IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LABOUR REVISION NO. 03 OF 2022

(Originates from Complaint No. CMA/MORO/157/2020)

BETWEEN

ALEXANDER BENNY JOKONIA.....APPLICANT

VERSUS

MW RICE MILLERS LTD.....RESPONDENT

RULING

28th June & 5th August, 2022

CHABA, J.

Discontented by the Award issued by the Commission for Mediation and Arbitration for Morogoro at Morogoro (the CMA) dated 13/12/2021, the applicant, **Alexander Benny Jokonia** filed this Revision Application under the provisions of Sections 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (the ELRA) as amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 and Rules 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (11) (b) and 44 (1) and (2) of the Labour Court Rules, GN No. 106 of 2007 and any other enabling provisions of the law. The application has been preferred by way of chamber summons and notice of application supported by an affidavit sworn by the applicant himself.

The applicant is praying this court to call, examine and revise the ruling of the CMA registered as Mgogoro wa Kazi Na.

CMA/MORO/157/2020 by Kayugwa H. (Mwamuzi) delivered on 13th December, 2021. Indeed, the applicant was aggrieved by the Award of the CMA which dismissed his complaint on the ground of incompetence following a preliminary objection raised by the respondent in that case.

On her party, the respondent MW RICE MILLERS LTD filed a notice of opposition, counter affidavit sworn by the learned advocate Mr. Moses John Basila and notice of representation.

The background of the dispute in brief is that the applicant was employed by the respondent as a Regional Sales Manager for a period of 12 months. The term of contract had to commence effectively from 01/03/2020 and last on 28/02/2021. However, the applicant worked with the respondent from 01/03/2020 to 28/08/2020 and resulted to the present dispute.

It is on record that the applicant was charged and convicted with a disciplinary misconduct termed as "*Lack of Integrity*". He was alleged to commit some acts of deception leading to misappropriation of customer's fund contrary to the customer's bonafide intent to deposit the fund in the respondent company's account. Having satisfied that the misconduct was proved, the respondent terminated the appellant's employment on disciplinary grounds with effect from 31st August, 2020. The termination letter stated that the applicant was at liberty to appeal within the respondent's company or forward the dispute to the CMA. However, the applicant opted to lodge his complaint before the CMA.

It appears that mediation was unfruitful and the matter was set for arbitration. However, before arbitration could go any further, the parties raised preliminary objections against each other. The applicant's

preliminary hearing based on the defect of the respondent's affidavit and notice of the representation, whereas the respondent's preliminary objection was grounded on competence of the application to the effect that the time of service by the applicant was below six (6) months hence unfit for unfair termination dispute.

It is further clear on record that, on the later stage when the matter was scheduled for hearing of the respective preliminary objections, the representative to the applicant one Mr. Boniphace Basesa withdrew his preliminary objection and the CMA proceeded to entertain the respondent's preliminary objection. The centre for discussion on the raised preliminary objection by the respondent did focus more on the time the applicant had served in his employment. After hearing, the CMA found the raised preliminary objection had merit and thus dismissed the application basing on the interpretation of section 35 of the Employment and Labour Relations Act [CAP. 366 R. E. 2019].

As alluded to above, the applicant was aggrieved by the decision of the CMA and preferred this revision asking this court to call and examine the ruling associated with the Complaint No. CMA/MORO/157/2020. After such an examination, the applicant wishes this court to quash the ruling issued by the CMA on the following grounds: -

i) The arbitrator failed to give the applicant right to be heard on his preliminary objection and determining it on merit.

ii) The arbitrator failed to consider the evidence of the applicant, particularly the employment contract and termination letter that he worked for six months.

When the matter was called on for hearing, the applicant was represented by Mr. Boniphace Basesa from the Workers Union known as DOSHITWU, whereas Mr. Basila, learned counsel entered appearance for the respondent. By the parties' consensus, this application for revision was disposed of by way of written submissions. Both parties adhered to the court's schedule.

Having considered the parties' rival submissions in their written submissions, it is clear that the applicant's main complaints are based on two major grounds to the effect that he was not afforded with the right to be heard when he raised a preliminary objection against the respondent's pleadings hence not determined on merits, and that the arbitrator failed to consider the evidence of the applicant, particularly the employment contract and termination letter that he worked for six months. To support his contentions, he cited a number of relevant legal authorities which I do not wish to refer them here, and concluded that since the right to be heard is a basic right which has been enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania was not adhered to by the CMA.

On his party, the respondent through the learned counsel Mr. Basila contended that the applicant was fully afforded his right to be heard after he had prayed to withdraw his preliminary objection, a prayer which was granted and he never sought to refile or restore the same.

From the foregoing, and according to the record at CMA there is no doubt that what the counsel for the respondent submitted, that is the proper interpretation of the law, particularly when applied to the facts of this case which narrates exactly what transpired before the CMA. For

better appreciation of what has had transpired at the CMA, at this juncture it is prudent to quote and demonstrate the relevant part of the CMA's proceedings dated 03/02/2021 at page 7 of the typed proceedings which read:

> "*.... **Hali ya shauri:***
> *Shauri limekuja kwa ajili ya usikilizwaji.*
> ***Mlalamikiwa:***
> *Amewasilisha hoja ya P.O.*
> ***Mlalamikaji:***
> *Ameiambia Tume kuwa anaondosha hoja ya P.O. yake.*
> ***Tume:***
> *Imebaki na P.O. ya mlalamikiwa .....".*

As depicted from the above proceedings of the CMA, that is the true picture of what transpired in respect of the applicant's preliminary objection before the CMA. It is amazing to this court and may be to any reasonable minded person, to hear that Mr. Basesa and the applicant as well without colour of right lodged a complaint alleging that the applicant wasn't afforded with a right to be heard while the record is clear. As gleaned from the CMA's record, when the applicant prayed to withdraw his preliminary objection and granted accordingly, it is obvious that at the material time the applicant had nothing before the CMA termed as preliminary objection and Mr. Basesa is a very person who represented the applicant. In my settled view, this is one of the act which amounts to an abuse of the court process by Mr. Basesa and his client (the applicant). I say so because Mr. Basesa had the knowledge of what exactly transpired before the CMA. This kind of behaviour or

conduct is sternly discouraged by the court. Thus, the first ground is devoid of merit and it is hereby dismissed in its entirely.

As regards to the second ground which surrounds interpretation of section 35 of the Employment and Labour Relations Act [CAP. 366 R. E. 2019] (the ELRA), Mr. Basesa submitted that since the applicant's employment commenced on 01/03/2020, six months completed on the date of termination of his employment according to the termination letter. It is Mr. Basesa's argument that the first month was completed from 01/03/2020 to 30/03/2020. Following the same trend, on 31st August, 2020 when the employment was terminated, he had already completed six months of his employment. Based on the above facts, Mr. Basesa is faulting the CMA's decision to dismiss the applicant's complaint on the ground that he had not completed the term of six months while the same was attained and therefore his complaint was capable of being determined by the CMA on merits.

Responding to the argument advanced by the applicant, the counsel for the respondent referred this court to rule 23 (10) of the Labour Institution (Mediation and Arbitration Guidelines) GN No. 67 of 2007 which empowers the CMA to determine the preliminary objections before the main case. He then pointed out that the CMA was quite correct to have dismissed the application on the basis of section 35 of the ELRA (Supra).

He then discredited what the applicant stands on. He accentuated that despite the fact that the applicant's service did not attain six months, he was still under probation. To buttress his argument, he cited the case of **David Nzaligo v. National Microfinance Bank PLC,**

(Civil Appeal 61 of 2016) [2019] TZCA 287 (09 September, 2019) where the Court held *inter-alia* that an employee who has not attained the six months period or otherwise but still under the probationary employment cannot benefit from remedies under part III E of the ELRA.

In determining this last ground, I have carefully read the hand written proceedings of the CMA along with the word processed one and further perused the award of the arbitrator. In my considered opinion, I have observed that the arbitrator correctly analysed the available facts on the tenure the applicant had so far served in the circumstance. Further, I have noted that there is no dispute that the applicant was employed and later terminated. What I have gathered from the facts of this case is that the controversial issue between the parties is whether the applicant's employment was terminated on 28/08/2020 or 31/08/2020.

From the records, the termination letter stated clearly that the termination took effect from 31/08/2020. The crucial question is whether the applicant under the circumstance was entitled to pursue his complaint on the basis of unfair termination of employment under the ELRA (Supra). On this facet, the applicant is of the firm view that he worked for six months while the respondent submitted that there were only five months and 27 days. I have in mind that the respondent's counsel counted up to 28/08/2020 from the date the dispute arose. To resolve this issue, I was obliged to seek assistance from the Interpretation of Laws Act [Cap. 1 R. E. 2019] which is an Act to consolidate the law relating to the construction, application, interpretation and operation of written laws and to provide for related

matters. Under section 4 of the Interpretation of the Laws Act (supra) states clearly that a month is interpreted to mean:

> *"Calendar month" means the period beginning on the first day of a month and expiring on the last day of that month"*

From the above interpretation, there is no dispute that for the purposes of counting worked months for the applicant, it began from the first day of a month on 1st March, 2020 and expired on the last day of the same month as suggested by the applicant. However, referring to the applicant's termination letter, there is no any difficult to interpret the date of termination. In my understanding of the provision of the law, the applicant would have never worked on the 31st day of August, 2020 because on that particular day he was no longer an employee of the respondent.

Even if the applicant would have worked for exactly six months, but under the circumstance of this case and in accordance with the law, would have no right to sue under section 35 of the ERLA for one reason that he was still a probationary employee. I say so because, throughout the hearing of this revision the applicant did not produce any documentary evidence or adduced any piece of evidence to prove that he completed his probation period and thus was confirmed by his employer. According to the Probation Clause of the applicant's employment contract at page 1, it provides that:

> *"You will be required to serve a period of 3 months on probation. During the probationary period, service may be terminated by either side by giving the other one (1) month's notice or payment of one (1) month's salary in lieu of notice.*

Continuation of programme or employment will be considered on successful completion of the probation period, and subject to your work performance and/or adjustment to our company culture, rules regulation and work ethics and procedures. Depending on progress, this probation period could be extended to allow additional time for adjustment and settling in the job."

Assuming that the probation of three month's would have passed without having any addition time and taking into account that there is no evidence advanced by the applicant showing that he was confirmed for the post as observed above, still he would not be entitled to file the dispute in respect of unfair termination. Our Apex Court in the case of **David Nzaligo v. National Microfinance Bank PLC** (Supra), held inter-alia 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".

The principle of unfair termination is governed by the provision of the law under section 35 of the ELRA which states that:

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

From the above provision of the law, there is a bold line drawn for the minimum employment period within which a party can sue for unfair termination. The law says, the time must be more than six months and

not otherwise. On this facet, the case of **David Nzaligo v. National Microfinance Bank PLC** (Supra) is relevant in the circumstance of this case. The rationale is that an employee under the probationary period is equated to a person who is yet to be in a complete employment. The employer reserves the right to decline confirming the employee subject to relevant parameters. In the case of **Stella Temu v. Tanzania Revenue Authority,** Civil Appeal 72 of 2002, CAT at Arusha, (unreported) the probation period was treated by the court in the following observation: -

> *"It is our decided opinion that probation is a practical interview. We do not think that the right to be heard and to be given reasons extends even where a person is told that he/she has failed an interview."*

On the basis of the foregoing analysis, I would dismiss the second ground as well. The CMA's decision was correct as it had no jurisdiction to entertain the applicant's complaint. This application has no merits, and this court finds no genuine grounds upon which to revise the Award issued by the CMA.

As regards to the costs of the suit, I have considered a very well-reasoned justification of costs by the respondent in her submissions which in my opinion, is very strong and unchallenged. But since the nature of this case is purely a labour dispute, I make no order as to costs.

It is so ordered.

DATED at **MOROGORO** this 5th day of August, 2022.

M. J. CHABA

JUDGE

5/08/2022

COURT:

Ruling delivered at my hand and Seal of this Court in Chambers this 5th day of August, 2022 in the presence of Mr. Boniphace Basesa, Representative who appeared for the Applicant and Mr. Deusdedit Kikona who also appeared on behalf of the Respondent.

M. J. CHABA

JUDGE

5/08/2022

Rights of the parties fully explained.

M. J. CHABA

JUDGE

5/08/2022