IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]
AT ARUSHA

REVISION APPLICATION NO. 118 OF 2021
(Originating from the Commission for Mediation and Arbitration at Arusha, Labour Dispute No. CMA/ARS/ARS/84/21)

LEONCE BARONGO ..... APPLICANT

Versus

MEGA BEVERAGES CO. LTD ..... RESPONDENT

JUDGMENT

10th & 19th August 2022

Masara, J

At the Commission for Mediation and Arbitration at Arusha (the CMA), **Leonce Barongo**, the Applicant herein, challenged his termination from employment. It was his case that he was employed by the Respondent as Sales Representative for a monthly salary of TZS 1,500,000/= since January 2021. He was recruited in Dar es Salaam on 05/01/2021 but was deployed in Arusha on 07/01/2021. He had worked for a period of almost four months when he was issued with a termination letter on 08/04/2021. The reason for his termination was bad driving. He challenged that termination vide labour dispute No. CMA/ARS/ARS/84/21 citing breach of contract of employment as the reason for his termination were unsatisfactory. After hearing of the evidence adduced and scrutinizing the exhibits tendered, the CMA observed that the Respondent was in breach

of the contract. It awarded him compensation of five months' salary to the tune of TZS 7,500,000/=. The Applicant was aggrieved by the award; specifically, the amount of damages awarded.

Before dealing with the substance of the Revision, I find it apt to narrate, albeit briefly, the case for both sides. At the CMA, the Applicant stated that he was recruited as a Sales Representative and not a driver. That he was never given a car to drive. He also challenged his termination because up to the time of his termination, he had never received any warning letter or issued with a notice to appear in any disciplinary hearing. On the nature of employment, the Applicant stated that he had permanent oral contract with the Respondent. In the CMA Form 1, he claimed the remaining salaries until retirement, which he calculated to the tune of TZS 252,000,000/= plus other incidental terminal benefits as stipulated in that form. He termed them as damages arising out of the breach of his employment contract by the Respondent.

On her part, the Respondent through Angela Msechu, stated that the Applicant was employed on a fixed term contract of two years, as evidenced by the job offer letter, exhibit D1. The Respondent was emphatic the company has no permanent contract employees. Ms Msechu added that the job offer letter was to be signed by the Applicant after

completion of the driving tests, which was a condition precedent before confirming an employee in the position like that of the Applicant. She stated that the Applicant was terminated while on probation. According to DW1, after resolving to terminate the Applicant, he was paid all his terminal benefits; including, worked salaries, notice, leave and transport to the place of recruitment. The Applicant was also issued with a certificate of service.

Turning back to the Application before me, the Applicant supported his application with an affidavit detailing the points of contention. The Respondent contested the application by filing a notice of opposition and a counter affidavit deponed by one Ngereka Miraji. At the hearing of the application, the Applicant was represented by Mr. Desidery Ndibalema, learned advocate, while the Respondent was represented by Mr Ngereka Miraji, learned advocate. The application was heard through filing of written submissions.

In the affidavit in support of the Application, Mr Ndibalema raised three issues calling for this Court's determination. First, Mr. Ndibalema contended that the CMA award was against fair labour practices. That, having found that the Applicant was eligible to claim for breach of contract, the Arbitrator ought to have awarded him payment of the

remaining salaries to his retirement. He added that the Award by the CMA was devoid of legal base as it was founded on assumption, sympathy and mercy contrary to the tenets of law. According to Mr Ndibalema, courts should be cautious to avoid decisions based on sympathy; rather, decisions must be based on law. To support his argument, he referred the Court to the decisions in **Daphne Parry vs Murray Alexander Carson (1963) E.A 546** and **Hemed Said vs Mohamed Mbilu [1984] TLR 113.**

Mr. Ndibalema further submitted that the Applicant left his former employment with Alaska after he secured attractive package from the Respondent, a fact which ought to have been considered by the CMA before awarding five months' compensation. That, in addition to that, the Applicant was recruited from Dar es salaam; thus, had a legitimate expectation of working with the Respondent until his retirement. Counsel for the Applicant insisted that had the Arbitrator taken into consideration all the above factors, the amount awardable to the Applicant would have been more. He termed the breach as a fundamental one which touched the Applicant's entire family, concluding that Since breach was proved, it attracted damages of the remaining salaries of TZS 252,000,000/= and the other claimed benefits.

Secondly, Mr Ndibalema submitted that the employment contract was not terminated based on the Applicant's poor performance. It was the Respondent who deliberately breached the contract as there was no warning letter issued to him. Hence, the Arbitrator ought to have taken into consideration damages suffered by the Applicant. Mr Ndibalema fortified that any breach of contract attracts damages by the injured party, citing the case of **Photo Production vs Securica Transport Ltd (1980) 1 All ER 566,** to buttress his argument. According to Mr Ndibelema, the Applicant lost employment and income. He also incurred other undesirable consequences which attracted awarding the claimed sum so as to restore him in a better position. He thus invited this Court to award him the amount claimed in the CMA F1.

Lastly, Mr Ndibalema faulted the Arbitrator for accepting Exhibit D1 (job offer) as proof of the contract terms. He amplified that the Applicant had entered into permanent oral contract with the Respondent. That exhibit D1 was not signed by the Applicant, it was seen for the first time on the hearing day. He referred this Court to section 9 of the Law of Contract Act which requires acceptance of any offer by offeree so as to constitute a valid agreement. That, since the said job offer was unsigned by the Applicant, there was no acceptance on the part of the Applicant. It was

his further submission that the onus of proving existence or non-existence of a contract lies with the Respondent who failed to disprove existence of oral contract as per section 15(6) of the Employment and Labour Relations Act (ELRA). He made reference to the case of **Bakari Jabir Nyambuka vs QCD Supplies & Logistics, Revision Application No. 962 of 2018** (unreported) to support his contention that his contract was for unspecified period of time. Furthermore, Mr Ndibalema contended that the Respondent failed to prove that the Applicant was on probation. He urged the Court to order payment of the claimed sum until retirement since the amount awarded by the CMA was unfair and without any legal basis.

Mr Miraji vehemently contested the submissions by Mr Ndibalema. He submitted that the Applicant was on probation. To support his argument, he referred to the decision in **David Nzaligo vs National Microfinance Bank Plc, Civil Appeal No. 61 of 2016** (unreported). According to Mr Miraji, it was not possible for the Applicant to have a legitimate expectation of working with the Respondent until retirement since the Applicant was yet to be confirmed. It was Mr Miraji's further contention that compensation is awarded to support the injured party so as to survive while looking for another opportunity, but not to punish the employer. To

him, as long as the Applicant was under probation, the claim of TZS 252,000,000/= if honoured will be punitive to the Respondent contrary to the principles of labour law. He relied on the decision in the case of **USAID Wajibika Project vs Joseph Mandago & Edwin Nkwanga, Revision Application No. 208 of 2014.**

Mr Miraji labelled the contention that the Applicant had a permanent oral contract to be unfounded since the terms of such contract are unknown. He made reference to section 14(2) of the Employment and Labour Relations Act which mandatorily requires employment contract to be in writing. He fortified that the Applicant was not on a permanent employment contract, that he was still under probation but failed to meet the standards, customs and practices of the job position offered to him, hence the Respondent was forced to end up the probation and paid all his terminal benefits.

Regarding the contention that the Applicant left his previous employment expecting better pay, Mr Miraji contended that the Applicant failed to prove that he had a contract with Alaska before as purported. Similarly, it was Mr. Miraji's submission that there was no proof of damages suffered by the Applicant as alleged. In his view, the case of **Tanzania Bureau of Standards** (supra) relied on by the Arbitrator was appropriate because

it encapsulates clearly unfair labour practices and the relief available to employees who are on probation. He urged the Court to uphold the CMA decision as there was no contract between the Applicant and the Respondent warranting payment the damages claimed.

Lastly, it was Mr. Miraji's contention that in his testimony at the CMA, the Applicant did not disclose terms of the purported oral contract, implying that there was no such oral permanent contract. He maintained that exhibit D1 stood as the only proof that the Applicant was a probationary employee of the Respondent. In his view, section 9 of the Law of Contract Act is inapplicable in the prevailing circumstances. He reiterated his submissions that employment contract must be in writing, stating that the Applicant's counsel has read section 14(1) in isolation to section 14(2). Mr Miraji concluded that the TZS 7,500,000/= awarded to the Applicant was a fair compensation. He concluded by imploring the Court to dismiss the application for being devoid of merits.

In rejoinder submission, Mr Ndibalema opposed the contentions raised by Counsel for the Respondent regarding the acts of the Respondent. In his view, as long as the Respondent did not appeal against the CMA Award, the contention that the Respondent was not in breach of the contract does not arise. He added that the Respondent failed to prove that the Applicant

was on probation because had it been so, the Respondent would not have proceeded to pay the Applicant his terminal benefits, such as salary for the worked days, one month salary in lieu of notice, unpaid leave and transport to the place of recruitment. According to Mr Ndibalema, probation is not mandatory to every employee, as that is a private arrangement between an employer and employee. Furthermore, it was his submission that section 14(2) of the Employment Act cited by Mr Miraji is inapplicable in the case at hand as it applies to contracts in respect of all employees working outside Tanzania and not those working within the country.

I have critically considered the submissions made; including the affidavits of the parties and annexes thereto. The issue before me is whether the CMA decision of the CMA should be varied on the grounds raised by the Applicant.

The gist of the first ground of contention relates to the fact that the CMA Arbitrator failed to award the amount claimed by the Applicant in the CMA F1; that is, the remaining salaries and the other terminal benefits as enlisted in that form. According to Mr Ndibalema, since the Applicant had an oral permanent contract with the Respondent and since the CMA had ruled that the Respondent was in breach of that contract, the CMA ought

to have awarded damages pleaded by the Applicant. On his part, Mr Miraji supported the decision of the CMA on the ground that compensation is awarded to adjust and place the victim in a position to survive but it does not operate to punish the employer.

To address this ground, the first question to pose is whether there was an employment contract between the Applicant and the Respondent. From the evidence of Ms Msechu, the Human Resources Officer of the Respondent, before a person is employed as a Sales Representative, he must first be subjected to a driving test. Upon passing the driving test, it is when the job offer letter (employment contract) is signed and other documents, including guarantor form are also completed. She tendered the said offer letter which was admitted as exhibit D1. As to why exhibit D1 was unsigned by the Applicant, Ms Msechu said the following:

> *"The date of signing of the offer letter was the date also fixed for drive test. On the drive test day, the Applicant requested for rescheduling. This is it (sic) was not signed. The Applicant drive test was held on 11/01/2021 and the second was held on 05/04/2021 ..."*

In labour disputes, it is the duty of the employer to prove or disprove any term of the contract of employment. This is provided under section 15(6) of the Employment Act, which provides:

"(6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."

The said legal position was reaffirmed in the case of **Kundan Sigh Construction Co. Ltd vs Sohan Lal Singh, Revision No.31 of 2013** where this Court stated as follows:

"However, the law is very clear in a situation where there are no written terms of employment contract, See Section 15 (1) (b), (e), (h) (i) and 15 (6) of the Employment and Labour Relations Act, No.6 of 2004. With such position of the law and considering the evidence on record the applicant has the duty to prove that there was a temporary term contract as he alleged. Since the applicant did not supply any contract to the respondent, I cannot hesitate to say that he failed to discharge his duty to prove that the contract was a temporary one. In that regard I find no reason to fault the Arbitrator in his decision that there was a permanent employment contract."

I should state at the outset that the document, exhibit D1, presented as the offer letter lacks a number of details crucial to the employment terms offered to the Applicant. Whether the same was presented to the Applicant or not remains a mystery as the same is not signed by the Applicant. The reasons advanced by Ms Msechu appears novel. If passing of driving test was a condition precedent for signing of a permanent

contract of employment, one would have expected to find such a clause in the said contract. It is therefore my conclusion that although existence of an employment contract between the parties herein cannot be denied, such contract was not based on Exhibit D1 as alleged.

The next question is whether there was an oral permanent contract. I find it difficult to agree with the contention of Mr Ndibalema that the relationship between his client and that of the Respondent was meant to be an oral permanent contract. That would be a very irresponsible and unprofessional act from both sides. In his evidence, the Applicant stated that apart from the TZS 1,500,000/= monthly salary, the employer offered other packages such as 40% for his children school fees, house allowance and health insurance. These benefits could not be enforced in the absence of a written contract. Similarly, permanent contracts once made orally, pose difficulties in their enforcement. I therefore do not agree with Mr Ndibalema that the Applicant had an oral permanent contract with the Respondent.

Ms Msechu, in her evidence, stated that the Respondent does not issue permanent contracts; that they only have specific term contracts. She added that the Applicant was employed on a two years contract term. Going by the evidence of Ms Msechu, the two had a written contract (may

be exhibit D1), only that the same was yet to be signed by the Applicant on reasons best known to the parties.

As per the records, the Applicant undertook two driving tests, on 11/01/2021 and the second on 05/04/2021. It is evident that the Applicant's performance, according to exhibits D2, did not please the management of the Respondent. They, thus opted to terminate him. As correctly decided by the Arbitrator, this termination cannot be said to be justified.

On the damages awarded by the CMA, whereas I do not subscribe to the contention that passing of driving test was a condition precedent for the existence of the contract of employment between the parties herein, I agree with the findings of the CMA that the Applicant's claims of damages up to the time of his retirement cannot succeed. I also agree with him that, considering the time he had worked for the Respondent, the Applicant is not covered by unfair termination principles, but he is covered by unfair labour practices as stipulated by Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, G. N No. 42 of 2007. There is no doubt that the Respondent was in breach of the employment contract that she had entered into with the Applicant. The question is

whether the damages awarded is fair and just in the circumstances of the case.

I do subscribe with the holding of the honourable arbitrator and the submission of Mr Miraji that compensation in labour matters does not operate to punish the employer. Damages are paid in order to place the employee in a better position to survive and look for opportunities elsewhere. Awarding the Applicant TZS 252,000,000/= would not only be unfair to the employer but would be absurd. I associate myself with what was observed in the cited case of **USAID Wajibika Project vs Joseph Mandago and Another** (supra), where the Court insisted on a fair, just and equitable compensation, which does not act as punitive to the employer. In that case the Court further established the principle that compensation in labour matters is awarded as solace (relief) and not to punish the employer or enrich the employee.

The Applicant had only worked for four months by the time of his termination. It is also understandable that the amount paid to him may not have been satisfactory considering that he had just moved from his place of domicile with optimism that he had gotten a job to take care of himself and his family. I also take note that before terminating the Applicant, the Respondent paid him some terminal benefits as reflected

in exhibits D3 and D4, a fact which the Applicant did not dispute. Taking that into account, I believe the amount of TZS 7,500,000/= awarded as compensation was slightly on the low side. It is common knowledge that getting a new job in the current job market requires more than five months, if one is lucky to get one. I believe compensation of eight months' salary would meet the lost expectations by the Applicant and enable him to seek for alternative employment.

Regarding the other grounds relied by the Applicant, I believe the same are adequately covered with what I have endeavoured to deal with above. Mr Ndibalema submitted that the Applicant suffered damages as he is depended on by his family and that he left his job with another employer, Alaska, after securing an attractive package from the Respondent. He added that the Applicant lost not only his job but also an income; thus, he should be awarded damages claimed. It is unfortunate that no proof of previous employment was submitted by the Applicant. That said however, the adjustments made in the quantum to be paid will greatly mitigate the said damages.

In the last ground, the Applicant faults the CMA award for finding that the Applicant was on probation. The unsigned letter of offer may have been the reason why the learned arbitrator concluded that the Applicant was

on probation. That document, as already stated, does not satisfy to be a basis for the relationship that existed between the parties herein. The Arbitrator also appear not to give it such weight although he appears to have concluded that the Applicant was on probation. Even if he had concluded differently, the outcome may not have been any different. I do agree with Mr Ndibalema's argument that probation is not mandatory and there is no specific provision in the labour laws that provides for mandatory probation of an employee. That notwithstanding, this Court has consistently emphasized that, under normal circumstances, employers must subject employees to probation so as to test and asses the employee's ability and compatibility to the position employed. This is per the decision in **WS Insight Ltd (Formerly known as Warrior Security Limited) vs Dennis Nguaro, Revision Application No. 90 of 2019 (DSM Lab Div)**, where it was held *inter alia* 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."* (Emphasis added)

Similarly, though not specifically stated, section 35 of the Employment Act when read together with Rule 10(1) of G.N No. 42 of 2007 identifies all employees with less than 6 months' employment with the same employer, whether under one or more contracts as probational employees. In the case at hand, the Applicant worked with the Respondent for only four months. In the circumstances one can correctly conclude that he was still on probation. Being a probational employee, the Applicant cannot claim the remaining salaries.

On the basis of the above observation and analysis, the Applicant's revision application succeeds only partially. The CMA award is varied by substituting damages to be paid to the Applicant from five months' salary compensation to eight months' salary compensation; to wit from TZS 7,500,000/= to TZS 12,000,000/=. The same to be paid with immediate effect. This being a labour dispute, each party shall bear their own costs. It is so ordered.

Y. B. Masara

JUDGE

19th August 2022