

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

MBEYA DISTRICT REGISTRY

AT MBEYA

LABOUR REVISION NO. 1 OF 2021

(Originating from award in the dispute number CMA/MBY/85/2008/AR.1)

Between

SHANTA MINING COMPANY LIMITEDAPPLICANT

VERSUS

HERMAN SEMBUARESPONDENT

JUDGMENT

Date of last order: 29th July, 2022

Date of judgment: 9th August, 2022

NGUNYALE J.

The applicant entered into an employment contract of unspecified period with the respondent on 10th August, 2015. He was put under probation for six months before he was confirmed in employment. Six months of probation expired and no letter of confirmation was issued to him. He continued to work until he was terminated by a letter dated 28th May, 2018 after disciplinary hearing. Aggrieved, on 28th June, 2018 filed a complaint to Commission for Mediation and Arbitration for Mbeya herein "CMA" for

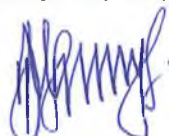
1 

unfair termination. Compulsory mediation failed necessitating the matter to go for arbitration. The arbitrator found termination substantively and procedural unfair. The respondent was awarded Tsh. 24,455,316/= for 24 months as compensation for unfair termination. Aggrieved the applicant filed the present application seeking to revise the proceedings and award of the arbitrator. In the affidavit he raised the following issues;

- 1. Whether it was proper for the arbitrator to proceed with arbitration hearing while reference to arbitration was out of time.*
- 2. Whether it was proper for the arbitrator to ignore the fact that the respondent was not formed by the applicant "probationary employee" thus incapable to institute the case of unfair termination against the applicant.*
- 3. Whether it was proper for the arbitrator to hold that the applicant had no valid reasons in terminating the respondent.*
- 4. Whether it was proper for the arbitrator to hold that the applicant did not follow the procedure in terminating the respondent.*
- 5. Whether it was proper for the arbitrate(sic) to award the respondent Tanzania shillings 24,455,316/=as compensation for unfair termination.*

When the application came for hearing the applicant was represented by Frank Munaku, while the respondent had the service of Mr. Msuya, both the leaned advocates. Parties agreed to dispose the preliminary objection by way of written submission, unfortunately, the respondent did not file the reply.

When Mr. Msuya appeared before the court on 6/7/2022 he orally submitted that after reading the applicant's written submission on the



second issue they had nothing to oppose and prayed to start afresh. Therefore, the court will not delve to paraphrase and discuss other grounds not subject of this ruling.

The respondent conceded to the second ground in which it was submitted by Mr. Munaku that the respondent's employment having not been confirmed by the applicant had no right to file a complaint on unfair termination to MCA. He cited the case of **Mtenga v University of Dar es Salaam** [1971] HCD 247 and **David Nzaligo v National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016 in which it was 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.

He added that evidence that respondent was not confirmed on employment came from DW4, the respondent and exhibit H1. He was of the view that status of the respondent being that of probationer was not entitled to file a complaint on unfair termination to the CMA and was not entitled to reliefs granted to him.]

I have perused the records of the CMA and found that through exhibit H1 the respondent was given a contract of unspecified period with a probation of six months. Evidence reveals that after expiry of probation



period the respondent continued to work and his employment was never confirmed, although he was being given all benefits as the employee. When he was terminated his employment was still to be confirmed by the applicant. Similar scenario was discussed in the case **Mtenga (supra)** in which the appellant was under probation of one year with the respondent, after one year probation time was extended for further one year. In the course the appellant was terminated. The appellant argued that he had been confirmed on employment after he received increment of salary. The court held that;

'I cannot spell out from them that the fact that the plaintiff was kept on after the expiry of the probationary period as laid down, and that an increments or increments has or have been paid, ipso facto establishes that the officer, who was originally appointed on probation, has in fact been confirmed by the Principal, for, as is crystal clear from the Regulations, it is only the Principal who has the power to confirm an officer in his appointment.'

The status of employee who undergo probation before the employment being confirmed attracted another discussion in the case so **Davido Mazengo v National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016 (also cited by the applicant). In this case the contract of employment provided that the employee had a probation period of six months



thereafter he could undergo the review for purpose of confirmation of employment. Having revealed evidence in record the court stated;

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....

See also the case of Stella **Temu v Tanzania Revenue Authority** [2005] TLR 178.

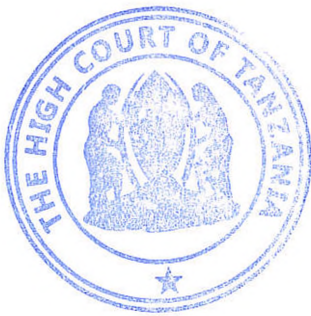
In this matter the contract of employment exhibit H1 at clause 3 provided that there will be a probationary period of six months at the commencement of the contract. The respondent during cross examination was emphatic that his employment had probationary period of six months and after expiry his employment was never confirmed by the applicant. It is the law that an employee on probation is not covered under the unfair termination provisions of section 35 to 40 of the Employment and Labour Relation Act [Cap 366 R: E 2019] and that fair termination principles does not extend and apply to employees on probation.

Thus, the CMA was not enjoined to deliberate the complaint of the respondent, instead it went on to grant the reliefs he claimed under the unfair termination procedure for his employment which was not yet confirmed by the applicant.



In the event, for the reasons stated hereinabove, the application is hereby allowed. The CMA award is quashed and set aside for the reasons raised by the applicant and conceded by the respondent. The respondent is at liberty to follow the proper course in pursuing his grievances. This being a Labour dispute, let each party to bear its own costs. Order Accordingly.

DATED at MBEYA this 9th of August, 2022.




D.P NGUNYALE
JUDGE