



IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 533 OF 2020

TANZANIA (2000) ADVENTURE.....APPELLANT

VERSUS

GASPER MCHAKIRESPONDENT

**(Appeal from the decision of the High Court of Tanzania, Labour Division
at Arusha)**

(Gwae, J.)

dated the 23rd day of September, 2019

in

Revision No. 82 of 2017

.....

JUDGMENT OF THE COURT

10th & 15th July, 2024

MAKUNGU, J.A.:

The respondent, Gasper Mchaki, was employed by the appellant, Tanzania (2000) Adventure as an Accountant on periodic fixed term contracts running from 1st December, 2013 to 31st March, 2015. The last contract that resulted in the dispute at hand was for a period of three months from 1st January, 2015 to 31st March, 2015. Upon realising that the respondent's employment contract would end on 31st March, 2015, the appellant on 25th March, 2015 wrote him a notification specifically informing him that effective from 31st March, 2015 he would cease to be

her employee and lastly that he should hand over his employer's properties before receiving his terminal benefits.

Aggrieved by the appellant's notification letter, the respondent lodged a claim with the Commission for Mediation and Arbitration ("the CMA") accusing the appellant for unfair termination of his employment contract. After hearing the parties, the CMA partly held in favour of the respondent and partly in favour of the appellant.

Dissatisfied with the decision of the CMA, the respondent successfully applied to the High Court via Revision No. 82 of 2017 seeking revision of that decision. In allowing the application, quashing and setting aside the award by the CMA, the High Court (Gwae, J) was of the view that the respondent had a reasonable expectation of renewal of his contract. Accordingly, the appellant was ordered to pay him twelve months salary as compensation in accordance with section 40(1) (c) of the Employment and Labour Relation Act, Cap. 366 R. E. 2019 (hence forth the "ELRA") and to issue him with a certificate of service.

Aggrieved, the appellant appealed to this Court citing five grounds of complaint. Before us the appellant was ably represented by Mr. Qamara Aloyce Peter, learned advocate while Mr. Julius Caesar Sabuni, also learned advocate appeared for the respondent.

On a careful consideration, the first two grounds of appeal are centred on the main issue for determination as to whether there was a reasonable expectation of renewal while the employment contract was categorically for a fixed period of time.

Submitting in support of those two grounds of appeal, Mr. Peter maintained in the first place that the respondent was not terminated from service but rather, before the expiry of the contract, he was notified that his contract would come to an end on 31st March, 2015. He emphasized that, even if the appellant had not issued the contested notification, the respondent's contract would still come to an end on the specified date. As for the contention that the respondent had reasonably expected renewal of his contract, Mr. Peter challenged him for not demonstrating the basis of his expectations and for not leading evidence with the view to showing how his earlier contracts used to be renewed. All in all, the learned counsel was of the strong view and he accordingly submitted that the respondent had failed to establish the basis of his expectation that upon expiry, his employment contract would be renewed. He relied on the cases of **Asanterabi Mkonyi v. TANESCO**, Civil Appeal N. 53 of 2019 [2022] TZCA 96 (7 March, 2020) [TANZLII] and **Ibrahim s/o Mgunga & Others v. African Muslim**

Agency (Civil Appeal No. 476 of 2020) [2022] TZCA 345 (13 June 2022) TANZLII. Based on the above cited authorities, he supported the CMA's verdict and urged that the appeal be allowed.

In resisting the appeal, Mr. Sabuni contended that the respondent had reasonably expected and sincerely believed that upon expiry, his contract would be renewed. According to him, the respondent's expectation was based on the undisputed fact that there had been previous renewals. The learned counsel submitted further that, going by the evidence on the record, it appears that the appellant was still in need of the respondent's services because immediately after termination of his contract the appellant went on and hired another accountant. He argued that the evidence on record shows that the respondent is a Senior Officer and a person of good behaviour. He relied on the case of **Dierks v. University of South Africa** (1999) 201LT 1227 which was referred in the case cited by the appellant's counsel of **Asanterabi Mkonyi** (Supra). He requested the Court to assess and consider factors stipulated in that case particularly the surrounding circumstances of the case. Accordingly, he supported the High Court's verdict and urged that the appeal be dismissed.

Rejoining, Mr. Peter reiterated his position that the respondent's employment was for a fixed term contract which was not subject to renewal and repeated his contention that the High Court erred in applying the principles of unfair termination in the present case.

We have examined the record of appeal and considered the contending written submissions and oral arguments for and against the appeal. In resolving the contentious issue at hand, we find it essential and logical to reproduce section 37 of the ELRA, which falls under Sub-Part E of that Act:

"37(1) it shall be unlawful for an employer to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure”.

The above provision creates the concept of unfair termination of employment by defining “unfair termination of employment” as termination where the employer fails to prove that the termination was for a valid and fair reason and that fair procedure was followed. However, section 36 of ELRA limits the application of this concept to “termination of employment” as defined hereunder;

“36. For purposes of this sub-part;

- i. A lawful termination of employment under the common law;*
- ii. A termination by an employee because the employer made continued employment intolerable for the employee;*
- iii. A failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;***
- iv. A failure to allow an employee to resume work after taking maternity leave granted under this Act or any agree maternity leave and*

v. A failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them."

[Emphasis added]

What is relevant to the present matter is section 36 (a) (iii) above to which we have deliberately supplied emphasis. Going by the above reproduced provision of the law, it is certainly clear that, an employer may be held liable for unfair termination if he fails to renew a fixed term contract where there was a reasonable expectation of renewal. It is noteworthy that this limitation is embraced by rule 3(3) of Employment and Labour Relations (Code of Good Practice) Rules, 2009 (the Code). In the same vein, rule 4(4) of the Code, stipulates 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"***

[Emphasis added]

Having found in **Asanterabi Mkonyi** (supra) that the ELRA does not define the phrase "reasonable expectation of renewal" we sought inspiration from the South African case of **Dierks v. University of South Africa** (Supra) in which, though not specifically defining the phrase, the court set the criteria for determining whether a reasonable expectation of renewal had come into existence pursuant to section 186(b) of the Labour Relations Act 66 of 1995. In that case it was held 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 purposes of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business".

As stated earlier, in arguing that he had a reasonable expectation of renewal of his contract, the respondent stressed that his employer had continuously rolled over his periodic contracts for close to two years between December, 2013 and March, 2015. Given such rolling over on numerous occasions, the expectation on the part of an employee after the expiry of time of the last contract, is reasonably justified all things being equal. We think that in the instant case the appellant's undisputed promise to extend the period of contract to one year places the respondent's expectation of renewal on the higher side. In addition, according to DW1, as revealed at pages 101 – 102 of the record of appeal, the appellant admitted that the respondent was among Senior Staff, he had not commit any offence and it was not a ground of his termination. Moreover, he performed well and had good behaviour. That, apart it is on record that whereas the initial renewal was for a period of two months, the last renewal was increased for 3 months. This as well entitled the respondent to have a justifiable expectation for renewal. After evaluating and considering all the surrounding circumstances of this case, it is our view that, the High Court was correct in its holding in this matter.

Thus, the respondent's claim that he had reasonable expectation of renewal of the last contract is plainly plausible and justified.

In the result and for the above stated reasons, we find the appeal to have no merit and dismiss it in its entirety with no order as to costs, this being a labour dispute.

It is so ordered.

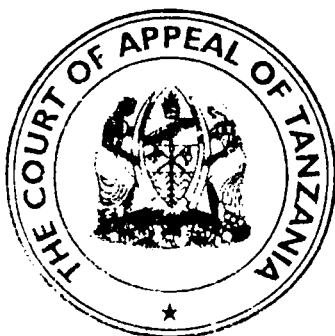
DATED at **ARUSHA** this 15th day of July, 2024.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 15th day of July, 2024 in the presence of Mr. Qamara Aloyce Peter, learned counsel for the Appellant, also holding brief for Mr. Julius Caesar Sabuni, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL