IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., WAMBALI, J.A., and KOROSSO, J.A.)

CIVIL APPEAL NO. 61 OF 2016

DAVID NZALIGO ..... APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Rweyemamu, J.)

Dated the 21st day of April, 2013
in
Labour Revision No. 347 of 2013

JUDGMENT OF THE COURT

23rd July & 9th September, 2019

KOROSSO, J.A.:

The appellant David Nzaligo being aggrieved by the decision of the High Court, Labour Division in the above mentioned Labour revision filed this appeal on the following grounds:

(a) *That the Honourable Judge erred in law and fact in arriving at a decision that the applicant, an employee who has worked beyond probationary period in his employment without being confirmed, is still a probationary employee.*

(b) *That the Honourable Judge erred in law and fact in arriving into the decision that the applicant, an employee who has worked beyond his probationary period in his employment without being confirmed, is not entitled to the reliefs falling under Part III, Sub-Part E of employment and Labour Relations Act, Act No. 6 of 2004.*

(c) *That the Honourable Judge erred in law and fact in arriving into the decision that the applicant, an employee who has worked for more than six months for the same employer in his employment without being confirmed, is not entitled to the relief's falling under Part III, Sub-Part E of employment and Labour Relations Act, Act No. 6 of 2004.*

(d) *That the Honourable Judge erred in law and fact in raising and determining the probation status of the applicant suo motu, which was not a ground of Revision, without affording the parties the right to submit for the same.*

The appellant and respondent through their respective counsel duly filed written submissions that were adopted upon prayer to the Court by the counsel for the parties and became part of overall submissions for each party respectively.

For better understanding of the essence of this appeal we find it pertinent to briefly narrate the background. The appellant was employed by the respondent and this given credence by an employment contract signed on 30th June 2010 by both the appellant and the respondent for the period between 1st July, 2010 and 13th January, 2011 as seen at page 59 of the record of appeal. The substance of the said contract being that NMB PLC Banking Company (the respondent) and David Nzaligo (the appellant) entered into an agreement where the respondent was to employ the appellant on permanent terms to perform duties as a Deputy Company Secretary. Clause 1 of the contract expressed that the starting date of employment was 01st July 2010, and that for the first 6 months of employment, the appellant was to be on probation and thereafter undergo a review, the expected aftermath being either confirmation upon being positively assessed.

When coming to the end of the probation period, the assessment of the appellant envisaged in the contract was undertaken as revealed at page 63 of the record of appeal. The assessment was strongly disputed by the appellant. Thereafter, on the 13th January, 2011 the appellant tendered a notice to resign and believing he was forced to resign, instituted a labour case at the Commission for Mediation and Arbitration (CMA) in Dar es

Salaam (CMA/DSM/KIN/101/11/261) complaining of unfair termination. The CMA entered an award in the appellant's favour being satisfied that his resignation was a result of the respondent's conduct (against the appellant) which led to intolerable working conditions for the appellant, and that the ill treatment which the appellant was subjected to was within the purview of Rule 7(2)(b) of Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 (Code of Good Practice Rules).

The respondent was dissatisfied with the award given to the appellant by CMA and at first filed Labour Revision No. 219 of 2012 that was later withdrawn and then applied and was granted leave to file an amended Labour Revision, that is, Labour Revision No. 347 of 2013 at the High Court Labour Division, Dar es Salaam which ended with a Ruling in favour of the respondent. The High Court (as seen at page 244 of the appeal record) held that:

> *"since an employee on probation is not covered under the unfair termination provisions Part E of the ELRA, and I am not aware of any decision interpreting the position under the ELRA differently, I concluded that fair termination principles; which as demonstrated above, extends to employees who have been forced to resign (constructive*

termination) do not apply to employees on probation."

On the date when this appeal came for hearing, Mr. Mashaka Ngole learned Advocate represented the appellant while Prof. Cyriacus Binamungu learned Advocate entered appearance for the respondent. The learned counsel for the appellant started by submitting that he had nothing substantive to state or amplify then, and that the filed written submissions should suffice preferring to await submissions from the respondent counsel and questions from the Court to respond accordingly.

In support of the appeal, the appellant's written submissions argued all the four grounds of appeal and first the 1st, 2nd and 3rd grounds of appeal were argued jointly and then the 4th ground was dealt with separately. The counsel contended that the said grounds of appeal raise two issues for determination, first, being whether at the time of termination of employment, the appellant was still under probation, and as such not an employee of the respondent. Second, whether an employee, like the appellant, who has worked for more than six months but has not been confirmed, is not entitled to reliefs falling under Part III, Sub-Part E of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA).

With regard to the first issue, Mr. Ngole argued that the issue should be answered in the negative when one relies on clause 2 of the appellant's employment contract outlining specific and explicit terms of employment including probation of six months for the appellant which commenced on the 1st July, 2010 and was to end on the 31st December, 2010, and that the appellant was constructively terminated from employment on the 13/1/2011. The appellant's counsel submitted that there was no additional information to either show that the period of extension was extended beyond the agreed time as per Rule 10(5) of the Code of Good Practice Rules or lawfully terminated as per Rule 10(5) of the Code of Good Practice Rules.

Mr. Ngole contended further that the judge erred in law by holding that merely because the appellant had not been confirmed prior to resignation meant he was not a confirmed employee of the respondent. With regard to decisions cited and considered by the judge to arrive at the findings, the counsel sought the Court to find them distinguishable bearing in mind that facts and circumstances in those case are different from the present case. The counsel maintained that **Mtenga vs University of Dar es Salaam** (1971) HCD 247 and **Stella Temu vs Tanzania Revenue Authority**, [2005] TLR 178 are cases which were decided prior to the

enactment of the ELRA and the Labour Institutions Act, No. 7 of 2004 (LIA) and therefore not relevant to the current appeal.

The appellant's counsel asserted that the probation period for the appellant ended upon expiry of the six months as outlined in the terms of contract and that ELRA does not provide for automatic extension or renewal of the probation period, and that the law prescribes the method and condition for extension of probation under Rule 10(5) of Code of Good Practice Rules. That in **Mtenga vs University of Dar es Salaam case** (supra), the respondent did exercise her right to extend the probation period guided by rules, a situation different from the current appeal. Contending further that by virtue of section 61 of LIA, at the time of termination the appellant was still an employee of the respondent and that had the judge considered this provision and the facts before her, she would not have arrived at the finding she did, since the appellant satisfied all the conditions precedent to be an employee of the respondent as set under section 61 of LIA.

Venturing the second issue for consideration, Mr. Ngole submitted that even if the appellant was not an employee and it is taken that he was still under probation as found by the judge, having worked with his employer for six months, the appellant is covered under section 35 of

ELRA, Part III, Sub-Part E of ELRA and any other finding such as the High Court finding that the appellant was not covered under Part III Sub Part E of ELRA contravenes the law. According to the counsel's interpretation of section 35 of ELRA is that it is only employees who have worked for less than six (6) months who are not covered by the said relevant provision.

The third issue which the appellant identified for determination based on the 4th ground of appeal is whether the judge of the High Court erred in law and fact in raising and determining the probation status of the applicant *suo motu* without affording the parties the right to submit on the same. The appellant counsel restated the cardinal principle of law that one is entitled to be heard before being condemned. Asserting that this principle must be adhered to and then cited the decision of this Court in **John Morris Mpaki vs NBC Ltd and Ngalagila Ngonyani**, Civil Appeal No. 95 of 2013 (unreported) to reinforce his argument, where it was stated that;

> "... *it is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard...*"

The appellant's counsel argued that in the present appeal had the High Court judge heard the appellant on the issue, she would not have reached the conclusion she did. The appellant counsel thus implored the Court to reverse the High Court decision in Labour Revision No. 347 of 2013 and find in the appellant's favour, and in effect uphold the decision of the CMA dated 6/9/2012 with costs.

Prof. Binamungu on his part proceeded to amplify on their written submissions and at the same time responded to the grounds of appeal. The counsel conceded the fact that the appellant was an employee of the respondent, in line with the contract of employment expounding that the first six months of employment constituted a probationary period and also the fact that the appellant resignation from employment was on the 13th January 2011.

Two issues for consideration emanating from grounds of appeal were raised by the counsel, first, whether at the time of resignation, that is, 13th January 2011, the appellant was a probationer or an employee? Second, whether a probationer is covered under Part III, Sub-Part E of the ELRA. Responding to the first issue, Prof. Binamungu submitted that this is a question of fact and since the appellant did not dispute the fact that he was a probationer for the first six months, arguing that this can be

discerned from the appellant's statement as found in the record of appeal at page 12 in Form No. 1 item 4(a) where it is stated;

"...*probation period wasn't matured properly leading to its abuse*".

Thus the counsel argued that when these statements are considered together with the appellant's participation in the confirmation process as shown on page 63 of the records of appeal, there is enough evidence to demonstrate that the appellant was still a probationer at the time he resigned. The respondent counsel also made reference to the employment contract between the appellant and the respondent, found under clause 2, stating that upon fulfilment of the conditions therein the appellant was to be served with confirmation letter regarding the appointment.

It was further contended by the counsel that resignation of the appellant having occurred before receiving confirmation of employment, meant that the contractual terms were rendered unfulfilled and leads to a conclusion that the appellant resigned as a probationer. The counsel thus entreated the Court to hold that the appellant was a probationer and not an employee who completed his probation as argued by the appellant's counsel, arguing that the appellant's counsel contentions are not supported by evidence or the law.

Prof. Binamungu further contended that the High Court's reliance on **Mtenga vs University of Dar es Salaam** (supra) holding was proper where it held that confirmation of employment is not automatic. The other case cited by the appellant also considered, is a decision of this Court in **Stella Temu vs Tanzania Revenue Authority** (supra), where the probation period was stated to be a period of practical interview. The counsel stated that this being the position, until when one is informed of the results of an interview, one cannot regard himself/herself to have passed the interview and that this legal position maintains stability and certainty in law, because if disregarded, and allowing automatic confirmation in employment, that practice will not only create chaos but also instability in the working environment in Tanzania.

The counsel for the respondent when deliberating the import of Rule 10(2) of Code of Good Practice Rules, having been discussed by the appellant's counsel, implored the Court to find it of no value to the case before the Court, since the respective rule requires that terms of probation be made known to an employee before the employee commences employment, and thus argued that in the present case, there is no question that the appellant was made aware of the terms of probation since it was known that it will be for six months and thereafter, an

evaluation. Contending that any delay in confirmation of the appellant after the date of supposed expiry of six months' probation period, up to the date of the appellant's resignation was a reasonable period for the respondent to evaluate the appellant and form an opinion whether to confirm or decline to do so. The respondent counsel also considered the import of section 61 of the ELRA discussed by the appellant's counsel and submitted that the said provision is inapplicable in the present situation because it relates to contracts of service and distinguishing them from contracts for service and thus not applicable.

Addressing the second issue, the respondent counsel contended that the appellant was a probationer at the time he resigned and that this being the case, Part III Sub Part E of ELRA does not cover him thus supporting the judge's finding on this issue as against the appellant's position. The counsel argued that the cited section 35 of ELRA does not assist the appellant since the provision does not state that a probationer is entitled to remedies under Part III Subpart E Sections 35-40 of ELRA. That the provision deals and provides remedies for unfair termination of employment but eliminates all employees who have worked under the period of six months, leaving other categories of employees (not probationers).

Regarding the concern raised that the appellant was denied the right to be heard, specifically, that the High Court raised the issue of the appellant's probation status and decided on it without according the appellant an opportunity to respond, Prof. Binamungu asserted that the claim has no merit. The counsel undertook to distinguish the cases referred to by the appellant's counsel, such as the case of **John Morris Mpaki vs The NBC Ltd and Ngalagila Ngonyani** (supra), and argued that the decision is distinguishable since it addresses different circumstances to the one obtaining in the current appeal.

The counsel for the respondent submitted further that the issue as determined by the High Court was not a new matter since the respondent and the appellant had submitted on the issue before at the CMA, and thus the judge was justified to make a decision on it. The counsel made reference to the decision in **James Funge Ngwalilo vs Attorney General** (2004) TLR 162, where the Court stated that even though the parties are bound by their pleadings where an unpleaded matter has been argued and left for the court's determination, the court is bound to make a decision thereon. The respondent prayer was for the appeal to be dismissed with costs.

The appellant's counsel rejoinder was mainly a reiteration of his earlier submissions found in the written submissions and also some reaction to the respondent's counsel submissions mainly on the two identified issues. With regard to the contention that the appellant was denied the right to be heard, the counsel disputed the respondent's counsel submissions that the disputable issue was framed during the hearing at CMA, stating that the issue on the status of probation was never framed as an issue and thus it was a new issue framed and decided by the judge alone. Also reiterated that the assessment of the appellant was conducted after the expiry of the probation period and thus the appellant was not a probationer when he underwent constructive termination, and that the holding in the case of **John Morris Mpaki** (supra) is relevant since the right to be heard for any party is an issue of natural justice and thus relevant. The counsel thereafter reiterated the appellant's prayers as sought through oral submissions, in the memorandum of appeal and written submissions.

Having heard and considered both oral and written rival submissions, we find that there are various matters which are not contentious already presented herein above. Such facts include; the fact that the appellant was employed by the respondent on terms of employment as per the

employment contract and the date of signing the contract, date of start of employment, the six months period of probation for the appellant and date of appellant's resignation. It is important to note that the sanctity of the employment contract cannot be gainsaid. In the present appeal the appellant and the respondent agreed to be bound by the contract under the terms and conditions therein and also accepted the rights and duties, responsibilities and obligations on either party.

In the cause of determination of the four grounds of appeal to be done sequentially, some contentious issues will also be addressed. Thus, starting with the first ground of appeal, we find the relevant issue to be determined here is whether the appellant was still a probationer at the time he resigned. The appellant is aggrieved by the finding of the High Court that an employee on probation does not assume employment status on expiry of period of probation, that is, expiration of the specified period of probation renders such an employee eligible for confirmation only. As already stated above, there is no doubt that for the first six months of employment the appellant was on probation. Rule 10 of the Code of Good Practice Rules states;

> *"10-(1) All employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines*

(2) Terms of probation shall be made known to the employee before the employee commences employment.

(3) The purpose of probation is normally to enable the employer to make an assessment of whether the employee is competent to do the job and suitable for employment.

(4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standards required, the custom and practice in the sector".

In the present appeal, it is evident that the appellant resigned before being confirmed, a finding of fact by the judge. From the available evidence clause 2 of the appellant's contract specifies there being a probation of six months, starting from the 1st July, 2010 and in effect meant it was to end on the 31st December, 2010. There is no doubt that the appellant took part in the assessment process, and it is also a fact that up to the time he resigned, he was yet be confirmed. The employment contract clause 2 provides that confirmation to permanent employment shall be upon fulfilment of the certain conditions highlighted therein and that's when a letter confirming first appointment will be issued, thus in

effect we find this clause inferring that confirmation is not automatic. Clause 2 provides:

> "2. *Terms of Employment: The starting date of employment is 01st July 2010. The first 6 months of employment constitute a probationary period, during which time NMB PLC will review the Employee's performance.*
>
> *Confirmation to permanent employment will depend on the following:*
>
> - *Employee's good working performance*
> - *Satisfactory medical report issued by an authorized Medical Doctor, appointed by the Bank, confirming that the employee is medically fit to carry out the challenging and demanding duties that are assigned to you.*
> - *Receipt of positive references from the employee's referees*
> - *Verification of employee's certificates and transcripts with relevant authority and in case a certificate is found to be forged, legal measures shall be taken against you the employee including termination of this appointment.*
>
> *If the entire above are fulfilled, you will be served with a confirmation letter on first appointment. In case the agreement is terminated during the first six months, a written notice of seven (7) days will*

be applicable, after this period, thirty (30) days' notice will apply".

We found nothing in the record of appeal to contradict the fact that the appellant left employment prior to receiving the letter of confirmation. The argument by the appellant's counsel that there being no extension of probation meant the probation period had expired, does not hold water bearing in mind the fact that the appellant was still under probation (a probationer) at the time he resigned on the 13th January, 2011, he was still under assessment and he was yet to be confirmed. In fact applying the import of the decision of this Court in **Stella Temu** (supra), that while under the period of probation, the appellant was under a "**practical interview**", the position in this case is that the appellant was still under probation.

The status of employment for an employee under probation who continues working after expiration of probation period without the employer having made a decision to confirm or not to confirm was discussed in **Mtenga vs University of Dar es Salaam** (supra) and stated that, being on probation after expiry of probation period does not amount to confirmation and that confirmation is not automatic upon expiry of the probation period. This being the position, we find no reason to depart from

the finding of the High Court on this issue. There is no evidence that the appellant did fulfill the required conditions to warrant confirmation and thus move from the status he was, that of a probationer as required by the contract of employment.

We are therefore of the view that confirmation of an employee on probation is subject to fulfilment of established conditions and expiration of set period of probation does not automatically lead to change of status from a probationer to a confirmed employee. Therefore since the appellant failed to fulfil the conditions set, he was still a probationer at the time he resigned and thus the 1st ground of appeal fails.

Having found that the appellant was still a probationer, we proceed to the 2nd ground of appeal which we will consider together with the 3rd ground of the appeal. The gist of contention is that the appellant seeks the Court to consider whether the fact that he was not confirmed but having worked for over six months with the respondent, he is entitled to reliefs falling under Part III, Sub Part E of ELRA. We find that these 2nd and 3rd grounds of appeal require this Court to consider and determine whether or not the appellant was entitled to reliefs falling under Part III Sub E Part E of ELRA. As already stated, the High Court was satisfied that the appellant was harassed and abused during his time as an employee of the

respondent as held by the CMA, which caused him to resign, but disagreed with CMA findings that there was constructive termination/unfair termination on the part of the appellant. The High Court held that the appellant being under probation was not entitled to claim for unfair termination.

Section 35 of ELRA which is in Part III Subpart E, states:

> *"The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts."*

As stated hereinabove, the High Court judge was of the view that an employee on probation is not covered under the unfair termination provisions Part E of ELRA and that fair termination principles extend to employees who have been forced to resign and that (constructive termination) it does not apply to employees on probation.

We are aware that for the employee, probationary period is there to allow one to see if one enjoys working with the employer and whether the employee matches the skills and abilities for the job recruited and thus where resignation is before "*results of the interview*" are out, nor there being a confirmation letter that the probationer is to continue with

employment, applying this to the current appeal, we are inclined to find that there is no evidence that the conditions of probation and employment found in clause 2 of the employment contract were fulfilled and the appellant was still being assessed. Though without doubt the assessment was delayed but since results of the assessment were yet to be revealed, the probationary status was still in effect for the appellant as found hereinabove.

Section 35 of ELRA provides that the provision of Part III SubPart E shall not apply to an employee with less than 6 months employment with the same employer, whether under one or more contract, means that a worker with less than 6 months of employment may not bring an unfair termination claim against the employee, as held by the judge.

Whilst we are aware of the appellant's counsel submissions that the appellant probation exceeded the six months threshold by about 11 days prior to resigning, but since the probation period was yet to be declared to have ended, at the time the appellant was still on probation, we are of the view that a probationer in such a situation, cannot enjoy the rights and benefits enjoyed by a confirmed employee. Having regard to the circumstances of the present case, can it be said that the said provision covers the appellant's situation, since the record of appeal reveals that the

appellant worked for more than 6 months with the same employer. We find that the import of section 35 of ELRA though it addresses the period of employment and not the status of employment, the fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination. It suffices that when assessing this provision it is a provision that envisages an employee fully recognized by an employer and not a probationer.

This being the case, Part III SubPart E of ELRA being a part addressing unfair termination of employment, it goes without saying that, taking all the circumstances pertaining in this appeal as alluded to hereinabove, it would have been prudent if the appellant would have waited for the assessment to be finalized for him to proceed accordingly and enjoy the benefits of the provision under dispute, that is, being recognized as an employee of above six months. The various sections cited by the appellant's counsel including section 61 of LIA to demonstrate that the appellant was an employee of the respondent at the time of resignation, we find are not applicable since it addresses matters related to contract of service which is not the case in the present appeal. Particular circumstances of this case lead to only one conclusion that the appellant was still a probationer at the time he resigned and cannot benefit from

remedies under Part III E of ELRA. The 2nd and 3rd grounds of appeal therefore, fail for the reasons stated.

The fourth ground under scrutiny is whether or not the High Court Judge determined the issue of the status of probation *suo motu* without according the parties the right to submit on this, that is, to be heard. The gist of the contention is that the appellant was not accorded an opportunity to be heard on the issue of the probation status and that had the appellant been given that opportunity, the High Court would not have arrived at the decision they had on the said issue, while the counsel for the respondent asserted that, this was not a new issue for the parties to consider having been previously discussed at the CMA.

The right to be heard in any proceedings is paramount and this cannot be overstated enough. The right of a party to be heard before adverse action or decision is taken against him/her has been stated and emphasized by the Court in numerous decisions. In, for instance, in **Abbas Sherally Vs Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (unreported), it was held: -

> *"That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is*

considered to be a breach of the principles of natural justice."

Again, in **John Morris Mpak**i (supra) referred to by the appellant counsel, this Court stated that;

> *"The law that no person shall be condemned unheard is legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard."*

In the present appeal, we find no evidence to show that the appellant was denied the right to be heard on the issue of the status of probation, as it is an issue which was considered in various ways from the CMA. Perusing though the record of appeal at pages 167 to 174, in a counter affidavit sworn by the appellant filed on 29th April, 2014 as against the affidavit in support of the amended chamber summons sworn by Frank Mukoyogo, the Acting Head of Legal and Company Secretary of the respondent filed on 22nd April, 2014 at pages 118 to 121 of the record of appeal, in paragraph 2(a) takes note of the deposition of paragraph 2 at pg 118 stating that;

> *"The applicant was an employer of the respondent effective from 1/07/2010 up to 13/01/2011..."*

The appellant in paragraph 2(c) at pages 127 of the record challenged the contents of paragraph 6 of the respondent supporting affidavit which stated that:

> *"The Respondent stated further that his probation period came to an end on 10th January 2011 and the assessment was made on 11th January 2011 by his line manager..."*

Apart from the above evidence there are also final submissions on the part of the appellant and respondent which allude to this issue. We acknowledge that the issue was not framed as such, but the contents of the submissions at the CMA and the affidavital averments at the High Court, reveal that the substance of this issue was argued and responded to by the appellant.

In effect the above cited excerpts from the record of appeal illustrate that the issue of the status of the appellant probation was in one way or another averred in the pleadings before the High Court and thus the judge cannot be faulted for drawing the issue for consideration when determining the Revision related to the current appeal. Assertions that the issue was drawn *suo motu* by the Urt judge does not stand since the parties themselves raised the issue in their pleadings before the High Court which prompted the Judge to consider and frame it as one of the consequential

issues when evaluating the evidence. Consequently, the 4th ground of appeal fails.

In the event, for the reasons stated hereinabove, the appeal fails in entirety and is hereby dismissed. This being a Labour dispute matter, let each party to bear its own costs. Order Accordingly.

DATED AT DAR ES SALAAM this 30th day of August, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 9th day September 2019 in the presence of Ms. Patricia Pius Mbasa holding brief for both Mr. Mashaka Ngole Counsel for appellant and Prof. Cyriacus Binamungu Counsel for the Respondent.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL