred the case of **Abdalla Abbas Najim vs Amin Ahmed Ally [2006] TLR 55** to support the argument that, annexures not tendered in court as exhibit are not tested in evidence and the judgment cannot base on such annexures.

Arguing on fifth ground Mr. Maeda submitted that, the honourable Arbitrator misconceived the facts of the matter by concluding that there was unfair termination in place as the applicant was still paying the respondent despite the fact that the respondent had absconded from the office without notice.

The applicant also submitted that, the CMA failed to examine the proper timeline on the occurrence of the event which clearly indicated that the case was prematurely lodged at CMA. That, that fact itself could have guided the CMA to find that the unfair termination was highly improbable. In his conclusion, the counsel for the applicant prayed for this court to allow the application and overturn the MCA award.

Having considered the records, the application before me and the submission in support of application, I have no doubt that there was employment relationship between the applicant and the respondent. What is in contention is whether the respondent was unfairly terminated by the applicant.

Before I embark into discussion of the matter in contention, I find it important to first address the issue raised by the counsel for the applicant that the CMA wrongly entertained the dispute that was raised by the respondent who was a foreigner hence contravening the law. I am quite aware that, the question of the respondent being a foreigner

with no working permit or residence permit, calls for the question of jurisdiction of the CMA. CMA has no jurisdiction in dispute arising from a contract of employment that was void for want of work permit. This is also the position of the Court Appeal in **Serengeti Breweries Limited Vs. Hector Sequeiraa**, Civil Application No. 373/18/2018 and this court in **Rock City Tours Ltd. Vs. Andy Nurray,** Revision No. 69 of 2013 at Mwanza. Now the question is whether there was a proof that the respondent had no working permit.

Based on the records before the CMA the issues that were framed for determination are; whether the termination was fair and what reliefs are parties entitled to. The issue on the respondent's working permit was not among the issues raised and deliberated on by the CMA. Such issue was raised by the applicant's counsel in his final submission and as well pointed out by the counsel for the applicant Mr. Timoth Maeda, the respondent was cross examined on whether he was in possession of a residence permit and he confirmed to have a permit to stay for seven days. The passport which the counsel for the applicant alleged that it produced in evidence is not in record and in fact no evidence showing that the applicant was contesting on working permit of the respondent and the respondent failed to prove the same.

It must be noted that, the issue on whether the respondent has the working permit or not at the time the dispute arouse is a matter of fact that need to be proved by evidence. If that was a matter in contention, the same could have been raised as an issue and be dealt with by the CMA. The CMA was right not to deal with the issue that was instigated during the final submission. Allowing such action would

prejudice the respondent as he would have been condemned unheard. There is plethora of authorities which strengthen on the holding that, the court when determining an appeal cannot consider the matter which was not properly raised in the trial CMA. In the case of **The Registered Trustees of Arusha Muslim Union versus The Registered Trustees of National Muslim Council of Tanzania alias BAKWATA**, Civil Appeal No. 300 of 2017 (Unreported) where it was held that;

> *"...the right to be heard (**audi alteram partem**) before deciding the matter in dispute or issue on merit. The Court has insisted that the right to be heard is both elementary and fundamental and its fragrant violation will of necessity lead to the nullification of the decision arrived at".*

Also see the cases of **Mbeya-Rukwa Auto Parts & Transport Limited vs Jastina Mwakyoma,** Civil Appeal No. 45 of 2000 and **Abbas Sherally & Another vs Abdul S.H.M. Fazalboy,** Civil Application No. 33 of 2002 (Both unreported). Standing on the authorities cited above, the issue of the respondent being a foreigner and working without permit cannot be determined at this level.

It was the argument by Mr. Maeda that, the CMA erred in giving locus to a person who is a foreigner (the respondent) for considering his evidence. There is no dispute that the respondent was a foreigner but, being a foreigner does not exclude him testifying before the CMA. What matters is the credibility and admissibility of such evidence in accordance to law governing evidence in Tanzania; the Law of evidence Act, [Cap. 6 RE 2019]. As also discussed above, nothing was established

during hearing which could make the respondent an incompetent witness. This was well addressed by the Arbitrator said at page 3 of the typed proceedings as follows: -

> *"According to the law the issue of working permit in Tanzania only relates to validity of employment contract. It is known that a foreigner in Tanzania without working permit cannot contract employment. However, to the applicant it was not same position. Someone has to understand that working permit issue does not affect or apply to witness. Anyone can be a witness nevertheless the capacity to contact in employment".*

I agree to the above holding by the Arbitrator. The nationality of a witness has nothing to do with credibility and, or admissibility of evidence in law.

Regarding the issue of unfair termination, it is undisputed fact that the contract of employment between the applicant and the respondent of three years term was to terminate on 30th September, 2016. It is also not disputed that, the contract was extended for three months up to 31st December, 2016. The parties also do not dispute to the fact that there was email communication between the respondent and Mr. Molman who is among the directors of the applicant on the renewal of employment contract. What is in contention is that the applicant unfairly terminated the contract which the respondent had raised expectation that it will be renewed.

Going through the records it is clear that, the CMA in its decision agreed with the argument of the respondent that the decision of the board of directors not to renew the respondent's contract contravened

the law as the respondent had legitimate expectation of his contract for employment being renewed. The arbitrator's decision was basically on the on the email conversation between the respondent and Mr. Molman and the three month's extension. That, such conducts made the respondent to create a legitimate expectation that the contract will be renewed upon the meeting of the Board of Directors. To substantiate her holding, the arbitrator based his decision on Rule 4(4) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 which provides as;

> *"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"*

We agree with the CMA that, where it is well established that an employer made a promise which reasonably raise expectation of the employee that the contract will be renewed, if not renewed, the employer may be regarded to have unfairly terminated the employment.

In the present matter, I could not see any conduct of the applicant which could reasonably make the respondent believe that the contract was a must to be renewed. The emails conversation which was referred as establishing expectation was admitted in evidence as collective exhibit A2. For easy reference, I would like to specifically quote the response by Mr. Molman which is referred as establishing the expectation after the respondent's proposal for renewal. The same reads;

> *"Hi Edward*

Happy to discuss when we meet in October. To prepare myself I have tried to find a copy of your agreement in our dropbox files, but could not find it. I cannot approach Jan Priester either, since his condition is quite bad at the moment. So could you please send me a copy? So I could discuss with the relevant Board members."

There is nowhere in those emails conversation where the respondent was promised that the contract will be renewed. Mr. Molman requested for a copy of existing contract and only promised the respondent that the issue of renewal of contract is a matter that could be discussed by the Board member on its meeting. However, since the same could not be conducted on time before the expiry of the existing contract, one-man decision was made to extend the contract for three months. To my view, that conduct does not raise any legitimate expectation that the proposal by the respondent for the two years renewal was accepted or was to be accepted.

Again Rule 4(4) referred to by the CMA cannot be read in isolation of Rule 3(1)(c) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 which deals with termination of contract. The said provision reads;

3.-(I) For the purposes of these Rules, the termination of employment shall include-(c) failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal of the contract (Emphasis added)

The above provision introduces three requirements for termination of contract; failure to renew a fixed term contract, on the same or similar terms and reasonable expectation of renewal. There is no dispute

that the contract was a fixed term contract but, for the respondent to be with legitimate expectation of his employment being renewed, the expiring contract and the expected one must have same or similar terms. To the contrary, that was not proved in the present application and the situation in the present matter cannot be accommodated under this provision.

The record is crystal clear that, there is nowhere indicated that the intended contract had similar terms with the ending contract. While the ending contract had three years terms, the respondent was proposing for the two years renewal. As well submitted by Mr. Maeda, there was no terms revealed for the intended contract so as to make any one believes that there was expectation of the contract that could seek refuge under Rule 4 (4). As it was also discussed above, the applicant's conduct did not raise any legitimate expectation of renewal of contract.

On the submission by Mr. Maeda that the dispute was filed pre-maturely, I do not agree with his contention that because the three months contract was still valid the respondent was not justifiable to institute the complaints before the CMA. The respondent had right to contest the termination after he was issued with a copy of termination letter. By the time the respondent referred the matter for mediation and then to CMA, he was already issued with a termination letter. On the date the termination letter was issued, it is when the cause of action arouse. Thus, the dispute was not filed to CMA prematurely as suggested by the counsel for the applicant.

Having concluded on failure to prove the legitimate expectation it is my settled mind that, there is no proof that the respondent wsa

unfairly terminated. The respondent filed the dispute in respect of the contract which was expiring on 30th September, 2016. It is on record that, that contract terminated automatically for being a fixed term contract on the final date of the contract as so required under the law. The Employment and Labour Relations (Code of Good Practice) Rule 4 (2) reads;

> *4(2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.*

In this matter, as the applicant and the respondent had a fixed term contract, upon the expiry of contractual terms, the applicant was not obligated to give reasons for terminations or notice of termination as the contract terminated automatically. The respondent could not have claimed legitimate expectation of renewal of contract as nothing was done by the applicant to insinuate that they were going to renew the contract.

From the above arguments and reasons, it is the finding of this court that the application for revision has merit hence allowed. As CMA award could not stand, the same is hereby quashed and set aside. No orders for costs.

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D.C. KAMUZORA

JUDGE

09/09/2021