

TANZANIA / JUDGMENT

david mwakatika vs ttcl corporaton tanzania telecommunication corporation and another 2021 tzhcld 515 15 october 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LABOUR DIVISION) AT DAR ES
SALAAM REVISION NO. 157 OF 2020 BETWEEN DAVID
MWAKATIKA APPLICANT VERSUS

1. TTCL CORPORATON (TANZANIA TELECOMMUNICATION CORPORATION)..... 1st
RESPONDENT
2. ATTORNEY GENERAL..... 2nd RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J. The Revision beforehand emanates from the award of the Commission for Mediation and Arbitration ("CMA") in Labour Dispute No. CMA/DSM/ILA/R. 322/18/284 ("the Dispute") delivered on 26th March 2020. In the dispute, the applicant ("the Employee") was complaining of unfair termination of employment by the 1st respondent, TTCL Corporation (Tanzania Telecommunication Corporation) then a corporate body incorporated under the Companies Act and owned by the Government of the URT ("the Employer"). The 2nd respondent is a necessary party who was joined under Section 6A of the Government Proceedings Act, Cap. 06 i R.E 2019. In his Notice of Application as well as the Chamber Summons lodged under the provisions of Rule 24(1) (2)(a),(b),(c),(d),(e),(f) and (3)(a),(b),(c),(d), Rule 24(1)(c), 28(1) of the Labour Court Rules GN. No. 106 of 2007 ("the Rules") Section 91(l)(a),(b) and 94(l)(b)(i) of the Employment and Labour Relations Act, 2004 ("ELRA") the applicant is moving the court for the following:-

- (1) May this Honourable court be pleased to call upon, examine and revise the records of proceedings of the Commission for Mediation and Arbitration Dar es Salaam zone at Ilala, in the Labour Dispute No. CMA/DSM/ILA/R.322/18/284 (Hon. Massawe, G. Arbitrator) delivered on 26th March, 2020) with a view to satisfy itself as to legality, propriety, rationality and correctness thereof.

- (2) This Honourable Court quash and set aside the award of the Commission for Mediation and Arbitration Dar es Salaam Zone at Ilala, in the Labour Dispute No. CMA/DSM/ILA/R.322/18/284 (Hon. Massawe, G. Arbitrator) delivered on 26th March, 2020. The Chambers Summons was supported by an affidavit of the applicant dated 20th April, 2020. In this court, the applicant was represented by Mr. Chacha Chambiri, learned advocate while the 2 respondent was represented by Ms. Rehema Mtulya, learned State Attorney. The application was disposed by way of written submissions. Much appreciation to the comprehensive, well researched submissions made by both parties. I will not reproduce the submission but instead, I will take them on board while determining the issues raised. Before I venture into the determination of the issues raised, brief background of the matter is narrated. The employment relationship between the applicant and the respondent dates way back to 05th day of August, 1991 when the Applicant was employed by the 1st respondent ("the employer") in permanent and pensionable terms. The applicant rose from the position of Technical Officer in Training to various substantive technical positions. In the year 2015 while in a position of a Supervisor, there emerged an opportunity of a position of manager in the employer organization. The applicant successfully applied for the job. However, in the new managerial position, the terms of the contract changed from permanent pensionable to a three years renewable contractual term. The new position commenced on 23rd February, 2015. One of the terms of renewal of the contract was a three month prior notice of intention to 3 renew from either party followed by a mutual agreement to renew the terms. In November, 2017, three months before the contract came to an end, the applicant communicated to the respondent of his intention to renew the contract (EXT3), the employer replied that the renewal will be subject to successful performance appraisal outcomes and its subsequent recommendations (EXT7). However, on the 07th February, 2018, 17 days before the contract came to an end, the applicant received a letter from the employer informing him that the employment contract was coming to an end and the employer had no intention to renew the same. It is the termination of the contract that the applicant was aggrieved with, he unsuccessfully lodged a dispute at the CMA hence this revision on the following legal issues (grounds):
1. Whether the CMA had jurisdiction not to consider the performance appraisal as the main criteria that employer agreed to use in its decision to renew, extend or terminate contract of employment with employee.
 2. The arbitrator erred in law and fact for failure to consider whether it was lawful for the employer to end the employment contract without 4 valid reasons where the employee had a reasonable expectation of renewal and
 3. Whether the Award issued by the CMA is tainted with irrationality and illegality. On those grounds, the applicant is seeking for the following reliefs):
 1. Reinstatement of the applicant into the respondent's employment in similar managerial or any other technical position in which the applicant has been trained.

2. Monetary compensation equivalent to 84 months' salaries for the unlawful termination. The respondent opposed the application on the ground that there is no sufficient ground for the applicant to file revision in respect of the award. Their prayer was for the dismissal of the application. On my part, I find that the issue for determination, in all that is stated and argued, is whether the termination of the contract was substantively and procedurally fair. The termination in question falls under the provisions of Section 36(a)(iii) of the ELRA, whereby there is a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal. The question is therefore whether the applicant had reasonable expectation of renewal. As per the records and the submissions in support of the grounds for revision, the applicant is challenging the CMA for considering the issue performance appraisal as the main criteria that employer agreed to use in its decision to renew, extend or terminate contract of employment with employee. I have taken time to review the contract of employment (EXT2), applicant's intention to renew the contract (EXT3), employer's reply to EXT3 informing the applicant that the renewal will be subject to successful performance appraisal outcomes and its subsequent recommendations (EXT7) and the employer's letter of ending the contract with the applicant (EXT5). These are the main documents relevant documents which will determine the controversy at hand. Generally speaking, contracts are legally-binding agreements, so when a party fails to meet their contracted obligations, there may be a breach. Section 37(1) requires parties to perform their respective promises unless such performance is dispensed with or excused by the Contract Act or any other law. As for the case at hand, the parties were bound by the terms of contract including notice to terminate it. The 1st respondent was, 6 on the other hand, duty bound by the terms of the contract to perform the periodic reviews of the performance of the applicant. The facts and evidence would now show if the parties abided to the terms of the contract. It is unfortunate that the respondents' arguments were just on the general terms of the contract. In her submissions, Ms. Mtulya, learned State Attorney representing the respondents submitted that according to rule 4 (2) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007:- "Where the contract is fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise" She argued that according to the above quotation, the law clearly stated that the contract was a fixed term without reasonable expectation renewal hence the contract terminated automatically. Obviously Ms. Mtulya did not take time at all to read the cited provision, therefore she missed the words "unless the contract provided otherwise" and the terms of employment contract under dispute (EXT2). I will therefore proceed to 7 determine the terms of the contract in relation to the termination of the applicant. Starting with the contract of employment (EXT-2) the terms in the said contract are very clear that the employer is employed on fixed term contract for three years subject to renewal (Clause 1.3 of T-2). The contract is further clear that on the condition that the party wishing to renew the contract shall issue the other party with the notice thereof three months prior to the expiration of the contract. Under the law of contract, where such a condition is put in a contract, the communication intended shall be the key factor to determination of compliance with the terms of the contract. According to the undisputed

evidence of both parties, as per (EXT-3) the applicant/employee communicated to the employer of his intention to renew the contract. So wrote the applicant: "I would like to advise you that my current contract is due to expire on 23d February, 2018. With respect to General terms and Condition of the Contract, I would like to inform you that it is my desire to renew the Contract for another period of three (3) years." The same is also supported by (EXT-7), a reply by the 1st respondent. Therefore, on his part, the applicant fulfilled his obligation to 8 show his intention to reply the contract. In EXT-7, the employer did not particularly deny the applicant's notice of intention to renew the contract. She only subjected it, as per the initial terms of the contract, to a performance review when she wrote: "Notwithstanding the fact that you have shown contract renewal intention, I would like inform you that, your contract renewal will be subject to successful performance appraisal outcomes and its subsequent recommendations. Kindly ensure to fill end of contract performance appraisal forms through which your achieved milestones will be measured in relations to expected performance standards." Therefore, up till this point, just as per the terms of the contract, the parties were in fulfillment of the condition of the prior notice of renewal requirement. The employer did not deny the employee's intention to renew the contract, only that the same was subject to performance appraisal. So, what is this performance appraisal? Generally, performance appraisal refers to the periodic/regular review of an employee's performance in order to assess his overall contribution to a company. Its aim is to evaluate an employee's skills, achievements, and 9 growth, or lack thereof. Usually companies use performance appraisals to give employees big-picture feedback on the performance of their work and to justify other benefits like pay increases and bonuses. It is also a tool used in making decisions in a claim for unfair termination falling under Section 37(2)(b)(i) of the Act. As per the general definition of the term performance appraisal above, it is the employer who assesses the employee in order to give feedback of his performance and whether or not he is useful for growth and sustainability of the Company. Therefore since Section 39 puts an obligation that the employer shall prove that the termination is fair, the 1st respondent was (at the CMA) duty bound to prove that the said appraisal was actually conducted, had poor results and eventually communicated to the employer before the same was allegedly used as a reason to terminate the employee. It was Mr. Chacha's submission that while enquiring on performance of Applicant, Eng. Mwakatika heard superlatives such as 'exceeding expectation' from PW1 'very good' from RW1, 'excellent' from PW3 and 'outstanding' from PW2. He then argued that there is no doubt that criteria for renewal of Applicant's contract were fully met. 10 As for me, having checked the records, I have realized that at the CMA, the employer failed to tender the performance appraisal to assure the court that it was actually conducted on the ground that (according to the testimony of PW1 and PW2) the Performance Appraisals are confidential documents and were supposed to be given to Applicant upon being submitted and signed off by the employer. The two witnesses forgot that they are testifying before a Commission that is a creature of Statute, the Labor Institutions Act, Cap. 300 R.E 2019, and in such quasi-judicial body with mandate to hear and determine disputes, no document is confidential as long as it is a useful document for determination of the matter in order to meet the ends of justice.

Hence the 1st respondent's omission to tender the appraisal forms leads to only one conclusion, it was never performed prior to termination of the employee. The above notwithstanding, I have thoroughly gone through the employer's letter of ending the contract with the applicant (EXT5), there are several phrases which caught my attention. To begin with, the said letter was completely silent on the reason for termination of the applicant. Having made reference to the EXT-2, the employer went directly to write: ii "This is to notify you that; it has been decided not to renew your Employment Contract on its expiry on 22nd February,

2018. Hence, your last date of employment with TTCL will be 22nd February, 2018 and you will be entitled to the following dues:

1. Repatriation Expenses for yourself and personal effect to the place to recruitment/domicile for yourself and family which is Tarime
2. Ex-gratia payment equivalent to three (3) months' salary.
3. Your social security entitlements from the respective social scheme fund in which you are a member which you will claim in accordance with the laws and regulations governing the scheme.
4. Certificate of service as per section 73 of TTCL Corporation Human Resources Policies, Guidelines and Regulations for Managers (2006)." The reason for termination was not mentioned at all. However, what also caught my attention is the fact that at the end of the said letter, the employer concluded: 12 "On behalf of TTCL Corporation Management and indeed the entire TTCL corporation staff, I take this opportunity to sincerely express appreciation for your contributions during your tenure in TTCL Corporation until the end of your contract period." This clause means that the applicant contributed to the company's wellbeing, sufficient to be appreciated. Therefore, it was all more important to have the reasons for termination communicated to him by communicating to him the results of his performance appraisal and the shortfall. After all, that was a condition precedent to the renewal of the contract and since the employer did not deny renewal of the contract, only subject to performance appraisal; it was the employer's duty to perform the appraisal in order to justify the renewal or non-renewal of the contract. Absence of that is a fundamental breach of the terms of the contract. From the above, since the employer failed to prove that she relied upon Performance Appraisals on his decision not to renew the contract, indeed the CMA erred by failing to consider performance appraisals as the main criteria that employer agreed to use in its decision to renew, extend or terminate contract of employment with the employee; because indeed 13 apart from the notice of intention to renew, it was main and the only remaining criteria for renewal of the contract. On those findings, I am in agreement with Mr. Chambiri that the manner in which the contract (EXT-2) was terminated is neither proper nor legal in any aspect. It is therefore unfair both substantively and procedurally. Having found that the termination of the applicant was both substantively and procedurally unfair, the next question is the reliefs that the parties are

entitled to. According to Mr. Chambiri, at the CMA, the Applicant prayed for Award and Order against the 1st Respondent for Reinstatement of the Applicant into 1st Respondent's employment in similar managerial or any other technical position in which the Applicant has been trained. He also prayed for monetary Compensation equivalent to 84 months' salaries for the unlawful termination or in the alternative, the 1st Respondent compensate the Applicant all unpaid salaries from the date of termination to the date of compulsory retirement age of 60 years including all leaves payments from the date of termination to the date of compulsory retirement at age of 60 years. Further prayer was for payment of all Employer's pension contribution in favour of Applicant from the date of 14 termination to the date of supposedly compulsory retirement and other benefits such as medical, annual leave pay and repatriation as per the contract of employment. On the other hand, the respondents prayed for the dismissal of the suit. On my part I don't see how the applicant should be entitled for compensation of unpaid salaries until he attains the age of 60 years, this is because he had voluntarily switched from the permanent pensionable employment to a fixed term contract and was paid all his dues at the time of switch. He is therefore only entitled to the remedies for unfair termination in breach of the terms of his contract under Section 40(1)(c) of the Act. Under the Section, the law requires the employer to pay compensation to the employee of not less than twelve months remuneration. At this point I have considered many factors including the fact that the employer had previously worked for the employer on permanent basis for 24 years, the fact that they took him to managerial position on fixed term show that they appreciated his performance. The fact that the applicant had hope of renewal of his contract while the letter of termination was served to him only 15 days before the contract came to an end. Not a very pleasant situation to encounter. 15 Owing to the above, I hereby order the 1st respondent TTCL to compensate the applicant with an equivalent of a salary of 36 months. The applicants salary was Tshs. Tshs. 2,547,836/- X 36 months = 91,722,096/- (say ninety one million, seven hundred and twenty two thousands, and ninety six shillings). Pursuant to Section 40(2) of the Act, this order shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement. Therefore, all the applicant's entitlements to be paid as per the end of employment contract letter EXT-5 shall remain intact. For the sake of clearance, the employer is still entitled to pay (if not yet paid) the application the following:

1. Repatriation Expenses for yourself and personal effect to the place to recruitment/domicile for yourself and family which is Tarime
2. Ex-gratia payment equivalent to three (3) months' salary.
3. Social security entitlements from the respective social scheme fund in which he is a member which he was to claim in accordance with the laws and regulations governing the scheme.

4. Certificate of service as per section 73 of TTCL Corporation Human Resources Policies, Guidelines and Regulations for Managers (2006). 16 In conclusion, having made those findings, the award of the CMA is revised and set aside. The employer (1st respondent) is ordered to pay the respondent a total sum of Tshs. 91,722,096/- (say ninety one million, seven hundred and twenty two thousands, and ninety six shillings) as compensation for unfair termination of his contract. It is so ordered. Dated at Dar-es-salaam this 15th day of October, 2021 17

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