

TANZANIA / JUDGMENT

tanzania telecommunication corporation vs narcis tibaijuka 2022 tzhcld 728 5 august 2022

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5 August 2022

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM REVISION NO. 372
OF 2021 TANZANIA TELECOMMUNICATION CORPORATION.....
APPLICANT VERSUS NARCIS TIBAIJUKA.....RESPONDENT (From the
decision of the Commission for Mediation and Arbitration at Ilala) (Kokusiima: Arbitrator) Dated
23th August, 2021 in REF: CMA/DSM/ILA/655/19/314/19

JUDGEMENT

16th June & 05th August 2022 Rwizile, J This application emanates from the decision of the Commission for Mediation ; and Arbitration (CMA) in Labour Dispute No. CmX/DSM/ILA/655/19/314/19. This Court has been asked to call for and examine the records, proceedings and the ruling of the CMA. In brief, it was stated that the respondent was the employee of the applicant (formally known as Tanzania Telecommunication Company Limited) from 1991 to 2002 under permanent contract. In the year 2002 i following its privatization, in the new identity the respondent was placed under two years contract as team leader dispatch. In the year 2004 his contract was renewed under the same terms and conditions. In the year 2006 after his application, he was given a two year's contract in the position of team leader commercial relationship support. In 2007 changes of the scheme of service of the applicant occurred and the respondent was appointed as an assistant regional manager commercial under permanent contract. In 2013, following the advertisement of a post of a manager corporate sale, the respondent applied, won and was given a three-year contract renewable upon mutual agreement of the parties. The new position triggered the respondent to terminate his permanent contract with the applicant entered in 2007. In 2017 the respondent's contract was renewed for another three years from 01st August, 2016 to 31st July, 2019 with same^ terms and conditions. In August, 2017 there were disciplinary charges against him. On 13th October, 2017 was given a warning and assigned new duties and responsibilities under customer service department serving as customer service executive. Other terms of the contract remained the same as per the contract entered on 06th September, 2013. 2 Following the letter dated 30th April, 2019 to the respondent of the intention to renew the contract, the applicant through the letter dated 23rd May, 2019, did

not renew the contract due to business demand. The respondent on the expiration of his contract was paid his entitlements and benefits as per the contract. He filed a labour dispute alleging termination of employment was for unknown reason. After a full trial, the award was in favour of the respondent and that made the existence of this application. The application was supported by the applicants affidavit sworn by Henry Mtahiko, Human Resources Officer and the same was opposed by the respondent's counter affidavit. Grounds for revision stated were: - /' Whether the hon. arbitrator had Jurisdiction to entertain a dispute omappHcation, interpretation or implementation of the collective "agreement entered on 18-19/06/2019. Exhibits D7 & T12 ii. Whether the respondent in terms of exhibit D4 and D5 was not in a managerial position ill. Whether exhibit DI did not state clearly when the employment contract between the parties shall expire. 3 iv. Whether exhibit DI amounted to a termination letter on grounds of business demand against exhibit D7.

- v. That the hon. arbitrator erred in law and fact to hold that the applicant was in contravention of the Tanzania Telecommunication Corporation Act, No. 12 of 2017 without affording the Applicant a right to be heard. vi. That, the hon. arbitrator erred in law and fact by failing to evaluate the evidence adduced by the applicant who proved that the contract of employment ended automatically and that there was no expectation of renewal. vii. That, the award is defective and improperly procured for being based on the arbitrator's personal opinion and not making reference to any specific legal provision or interpretation. viil. That/ the hon. arbitrator erred in law and fact in basing her decision 5 on matters not pleaded or proved by the respondent. The hearing proceeded orally. The applicant was represented by Miss Ghetu Msetu and Ashura learned advocates, whereas the respondent was represented by Kheri Kusekwa, learned advocate from TEWUTA. Miss Msetu abandoned the first issue. Arguing the second, it was submitted, that the respondent was terminated at the position of the 4 executive customer service. He stated that section 2 of The Employment and Labour Relations Act, [CAP. 366 R.E. 2019] [ELRA] defines an executive officer and it does not fall in exhibit D7. On the third issue, she submitted that exhibit DI states clearly that the contract was ending in 2019 and so was not covered in terms of D7. In his view the respondent was legally terminated. % On the fourth issue, Miss Msetu submitted that the respondent and many others were not covered in D7 and that many others were terminated. It was her submission, the respondent was on contract and was paid his dues at the end of contract. In her view, the applicant properly did her duty in terms of the contract. She submitted on the fifth issue that the award was improperly procured as the law. She argued, in 2017, the law enacted under section 29(1) of Act No. 12/2017 of Tanzania Telecommunication Act, so the respondent's contract was in existence and was transformed like others. On the sixth issue it was submitted that there was no expectation of renewal as the applicant did not accept his offer for renewal (exhibit DI) and so was paid all terminal benefits as per the contract (exhibit D5). 5 Miss Msetu argued the seventh issue, she submitted that the arbitrator did not consider the law even evidence in the award. It was stated that the contract came to an end automatically and there was no reason to renew it. There was no such expectation. He finalized by praying for the application to be granted. In opposing, Mr. Kheri on the second

point argued that the respondent was not on the managerial position. He stated that exhibit D5 as dated 13.10.2017 shows new duties of the respondent. He argued as well, that exhibit D3 is the managerial contract and was dealt with exhibit D4 clause

4. He continued to state that the respondent as exhibit D5 clause 4 shows was assigned other duties and responsibilities and became customer service executive. Thus, he added, he was no longer a manager and that the applicant did not prove so at CMA. It was argued on the third point that the dispute was on expectation for % '■' renewal. He stated that the respondent had reason to expect a contract renewal as in exhibit DI and D4, made it clear. He continued, its expiry and renewal were mutually agreed. For him, exhibit DI shows reasons for termination was due to business demands. Further, he said, failure to renew the same as per exhibit D3 was a time factor and not due to business demands. He went on and held the view that Act No. 12 of 2017 came before the new scheme and that exhibit D7 was plain on this point as agreed on 19.06.2019 in the new scheme. Mr. Kheri continued by citing section 36 of ELRA and the case of Asanterabi Mkonyi vTANESCO, Civil Appeal No. 53 of 2019, Court of Appeal of Tanzania at Dar es Salaam at pages 7-11 to support his submission. He stated that the respondent expected to be in the new scheme as per section 29(1)(2) and (3) of Telecommunication Service Act, No. 12 of 2017. The new scheme, he clearly pointed out, had new good terms which the respondent expected to apply to his contract as well. He stated that at page 17 of the award the applicant did not show the scheme and where he could fit. He submitted further that exhibit D7 was an agreement not to effect retrenchment which was to be done on 28.08.2018. He continued to %, submit that all factors stated created expectation to the respondent, that his contract would perhaps be renewed as held in the case of Asanterabi (supra). On his view the applicant ought to give new terms and conditions as was stated clear at page 15 of the award. 7 In a rejoinder Miss Msetu submitted that there was no expectation for renewal as per the agreement made in June, 2019. She stated the respondent applied for renewal on 30.04.2019. He was on 23.05.2019 informed of no renewal. He stated that business demand is an issue and the notice is clear under section 37(2)(b)(c) and section 37 of ELRA. He finalized by stating that the respondent as provided under section 29(3) of Telecommunication Act, No. 12 of 2017 as was a customer service executive, therefore not covered by the new scheme. After perusal of the pleadings, submissions, CMA proceedings and exhibits I have found this Court to have these issues to determine: -
 - i. Whether there was a reasonable expectation for renewal of the respondent's contract. In determining this point, I have to say, there is no dispute that the respondent was employed by the applicant in different fixed term contracts. Looking at exhibit D3 which was his last employment contract dated 25th January, 2017, it was explicit that the contract was renewed for a period of three years with effect from 01st August, 2016. It was also plain that 8 the contents of the original employment contract entered on 06th September, 2013 were still applicable. For easy reference it stated: - "From: Head of Human Resources To: Narcis T. Daudi Thro' H/Sales SUB: RENEWAL OF YOUR EMPLOYMENT CONTRACT WITH TTCL AS MANAGER CORPORATE SALES FOR A PERIOD OF THREE YEARS. In view of the above,

THIS AGREEMENT to renew your employment contract is made this day of 2nd January, 2017 between TANZANIA TELECOMMUNICATIONS COMPANY LIMITED a Company incorporated under the Company Ordinance Cap 212 and having its registered office at the Extelecoms Building, Samora Avenue, P.O. Box 9070, Dar es Salaam (hereinafter called "the Employer") on one part and Narcis TT. Daudi of P.O.Box 9070, Dar es Salaam (hereinafter called "the employee") on the other part. 9 Whereby without changing and/or altering the other contents of the original employment contract entered into by parties on 08th September, 2013, save for the provisions relating to tenure and probation which will not be applicable in this case. It is hereby agreed that: // Then reference to the former employment contract which is exhibit D4 at paragraph 1.2 it states: - "This contract shall take effect on the 1st August, 2013 and shall continue for a period of three (3) years. This agreement may be renewed by mutual agreement of the parties, provided that the party wishing to renew the contract shall issue the other party with notice of intention to renew three months prior to the expiration of the contract. (Emphasis is mine)" This provision meant that for the part who wished to renew the contract had to inform the other part of the intention to renew. By his letter dated 30th April, 2019 exhibit D2, the respondent signified his intention to have the contract renewed. Since renewal as per the contract was by mutual agreement, the applicant was explicit, she had no intention to renew the employment with the respondent. In law, termination of fixed term contracts is governed by rule 4(2) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, that: - "Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise." It goes without saying that on 23rd May, 2019, two months before the end of the fixed contract, the respondent was informed of termination of the same. The position is different from the case of Asanterabi Mkonyi (supra) where circumstances that lead to expectations of renewal were clear that when the employee continued to work after expiry of the fixed term contract as provided under rule 4(3) of G.N. No. 42 of 2007. % Further, under section 29 (1)(2) and (3) of Tanzania Telecommunications Corporation Act, No. 12 of 2017, provides for the Public Officers and employees of defunct company as hereunder: - "Subject to subsection (2) until such time when new scheme of service and terms and conditions of service are drawn up the ii Corporation, the scheme of service and terms and conditions of service in the defunct Company shall continue to apply to every public officer or employee transferred to the service of the Corporation.zz It is not plausible to hold that this law changed terms and conditions of service that existed before the enactment of the law and coming into force of the new service scheme. The respondent referred clause 2(3) of exhibit T12 (TAARIFA YA MAJADILIANO YA UTEKELEZAJI WA MIUNDO YA MAENDELEO YA UTUMISHI NA MISHAHARA KATIKA KIKAO MAALUM KILICHOFANYIKA TAREHE 18-19 JUNI, 2019 - DSM) and when going through it, there is no such clause. In going further in exhibit T12, clause 4 plainly states: - "Wafanyakazi waiiopo kwenye ajira wenye sifa na vigezo wataingia moja kwa moja kwa kujaza nafasi stahiki katika miundo hii." Further, it was plain from the same exhibit that there were some procedures to be employed for one to qualify into another scheme. Going through the records exhibit T1 shows that the respondent was employed on

09th August, 1991 by the applicant as technical officer trainee when the applicant formally known as Tanzania Posts and 12 Telecommunication Corporation. The respondent was transferred to the post of customer service executive in October, 2017. For easy reference as provided in the untyped testimony of the respondent. "S/J Baada ya Disciplinary hearing mwajiri aiitoa uamuzi gani? Mnamo October, 2017 niiipokea barua ya kuitwa tenakazini. Rejea kieleiezo D5. S/J Eiezea Tume kuhusu barua hiyo? Kamati iiiona nina makosa na menejimenti ikakubaii kwanza niiishishwa cheo kutoka manager mpaka Customer Service Executive niihamishwa kitengo kutoka Cooperate Sales kwenda Customer Service." Based on evidence by the respondent and exhibits tendered it is proved that the respondent did not qualify to the new scheme. Above all, the applicant was entitled to terminated the contract based on the terms of the same. In my considered view, there was no breach of the terms of the contract between the parties. I, therefore, hereby fault arbitrators finding. I hold that the respondent's employment contract ended automatically upon expiry and there was no expectations of renewal since the applicant made it clear of no intension to renewal the same two 13 months before it came to an end. Having said, what I said, I find merit in this application. I hereby quash the CMA award. No order as to costs. A.K. Rwizile JUDGE 05.08.2022 14

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Prepared on 14 October 2026 · Esheria