IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

CIVIL APPEAL NO. ……. OF 2024

BETWEEN

KILI SECURITY CO. LTD ……. APPELLANT

AND

TUMAIN JACOB MATHAYO ……..……. 1ST RESPONDENT

OMARY MUSA MPHINANGA …….. 2ND RESPONDENT

YUSUF OMARY MZIMBILI …….. 3RD RESPONDENT

OMARY ATHUMANI MNDOLWA ……..…….. 4TH RESPONDENT

IZACK GEORGE MULLA ……..……. 5TH RESPONDENT

CHARLES MARTIN MHINA ……..……..…….. 6TH RESPONDENT

GODSON ANDREA MCHOMVU ……..……..…… 7TH RESPONDENT

(Appeal from the judgment and Decree of the High Court of Tanzania Moshi Sub Registry at Moshi, Hon. Mongella, J) in Labour Revision No. 11 of 2023 Dated and Delivered on 19th March, 2024)

THE APPELLANT'S WRITTEN SUBMISSIONS IN SUPPORT OF THE GRPUNDS OF APPEAL

(Pursuant to Rule 106 (1) of the Court of Appeal Rules, 2009, GN No. 368 of 2009 as amended)

Honourable Justices of Appeal,

This appeal originates from the Decision of the High Court of Tanzania at Moshi Sub Registry before Honourable Justice Mongella in Labour Revision No. 11 of 2024 dated 19th March 2024, originally from the CMA Award in Labour Dispute No. CMA/KLM/MOS/ARB/43/2022 which was delivered on 9th June, 2023 by Hon. Arbitrator M. Batenga.

The background of this dispute is that the Respondents were employed by Respondent under a fixed employment contract for a period of one year, commenced from 1st August 2021 and automatically terminated on 1st August 2022 after expiration of contractual period. On 30th July 2024 the Respondent were notified by Appellant trough a letter about the end of their employment contracts and intention of non-renewal of their employment contracts as reflected from page 62 to page 75 of the records of appeal. The Respondents upon termination of their employment contract by reason of time and thus they lodged labour dispute before the Commission for Mediation and Arbitration (CMA) at Moshi in Labour Dispute No. CMA/KLM/MOS/ARB/43/2022 which was finally and conclusively determined by Hon. Arbitrator M. Batenga, who found the Appellant breached the employment contracts as the Appellant terminated the Respondents' contracts before the agreed time, also Arbitrator found termination was unfair as the Appellant terminated the Respondents' employment contracts two days before the agreed time, and thus required the Appellant to pay the Respondents the two days salaries remained in their contractual period.

The Respondents were aggrieved and dissatisfied by the above referred decision of the CMA and consequently filed Labour Revision No. 11 of 2023 before the High Court of Tanzania which was heard and finally determined by Honourable Justice L. M. Mongella on 19th March, 2024 who found that there was expectation of renewal of employment contract, and thus termination was unfair and ordered the Respondents to be paid one month salary in lieu of notice, severance payment, compensation for twelve months salaries for unfair termination, thus the Appellant aggrieved and dissatisfied by the above referred decision of the High Court and hence the Appellant filed before this Court the present appeal.

Honourable Justices of Appeal,

The memorandum of appeal filed before this Court contains six (6) grounds of appeal in which the Appellant is challenging the findings of the High Court. Basically, the Appellant is challenging the unfairness of the Respondents' termination both procedurally and substantively unfair and appropriateness the terminal benefits awarded to the Respondents. At the outset we beg to withdraw 5th ground of appeal and remained with only five grounds of appeal. The written submission is made in support of each ground of appeal which shall be discussed separately and sequentially as hereunder: -

1. **The learned Judge of the 1st Appellate Court erred in law and fact for finding and holding that there was reasonable expectation of renewal of the contract, while there was no any evidence in record to support the same, and thus went contrary to Rule 4(4), 4(5) and 4(6)(a)(b) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007.**

Honourable Justices of Appeal,

In determining whether the Respondents were unfairly terminated, the High Court made finding that the Respondents' termination was unfair as there was reasonable expectation of renewal of their employment contracts. The relevant part of the finding of the High Court is found at page 479 of the records of appeal states and we quote as hereunder: -

> ***"It is apparent on record that all applicants stayed in employment with the respondent for more than three years, having their contracts consecutively renewed. In the premises, I am of the view that the duration upon which their contracts were being renewed for different consecutive times and the nature of the employer's business, gave the applicants an expectation that their contracts would once again be renewed. In fact, I find the respondent's act of consecutively***

renewing the applicants' contracts up to 9 years proving the existence of a custom of renewing of contracts annually."

The High Court made further finding as reflected at page 479-480 of the records of appeal, the relevant part of the High Court judgment reads and we quote as hereunder:

"In consideration of the fact that previously the applicants' contracts were renewed for several times, with some of them up to 9 consecutive times, it is incredible that their contracts had to stop being renewed on ground of seasonal variations. The respondent ought to have provided thorough explanation as to how the seasonal variations affected the applicants' renewal of contracts. She as well ought to have proved that the said BONITE Bottlers company was the respondent's sole client or that the applicants were employed to be specifically stationed at BONITE Bottlers. Further, from the record, it appears that the posts were available and were later filled by the respondent. This is discerned from the testimony of DW1 whereby he refused to reply to such question during his cross examination."

Therefore, from the above quoted parts of the High Court decision it is clear that the high Court finding that the termination was unfair because there was reasonable expectation for renewal of Respondents' contracts, based on the facts that Appellant renewed the Respondents' employment contracts more than three consecutive years. Also, the high court finding that periods of renewal of the Respondents' contracts several times and consecutive proving the existence of a custom of renewing of contracts annually, as well as nature of the Appellant's business created reasonable expectation for re-engagement.

Honorable Justices of Appeal,

It is our strong submission that, the High Court was in serious error for finding that the there was a reasonable expectation of renewal of the Respondents' employment contracts based on periods

of renewals, because all the respondent claimed that had worked with Respondent for more than three years under the written contract, the fact which was strongly disputed by Respondent's witness (DW1). Furthermore, the testified that they had previous written employment contracts with the Appellant, but they did not tender the purported previous employment contracts.

We further submit that section 100 of the Law of evidence Act, Cap. 6, R.E 2022 is very clear that, the contents of the written document cannot be proved by the oral evidence, thus allegation that there were previously employment contracts with Appellant was not proved at all, because they did not tender those previously employment contracts.

Honourable justices of appeal,

The High Court finding that the nature of Appellant's business created expectation of renewal but there was no any explanation how she arrived into such finding, as well there was no any tangible evidence presented by the Respondents to prove that the nature of the Appellant's business created their expectation of renewal. Thus, the High Court serious erred in reaching that conclusion while there was no any evidence in record to support such finding. Also the high court seriously erred in finding that the Appellant's act of consecutively renewing the Respondent' contracts up to 9 years proving the existence of a custom of renewing of contracts annually, while there were no any proof that the Respondents' employment contract were renewed for consecutive 9 years. Also, such finding was arrived contrary to other Respondents because the one who alleged he work for 9 years was 7th Respondent herein while other claimed to work for 7years other for 4 years, but all their claims were not supported by required documentary evidence, because they testified that those previously employment contracts were in a written form.

Honourable Justices of Appeal, the PW1 (7th Respondent herein) testified that he worked with the Appellant for 9 years under the written employment contracts, but he did not tender those previous employment contract as evidence. We submit onus of proving reasonable expectation rests to the Respondents herein because those facts were within their knowledge. We further submit that since PW1 alleged that he had previously written employment contracts with the Appellant, and he did not tender them as evidence, this implies that there was no evidence to prove his previous renewal of his employment contracts with the Appellant and terms of those contracts. Under our Law of Evidence, it is very clear that oral evidence cannot prove the contents of written document, thus the purported previous written employment contract cannot be proved by oral testimony, that being the position we submit that the high court judge serious erred in arriving into those findings, because the said findings of the high court judge were not supported by the evidence on record.

Honourable Justices of Appeal, PW2 (2nd Respondent herein) testified at the Commission for Mediation and Arbitration that, he worked with the Appellant for 7 years but he did not tender those previously employment contracts with the Appellant. Therefore, there was no evidence to prove previous renewal of his employment contract, thus the finding of the high court judge was no supported by the evidence on record.

Honourable Justices of Appeal, PW3 (1st Respondent herein) testified at the Commission for Mediation and Arbitration that, he worked with the Appellant for 6 years, and during cross examination he testified that he worked with the Appellant since 5/9/2016 under a written contract, but he did not tender those previously employment contracts with the Appellant. We submit that there was insufficient evidence to prove previous renewal of his employment

contract, thus there was no any relevant evidence to prove his reasonable expectation of renewal of the employment contract.

We further submit that, if the PW3 had previously employment contracts, the date of employment of previously employment contracts with the Appellant would have match with the employment contract dated 1/8/2021. We submit that there was controverse on those dates of employment, because under normal circumstances it is impossible for a contract started on 5/9/2016 and again to be renewed on 1/8/2021 which is different date and month of first employment. Indeed, there was no any evidence to substantiate the terms of the said contracts. Thus, if is very clear that the 1st Respondent failed to prove the existence of the previously renewal of the employment contract. Therefore, the finding of the High court Judge that there was reasonable expectation of renewal of the employment contract was not supported by the evidence on record.

Honourable Justices of Appeal, PW4 (3rd Respondent herein) testified at the Commission for Mediation and Arbitration that, he worked with the Appellant since the year 2018 under a fixed term written contract, but he did not tender those previously employment contracts with the Appellant. Again, we submit that there was insufficient evidence to prove previous renewal of his employment contract, thus there was no any relevant evidence to prove his reasonable expectation of renewal of the employment contract.

Honourable Justices of Appeal, PW5 (5th Respondent herein) testified at the Commission for Mediation and Arbitration that, he worked with the Appellant for 12 years 2018 under a fixed term written contract, but he did not tender those previously employment contracts with the Appellant. Again, we submit that there was insufficient evidence to prove previous renewal of

his employment contracts, thus there was no any relevant evidence to prove his reasonable expectation of renewal of the employment contract.

Honourable Justices of Appeal, PW6 (6th Respondent herein) testified at the Commission for Mediation and Arbitration that, he worked with the Appellant for 4 years since the year 2019 under a fixed term written contract, but he did not tender those previously employment contracts with the Appellant. Thus, there was insufficient evidence to prove previous renewal of his employment contracts, and his reasonable expectation of renewal of the employment contract.

Honourable Justices of Appeal, PW7 (4th Respondent herein) testified at the Commission for Mediation and Arbitration that, he worked with the Appellant for 4 years since the year 2019 under a fixed term written contract, but he did not tender those previously employment contracts with the Appellant. Thus, there was insufficient evidence to prove previous renewal of his employment contracts, and his reasonable expectation of renewal of the employment contract.

Honourable Justices of the Appeal, Respondents herein since they did not tender the purported previously employment contracts with the Appellant, this implies that there was any evidence in record to prove the terms of the purported contracts such as a duration of the purported contracts. Thus, there was no strong evidence to how many times the purported employment contracts were renewed. We submit that the reasonable expectation of the renewal the employment contract, is created on number of times the contract has been renewed and not on how long the employee worked with the employer.

We wish to bring to the attention of this Court's decision in the Civil Appeal No. 476 of 2020, **IBRAHIM MGUNGA AND 3 OTHERS VS. AFRICAN MUSLIM AGENCY**, Court of Appeal of Tanzania at Kigoma (unreported) where this Court held that and we quote: -

"While we entirely agree that indeed, in determining the existence of a reasonable expectation of renewal of a fixed term contract, the number of times the contract has been renewed is one of the factors to be considered, we do not think, in the circumstances of this case that, the one or two-times renewal of the appellants' contracts by the respondent in this matter, would be sufficient reason to establish that there was reasonable expectation for another renewal of their contracts."

Therefore, we submit that since there was no evidence adduced to number of times the contract has been renewed, there was no reasonable expectation of renewal. Thus, the findings of the high court judge were not supported by evidence on record.

Honourable Justices of Appeal, at page 481 and 482 of the record of appeal the high court judge serious erred in finding that, the PW3 had previous employment contract based on exhibit K-22 (annual leave form) which gave PW3 53 days leave. We submit that the saif finding of the high court judge was based on assumption and not evidence on the record, because there was no oral evidence from PW3 or DW1 which supporting the finding of the high court judge. Furthermore, the exhibit K-22 itself does provide any material to believe that the 53 days leave comprised prevailed contract and previous employment contract. Indeed, there was no letter which notified the PW3 that 53 days also leave comprised of previous leave which were not taken.

Honourable Justices of Appeal, high court judge finding that there was previously contract between the Appellant, PW4 and PW6 because PW4 and PW6 took their annual leave before the expiration of 11 months as required by the employment contract. We submit that the said finding of the high court judge was based on assumption and not on the evidence on the record, because

there was no testimonial evidence to substantiate the same. The high court judged assuming that there was previous arrangement without consider other factors that it is impossible the Appellant to approval annual leave and allow the Respondents to take their annual leave in one time, because that would leave the work place without security services. On our part we strongly oppose such findings of the high court judge because there was no evidence on the record to prove that the Respondents had reasonable expectation of renewal of their employment contracts.

In the light of all the above, we submit that the finding of the High Court is highly misconceived and without merits and thus it is submitted that, the 1st ground of appeal has merit and thus this Honourable Court is prayed to allow the 1st ground of appeal and consequently the decision of the High Court be quashed and set aside.

2. **That, the learned Judge of the 1st Appellate Court erred in law for finding and holding that there was a breach of contract and unfair termination in the same case contrary to the laws governing the labour disputes.**

Honourable Justices of Appeal,

The High Court awarded Respondents payment of one month salary in lieu of termination notice, after finding that the Respondents' contracts of employment were terminated two days before the expiry of contractual period. The High Court finding that the duration of the Respondents' contracts of employment was from 1/8/2021 to 1/8/2022 while the contracts were terminated on 30/7/2022.

The relevant part of the High Court judgment is found at page 481 of the records of appeal which reads and we quote hereunder: -

> **"It is vivid on the said contracts that the duration of the contract was from 01,08.2021 to 01.08.2022. The letters of termination indicate that the applicants' contracts of employment were terminated 2 days before the expiry of the contract period. This was on 30.07.2022. In the premises, in my considered view, since the contracts of employment were terminated before expiry of the contractual period, the applicants were entitled to a 28 days' notice as provided in their contracts of employment".**

In support of the 2nd ground of appeal, it is submitted that it was legally wrong and improper for the High Court Judge to make the above quoted findings on ground that the findings were made in total disregard of the evidence in records, as the high court finding that the contracts were terminated two days before expiry of the contractual period, but did not order the payment of the remained contractual period which was proper remedy, instead of high court judge granted reliefs for unfair termination, while the dispute was all about the breach of the contract. Therefore, it is obvious that the High Court judge's finding was highly misconceived and misleading.

Honourable Justices of Appeal, the high court judge erred in awarding double reliefs to the Respondents herein, because the high court judge finding that there was a breach of the employment contract and thereby awarded one month's salaries to the Respondents in lieu of the notice of termination of the employment contract, and at the same time awarded compensation of twelve months remunerations for unfair termination. We submit that the high Court judge serious erred to consider that the two disputes are distinct in reliefs and how to claim them in the CMA Form No. 1.

In the light of the above it was wrong and improper for both the High Court to finding that there was a breach of contract and unfair termination at the same time and in the same case, contrary to the laws governing the labour disputes, while it was only one labour dispute which was filled in the CMA Form No. 1, which was termination of the employment contract based on reasonable expectation of the renewal. Therefore, it is clear that the high Court findings on payment of the one-month salaries in lieu of notice of termination and the payment of compensation of 12 months remunerations for unfair termination is highly misconceived and without merits, and thus this Honourable Court is prayed to allow the 2nd ground of appeal consequently the decision of the High Court be quashed and set aside.

3. **That, the learned Judge of the 1st Appellate Court erred in law for failure to determine the appropriate remedy after finding that there was breach of contract, and thus contrary to the laws governing the labour disputes.**

Honourable Justices of Appeal, the High Court judgment at page 481 of the records of appeal finding that the Respondents were terminated two days before the expiration of the contractual period. Thus, from the above finding of the High Court Judge clearly reveal that the dispute was about breach of contract, and not unfair termination, thus the appropriate remedy was payment of the remained salaries for two days and not otherwise. Therefore, the High Court Judge erred in awarding the reliefs for unfair termination which was not substantiated by the evidence in record.

In the light of the above it was wrong and improper for the High Court to make appropriate relief after finding that there was a breach of the employment contracts, as the high court judge order

the compensation of 12 months remunerations to the Respondents, instead of the payment of the said two days salaries, and therefore it is clear that the high Court findings on payment of 12 months salaries to the Respondents is highly misconceived and without merits, and thus this Honourable Court is prayed to allow the 3rd ground of appeal consequently the decision of the High Court be quashed and set aside.

4. **That, the learned Judge of the 1st Appellate Court erred in law by for interpret section 42(2)(a) in isolation with section 42(2)(b) and 42(3)(c) both of the Employment and Labour Relations Act, Chapter 366, R.E 2019 and thereby awarding severance payment without considering the nature of the employment contract, which was fixed term contract and there was no clause for severance payment in the said contract.**

Honourable Justices of Appeal, the Respondents were employed by Appellant under the fixed employment contracts for one year started from 1/8/2021 to 1/8/2022, and in their employment contracts there were no clause for severance payment after expiration of their employment contracts.

The relevant part of the High Court judgment is found at page 481 of the records of appeal which reads and we quote hereunder: -

"With regard to severance pay, as a general rule, employees employed for a fixed term of 12 months, are not entitled to the payment when the contract comes to an end. In accordance with section 42 (2) (a) of the ELRA, severance pay is payable to an employee who has completed 12

months continuous service with the employer. In addition, what can be discerned from the provisions of section 42 (3) (c) of the ELRA, employees under fixed term contracts are not entitled to severance pay upon expiry of the time of the contract. In the case at hand, however, it is undisputed that the applicants had previous employment contracts with the respondent. That is, contracts signed before the ones that were terminated. Counting the time, it is obvious that the applicants had served the respondent for more than 12 months continuously and there is no evidence on record that they were paid any gratuity upon expiry of their previous contracts. In that respect, they are entitled to severance allowance."

From the above quoted findings of the High Court Judge clearly reveal that the Respondents were granted severance pay because they worked with Appellant for twelve months and thus the interpretation was sole relied on section 42(2)(a) of the Act, without consider that section 42(3)(c) of the Act exclude the employees whose contract ended by a reason of time.

Under **section 42(2) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019]** provides that, "*An employer shall pay severance pay on termination of employment if:-*

(a) the employee has completed 12 months continuous service with an employer; and

(b) subject to the provisions of subsection (3), the employer terminates the employment.

(3) The provisions of subsection (2) shall not apply: -

(a) N/A

(b) N/A

(c) to an employee who attains the age of retirement or an employee whose contract of service has expired or ended by reason of time.

We submit that from the above quoted section it is very clear that an employee whose contract, service ended by reason of time is not entitled to severance payment, thus since the Respondents' employment contracts were fixed term contracts ended by reason of time, and there is no clause in their contracts for severance payment, therefore the Respondents were not entitled to the severance payment. Thus, the high court judge erred in interpreted the above quoted provision of section 42(2)(a)(b) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] in isolation with section 42(3)(c) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] and thereby granted such relief to the Respondents, because section 42(2)(a)(b) of the Act does not apply to the employee whose employment contract ended by a reason of time.

In the light of the above it was wrong and improper for both the High Court to make an order for payment of severance pay, while the Respondents and the Appellant had a fixed term contract, and there was no clause in their employment contracts with the severance pay. Therefore it is clear that the high Court findings on severance pay is highly misconceived and without merits and thus this Honourable Court is prayed to allow the 4th ground of appeal and consequently the decision of the High Court be quashed and set aside.

6. **That, the learned Judge of the 1st Appellate Court erred in law and fact for failure to consider that, a fixed term contract with no reasonable expectation of renewal does not require the employer to issue a notice of termination to the employee, and thus went contrary to Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007.**

Honourable Justices of Appeal, the high court judge finding that the Respondents had fixed term employment contract with the Appellant and also finding that the Respondents are entitled to the one month's salaries in lieu of the notice of termination of the employment contracts, on reason that the Respondents' employment contracts were terminated two days before their expiration. We submit that the Appellant did not terminate the Respondents employment contracts, as the said notice was not termination notice but a notice which reminded the Respondents about the expiration of their employment contracts. We further submit the period of one year comprised of 12 months, that being the position twelve months obviously started from 1st August 2021 and ended on 31st July 2022, therefore, since the Respondents were paid all their salaries including the salaries for July 2022, implies that there was neither breach nor termination of the Respondents' employment contracts.

Since the nature of the Respondents' labour dispute was unfair termination based on expectation of renewal, we submit that the high court judge seriously erred in reaching into the finding that the Respondents are entitled to the one month salaries in lieu of the termination notice, while in a fixed term contract it is not mandatory to issue a notice, because the employment contract bearing the date of the expiration of the contract, thus act as notice to the parties. Also, in the Respondents' employment contracts there is no clause which requires the Appellant to remind them on the expiration date of their employment contracts.

In the light of the above it was wrong and improper for the High Court to make the order for payment of one moth salaries in lieu of notice of termination, while in the fixed term contract expired automatically without a notice, also there was clause in their employment contracts which obligate the Appellant to issue a reminder notice to the Respondents. Therefore, it is clear that the high Court findings on payment of one-month salary in lieu of notice for termination of

the employment contracts is highly misconceived and without merits and thus this Honourable Court is prayed to allow the 6th ground of appeal and consequently quashed and set aside both the decision of the High Court and that of the CMA.

Honourable Justices of the Appeal,

From above foregoing and in the length of submissions, established legal positions as well as strength of the authorities cited herein we pray that your honourable court to make a finding that all grounds of appeal advanced by the Appellant are meritous and consequently proceed on quashing and setting aside the High Court judgment and decree in Revision No. 11/2023 and make a finding that there was no unfair termination of the Respondents' employment contracts, thus they are not entitled to any reliefs.

Honourable Justices of Appeal,

It is humbly prayed and submitted.

Dated at Moshi this..……..……day of…..…….…….……, 2024

...……...…….

THE ADVOCATE FOR THE APPELLANT

Presented for filing this..……..……day of..……..…….., 2024

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