IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 26931 OF 2023

BETWEEN

SETH SHALOM ..... APPLICANT

VERSUS

WASCO ISOAF TZ LTD ..... RESPONDENT

JUDGEMENT

Date of last Order: *23/02/2024*
Date of Judgement: *08/03/2024*

MLYAMBINA, J.

Aggrieved by the decision of the Commission for Mediation and Arbitration (herein CMA), the Applicant preferred this revision application on the following grounds:

i. That, the Arbitrator erred in law and fact in holding that the contract of employment ended reason of underperformance in probation period while there was no evaluation issued by the Respondent.

ii. That, the Arbitrator erred in law in disregarding the provision of *Rule 10 (6) (a) and (b) and (7) and (8) (a) (b) and (c) of the Employment and Labour Relations Code of good Practice GN No. 42 of 2007* which requires the right to be heard and to be trained.

iii. That, the Arbitrator erred in law and fact for deducting the salary of the Applicant without giving explanation while the salary is the agreement entered with the Respondent in the Employment Contract (Exhibit P1).

The matter was argued orally. Mr. Joachim Joliga, Personal Representative appeared for the Applicant. On the other hand, Ms. MercyGrace Seuya Kisinza, learned Counsel judiciously represented the Respondent.

As regards the first ground, Mr. Joliga submitted that; the Arbitrator erred in giving a decision based on poor performance of the Applicant while the Respondent never did evaluation and training contrary to *Rule 10(6) (a) and (b) and (7) and (8) (a) (b) and (c) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 (herein GN. No. 42/2007).*

On the second ground, Mr. Joliga submitted that the Arbitrator in his decision deducted the salary of the Applicant without considering that the salary is not supposed to be deducted because it is the agreement between the employer and the employee. After deducting the salary, the Arbitrator never explained in his decision as to why he

deducted from the employee salary. He added that there were no reasons given.

Turning to the last ground, Mr. Joliga submitted that the salary of the Applicant herein was TZS 6,076,200. In his decision, the Arbitrator calculated the salary to be TZS 4,860,960. He further elaborated that the Contract of employment showed the salary. The Contract was tendered and admitted as exhibit P1. He also pursued the Court to revisit the case of **Lucy Selemani Noti v. Billion Dollars Co. Ltd**, Revision No. 16 of 2023, High Court Labour Division at Dar es Salaam (unreported). In the upshot, Mr. Joliga urged the Court to nullify the decision of the Arbitrator and order payment of the whole remaining 27 months and 9 days together with other reliefs as the Court deems proper as per the law.

In response to the application, Ms. Kisinza vehemently objected the application. *One*, the Applicant has not proved his case. *Two*, he has not substantiated his grounds for revision. She distinguished the cited decision in the case of **Lucy Selemani** *(supra)* to the case at hand on the account of three reasons. *First*, in the cited case there was neither contract nor grounds for termination and nor procedure followed at all by the Respondent. *Second*, there was no issue of probationary of the

employees raised. However, in the case at hand, there is an employment contract well referred to as Exhibit P1.

Ms. Kisinza went on to submit that, in the case at hand, the grounds of termination was underperformance as stated by the Personal Representative and the procedure for termination was followed. Further, the Applicant herein was the probationary employee which changes the landscape completely.

According to Ms. Kisinza, the Respondent herein followed due procedure of law when terminating the Applicant. Thus, it is undisputed fact that the Applicant was a probationary employee under six months of employment. His performance was below the standard required by the Respondent. He elaborated that the Respondent had three meeting with the Applicant concerning his performance in which he informed the Applicant of his concerns of employment. The employee was given an opportunity to respond to those concerns and he was given reasonable time to improve his performance but failed to do so.

Ms. Kisinza went on to submit that the first meeting was held on 19/05/2022 and the proceeding of this meeting was tendered and marked as exhibit D2. It was also undisputed by the Applicant. The

content of the meeting concerned underperformance. The employee was also given an opportunity to respond. He committed himself that he would improve. Unfortunately, his performance did not improve. On 21/07/2022 a similar discussion occurred after which the employee was issued with 30 days' notice for performance improvement. It was tendered as exhibit D3. Finally, he was called to the third and final meeting on 13/09/2022 where he was informed that his performance was not meeting the required goals and discharged from duty. The same was evidenced by non-confirmation letter which was tendered by the Applicant and marked as exhibit P2.

Ms. Kisinza reiterated that, in non-confirmation letter, the terminal dues were stated. By having those three meetings and having discussions with the employee. He was given ample time to be heard and he was evaluated during those meetings. Unfortunately, his performance did not meet the required standards as per *Rule 10(8) of GN No. 42 (supra).* In support of her submissions, Ms. Kisinza cited the case of **Josiah Zephania Warioba v. Bouygues Energies and Services**, Labour Revision No. 16 of 2022, High Court Labour Division at Arusha (unreported), p. 10 paragraph 2.

On lack of training ground, it was submitted that the Applicant have 15 years' experience in procurement industry. By his own testimony before CMA, he knew his job quite well. On that basis, he was employed by the Respondent as a Procurement Manager which is a very senior role. Ms. Kisinza argued that *Rule 18(5) paragraph (a) and (b) of GN No. 42 (supra)* which provides for an opportunity to improve, may be dispensed with. The Applicant qualifies as a Manager and a Senior Employee. Hence, he had high degree of professional skills. She added that, even the opportunity was provided by the Respondent. The three meetings were over and above the requirement of the law. The Respondent was not compelled by law to have sequential meetings with the Applicant.

It was further argued by Ms. Kisinza that, under *Rule 10 (6) (a) and (b) and (7) and (8) (a) (b) and (c) of GN No. 42/2007*, the guidance may also entail training. It is not a mandatory. It is in record that the Applicant herein did not request for any training. She maintained that the Applicant was a Manager not fresh from school. Thus, he had 15 years' experience. On the basis of her submissions, Ms. Kisinza prayed for the first and second grounds be dismissed in entirety.

On the third ground concerning salary, Ms. Kisinza submitted that the Applicant has not stated before this Court that the decretal sum is in dispute. He only disputed the basis of calculation of the decretal amount of salary. The Arbitrator based her decision from exhibit P1. Clause 6 of Exhibit p1 on remuneration, under paragraph 6 (1) the salary is clear. It is TZS 4,860, 960. She went on to elaborate that; Clause 6(2) provides for bonuses and allowances and payments in kind. The total is TZS 6,076,200 of which the Applicant claims to be his basic salary. Ms. Kisinza averred that it is a concoction of facts meant to mislead this Court.

Ms. Kisinza added that; the Arbitrator was in a correct mind in determining the terminal benefits relying on the basic wage as defined clearly under *Section 4 of ELRA* and it excludes allowances, overtime and any additional payments. In the upshot, Ms. Kisinza asked the Court to find the grounds of revision meritless and the application be dismissed with costs and any other reliefs as this Court may deem just.

Rejoining the application, Mr. Joliga submitted that the Applicant proved on balance of probabilities contrary to what the Respondent's Counsel has submitted. There is justification. He contended that the cited case talks of breach of contract. He also disputed the facts that the

Respondent followed all the procedures. Thus, even the dues have not been paid to date. He added that paragraph 1 of the employment contract talks of the relation of employment. The contract used the word "shall" on the salary. He argued that when the bonuses or over time or allowances are fixed becomes part of the salary. It was further disputed that it is not true that the Applicant had a probation of six months. The contract uses the word shall. Since the Applicant had a fixed term contract, he was supposed to be paid the remaining balance of the contract. He further reiterated his submissions in chief.

After considering the rival submissions of the parties, CMA and Court records as well as relevant laws, I find the Court is called upon to determine the following two issues; *one, whether the Respondent followed procedures in ending the employment of the Applicant and; two, whether the Arbitrator calculated properly the Applicant's salary.*

To start with the first issue, in the instant matter, it is undisputed fact that the Applicant was a probationary employee. He was engaged in a fixed term contract of two years commencing from 22/03/2022 and agreed to end on 31/12/2024 as indicated in the employment contract (exhibit P1). The Applicant was also supplied with a job discerption (exhibit D1) where he was informed that he will be in a six months'

probation period. Before the Court the Applicant contends that the procedures for terminating him as a probationary employee were not followed. That the Applicant was not evaluated. The relevance of probation period is highlighted in numerous decisions including the case of **WS Insight Ltd (Formerly Known as Warrior Security Ltd) v. Dennis Nguaro**, Revision No. 90 of 2019, High Court Labour Division where Muruke J, held that:

> Under normal practice an employer should subject an employee to a probationary period. During the period on probation, the employees, skills, abilities and compatibility are assessed and tested. The probation provides for an opportunity to test one another and to find out whether they can continue working with each other for a long period of time in a healthy employment relationship. At this point it is important to understand that, there are two employment contracts. The first is during probationary period, and, if successfully completed, a confirmation is issued to the employee, culminating in the conclusion of a second employment contract.

Following the Applicant's failure to perform as required the Applicant was supposed to terminate the Respondent in accordance with *Rule 10 (6) (7) (8) of GN. No. 42/2007* which provides the following procedures:

Rule 10 (6) During the period of probation the employer shall-

(a) Monitor and evaluate the employee's performance and suitability from time to time;

(b) Meet with the employee with regular interval in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counselling to the employee during probation.

(7) where at any stage during the probation period the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.

(8) subject to sub-rule (1) the employment of a probationary employee shall be terminated if-

(a) the probationary employee has been informed of the employer's concerns;

(b) the employee has been given an opportunity to respond those concerns;

(c) the employee has been given a reasonable time to improve performance or correct behaviour and has fails to do so.

Examining the application at hand, the record shows that before termination the Respondent convened a meeting with the Applicant on 19/05/2022 as evidenced by exhibit D2. In the said meeting, the Applicants' performance was discussed and he was notified the areas to improve. The Applicant also promised to improve.

Again, on 21/07/2022, the Applicant was issued with 30 days' notice of performance improvement (exhibit D3). Upon failure to improve. Again, on 13/09/2022 the Applicant was issued with a notice of non-confirmation of his employment (exhibit P2). Under such circumstances, it is crystal clear that the Applicant was evaluated before termination. I have noted the Applicant's allegation that he was never offered training. However, the allegation is an afterthought because he never tabled it before his employer in the course of his employment.

Moreover, it has to be noted that the Applicant was employed in managerial cadre, thus in assessing his performance an opportunity to improve may be dispensed with because he is expected that his knowledge and experience qualify him to judge whether he is meeting the standard set by the employer. This is pursuant to *Rule 18(5)(a) GN. No. 42/2007*. Therefore, in the application at hand, the termination procedures were all adhered by the Respondent as rightly found by the Arbitrator.

Coming to the last issue, the Arbitrator ordered the Applicant be paid his terminal dues as per the non-confirmation letter which are one month notice, his September salary and pending annual leave. The Applicant contends that the salary scale applied by the Arbitrator was

not correct. The Applicant's employment contract (exhibit P1), the Applicant's basic wage was TZS 4,860,960/=, responsibility allowance TZS 486,096/=, transport allowance of TZS 425,334/= and housing allowance of TZS 303,810/=. He was of the strong position that the Arbitrator was supposed to include allowance in his payments. On this aspect, it is my view that the Arbitrator properly calculated the Applicant's salary.

With regard to the payment of September salary, the Applicant only worked for 13 days because he was terminated on 13/09/2022. However, the Respondent indicated that he will be paid the salary for the whole month. On other payment of one month salary in lieu of notice and leave payment, they are paid according to the employee's basic salary in exclusion of other allowances paid. Thus, the Arbitrator properly calculated the Applicant's terminal benefits.

On the basis of the above analysis, it is my view that the present application has no merit. The Respondent properly ended the employment contract of the Applicant. I therefore find no justifiable reasons to depart from the CMA's decision. In the event, the application is hereby dismissed for lack of merit.

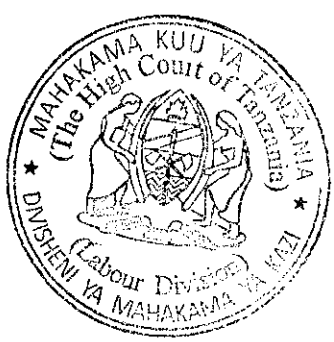
It is so ordered.

Y.J. MLYAMBINA

JUDGE

08/03/2024

Judgement prounounced and dated 8th March, 2024 in the presence of Joachim Joriga, Personal Representative for the Applicant and MercyGrace Kisinza Seuya for the Respondent. Right of Appeal explained.



Y.J. MLYAMBINA

JUDGE

08/03/2024