IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MUSOMA

LOBOUR REVISION NO 18 OF 2021

(Originated from Dispute Number CMA/MUS/174/2020

SAMWEL AKIM KAJIGILI ..... APPLICANT

VERSUS

CRDB BANK PLC ..... RESPONDENT

JUDGEMENT

1st June & 19th August, 2022

F. H. MAHIMBALI, J :

The applicant in this case was employed by the respondent from 2012 – 2019 under fixed term contract which was renewable after each and three years. He worked with the respondent and raised in his employment up to the post of Operational Manager. However, in January 2020, the applicant was offered with the permanent contract with new terms which, led him to be on probational services for a period of six months. Before the maturity or expiration of the probational term, the applicant's employment was terminated on April 2020 following allegations of misconduct, allegedly committed by him during his previous term of service on contractual basis. The applicant lodged his

complaint before the CMA at Musoma alleging that his termination was not fair in terms of fair procedural and fair reasons and that the claims against him were not proved beyond reasonable doubt. Thus, as per his CMA F1, the nature of the dispute is unfair labour practice. That the employer has shown bad practice by terminating the applicant without proper procedures and fair reasons. He thus prayed for reinstatement without loss of income.

Upon hearing of the application before the CMA, the arbitrator ruled that there was no proof that there was unfair labour practice against him, thus the applicant's claims were not established pursuant to section 110(1), (2) of the Evidence Act, Cap 6, R.E 2019. He is aggrieved by that decision thus the basis of this revision application.

The issues the applicant wants to invite this Court is to respond are four:

i. *Whether there was unfair labour practice by the Respondent.*

ii. *Whether there was discrimination during termination*

iii. *Whether the arbitrator analysed properly the evidence before her to arrive in her decision.*

iv. Whether it was proper for the Arbitrator to rule out that there was no unfair labour practice by the respondent.

During the hearing of the revision, Mr. Mhagama learned advocate represented the applicant whereas the respondent was dully represented by Mr. Galati learned advocate.

On his part, Mr. Mhagama first prayed the affidavit of one Ernest Mhagama be adopted to form part of the revision's application. He submitted that the dispute at CMA was for unfair labour practice. The reason why the applicant opted for unfair labour practice dispute instead of unfair termination are these. The applicant was employed by the respondent from 2012 – 2019 under fixed term contract which was renewable after each and three years. However, in January 2020, the applicant was given permanent contract. The same was terminated on April 2020 following allegations of misconduct.

His contention is that, the permanent contract is a new contract with new status of employment. All the previous rights duties, obligations, offences died a natural death upon engagement to his new terms of employment. Thus, following the April termination, the applicant preferred this dispute instead of unfair termination because according to section 35 of ELRA Act 6 of 2004, the only employee who

can file unfair termination is the one who attained at least 6 months of service in the employment. He cherished this position as well articulated in the case of **Agness B. Ruhere vs UTT Micro Finance PLC,** Labour Revision no 459 of 2015 (at Dar es Salaam). Thus, the remedy for a person terminated while in permanent employment but who is below six months of service has to file what is called unfair labour practice. This is also amplified by the same case of **Agness B. Ruhere** (supra). The probationer like any other employee is entitled to consideration of many other issues. In essence there is no clear definition of what is unfair labour practice. However, he invited this court to have a look in a neighbouring jurisdiction of South Africa, in the case of **Apollo Tyres South Africa (PTY) Limited vs Commissioner for Conciliation and Mediation and 2 others**, the Labour Court Appeal of South Africa – Durban, made an elaboration where an employee is terminated without following proper procedures outlined by law, that act amounts to unfair labour practice (at pages 15-16). He added that at CMA, the employer never at all established that the applicant breached any terms of contract of his employment in his new terms of service which amounted to termination of his employment as done. All witnesses testified for issues arising prior to the new employment status. In the circumstance of the case, it was improper for an employee to be

punished for offences which were committed for in a previous contract which no longer existed. The new contract entails new terms and obligations even if working with the same employer but on different terms. That was a new employment. An act of giving an employee a permanent and pensionable contract, is a sign of good trust to the employee. As per CMA records PW1 and PW2 explained thoroughly how to withdraw money from bank (Exhibit P.3 – circular).

On the framed charges/claims against the applicant, the Bank circular is very clear on how to issue out money from one Bank's account to the employer. The requirement that the said money must be known its source is not a circular requirement of the respondent. Exhibit P4 (circular) which was relied by the employer was issued later (i.e Bank Circular No. 2/2020). Prior to that, the operational circular for 2018 and 2019 was exhibit P3 which had different directives from those issued in circular no. 2/2020.

Even if the respondent had a lawful cause against the applicant (employee) he ought to have dealt with him as probationer and not as an employee approved for permanent basis, he added Mr. Mhagama. How the probationer is punished, the case of **Agness B. Ruhere** (supra) is elaborative. As per rule 10 (1) – (9) of the ELRA (Code of

Good Practice) GN 42 of 2007, there must first be **evaluation, instruction, training guidance, counselling, representation** prior to termination). Therefore, it is improper and unfair for an employer to terminate a new employee basing on the procedures other than those used to terminate a probationer. That is improper, emphasised Mr. Mhagama, leraned advocate and added that it also established the issue that there was unfair labour practice.

Whether there was discrimination in the said termination, he relied the decision of CMA at page 4. PW1 had testified how his fellow employees such as Nyandindi Cosmas etc, though charged together, but were re-engaged to the employment but the applicant was not. That was discrimination as all were charged with the same offence. The testimony of Dw1 (HR of the respondent) is clear that Nyandindi and Cosmas were still CRDB employees but not the applicant.

Whether the arbitrator properly analysed evidence of the dispute before CMA, he submitted that the answer is in negative. He relied on this answer, considering the undergoing submission that the CMA's decision is not well reasoned. The simple question he put was one, what reasons were there for the applicant not to be reinstated together with the other charged employees Nyandindi and Cosmas? As what was

stated by the applicant was not a mere story but what was investigated by the respondent (D.6), he reasoned that the arbitrator ought to have made a detailed analysis in his decision.

Lastly, whether it was proper for the arbitrator to rule out that there was no unfair labour practice by the respondent, he concluded that as the applicant was a probationer, the provided material and submission did not suffice the establishment that the applicant was terminated improperly, thus purely there was unfair labour practice by the respondent to the applicant.

With this submission, he made a finding that the employer/respondent improperly terminated the employment of the applicant. He thus prays that this court as per form no 1 of CMA, the applicant be reinstated to work.

In resisting the revision application, Mr. Galati learned advocate while relying on the detailed counter affidavit first prayed to adopt it to form part of his submission.

In his submission, he first agreed that the applicant was terminated his employment while under probation (4 months). However, he differed with Mr. Mhagama on the aspect that on that with the new

employment terms, the applicant was working with a new employer. That is not true but under new employment. That being the case, whatever the applicant did in the previous contract could be a ground for his termination or disciplinary action had **there been discovery of misconduct of the employer**. To him, it sounds odd that whatever was done by the employee in the former transactions should be foregone just because of new status of employment but with the same employer. As this dispute was filed at CMA by the applicant on the claim of unfair labour practice, he did so, only because to avoid the applicability of section 35 of the ELRA. In other words, the learned counsel submits that had it been filed as unfair termination, then the provisions of section 35 of ELRA would come into play, thus his claim could be baseless. He added that, despite this latter approach, the claims were liable for dismissal. Under section 35 of ERLA, matters relating to unfair termination to employees under probation, could not be adjudicated by CMA. Any claim for unfair termination, even if based on unfair labour practice, cannot be dealt with by CMA. He clarified that, an employee who is under probation, he is under practical interview. A person who is under practical interview, cannot contest the termination unlike confirmed employees. He relied on this was the position in the

case of **Stella Temi vs TRA** (2005) TLR 178 where at page 189, Ramadhani J. A.

With the decision of **Agness** referred by Mr. Mhagama, he labelled it as misleading if not objectively digested. What the judge reasoned in that case in one aspect is the relevancy of section 35 of ELRA. He then went further to import the regulations made under that law to negate what the Principal Act dictates. That is not proper. What is provided under rule 10 (6), is the treatment of the probational employee. Thus, the provision under rule 10 (6) can not in any way override the express provision of section 35 of the ELRA. In essence, the probational employee has neither right to challenge the reason nor even question the procedure of his termination. That said what was filed at CMA, legally ought not even to be heard from the beginning.

On the merit of the application, he argued that assuming the applicant had served the employer for more than six months, his main complaint that he was discriminated, he agreed with Mr. Mhagama on the cited case as far as the definition of unfair labour practice is concerned, at page16 of the said decision. However, he added that in **Merrian Webster Dictionary**, the word unfair labour practice is defined as "*various acts of employer or labour organisations that violate*

the rights or protection applicable under labour laws." He thought this is what the applicant ought to have established to be entitled of the reliefs he was seeking for.

That the applicant was charged together with other employees but was lonely terminated and considering it as indiscrimination, he contested it to be unfair labour practice in line with the cited case of South Africa. That notwithstanding, he argued that charging five persons acquitting 4 and convicting one is not unfair labour practice. That also depends on the level and extent of involvement to the offence one has been charged and convicted with. With this, the decision of the arbitrator is very clear. She had been very categorical as the employee failed to substantiate what is unfair labour practice in the context of this dispute. She rightly referred section 110 of TEA on whom burden of proof lies on claims of unfair labour practice.

What he gathered from the submission of Mr. Mhagama is this, after he had filed the case under unfair labour practice, he treated the case as unfair termination which he himself had avoided it for fear of being trapped by the intricacies of section 35 of ELRA. He added that at the CMA, the applicant didn't give sufficient evidence to establish the claims so as to convince the arbitrator that the employer committed any

act which violated the applicant's right or protection applicable under the law which are ingredients of unlawful labour practice.

Equating his submission to the issues raised in the application, he had the following:

- The first issue weather there was unfair labour practice by the respondent, the available material negates the assertion.

- Equally the submission serves for the issue number two as well because for him being convicted is not basis for conviction of all charged persons as there is an issue of proof and level of participation.

- As regards to the third issue, he answered it in affirmative because the trial arbitrator could not consider the fact that the new employment terms was equal to working with the new employer. The employer could take it as an offense committed by his employees, provided the said offense was discovered when the employee was under new contract of employment. Having so discovered, that was a good factor to influence the employer whether he could continue with that employee in the new terms.

All this in consideration, the fourth issue is answered in affirmative.

In winding up his submission, he submitted that what is contained in CMA's form no 1 is unfair labour practice. Since CMA's form no 1 stands for pleadings, parties are bound by their pleadings. The question is whether, the act of the employer to terminate his employee basing on previous acts amounts to unfair labour practice. He replied no. Thus, the application before this court is of no merit, the same stands to be dismissed.

In his rejoinder submission, Mr. Mhagama insisted that the central of this dispute is that the applicant was a probationer employee, therefore was not properly terminated as per law (Rule 10 (1) of GN 42 of 2007).

As per D6 exhibit, the report is clear as who were responsible, but only the applicant was victimized.

With the case of **Stella Tema** cited by Mr. Galati, he submitted that this case is not applicable in the circumstances of this case. They did not discuss about Section 35 ERLA. After all it was not applicable by that time and the circumstances are distinguishable.

That unfair labour practice for a probationer employee is not adjudicated by CMA is not true as there is no authority provided. Whether the employee was in new employment is undisputed. But by working on new employment terms with the same employer in the former terms technically there were new employee and employer. Thus, the old issues could not operate/override into the new terms.

Mr. Mhagama kept on insisting that though the case of Agness is a High Court case, but it has laid down good procedure on the subject under discussion. He persuaded me to consider it as a good law. As per this submission, the decision of the trial Arbitrator was not proper in the circumstances of this case.

Having heard the submissions and arguments from both counsel, the important question to ask is whether the revision application is merited. In reaching that end, I will be responding to the issues posed for this Court's consideration and guidance.

In essence it is uncontested that the applicant was once employed by the respondent on fixed term of contract before being offered the new terms of his employment on permanent basis with a probation of six months from January 2020. Unfortunately, his new employment expired on 21st April 2020 prior to the maturity of six months'

probationary period. According to law the employee on probationary period can not seek refuge under section 35 of the ELRA as he is in fact applying the import of the decision of the Court of Appeal in **Stella Temu** (supra), that while under the period of probation, the appellant was under a "practical interview". See also the case of **David Nzaligo Vs. International Microfinance Bank PLC**, Civil Appeal No. 61 of 2016, CAT at Dar es Salaam in which it confirmed the old position in **Stella Temu** (supra).

The first issue for consideration by this Court which was deliberated at CMA is whether there was unfair labour practice by the Respondent. Mr. Mhagama's position is this since the applicant was employed in permanent terms and was still in probation, he ought to have been dealt with like a probationer and be held responsible only for duties in his new employment terms. For him to be held liable for old deeds in a new employment was not proper and therefore unfair labour practice. On the other hand, Mr. Galati is of the firm view that, the employer cannot close eyes against his employee working in new terms as it is not exemption of old offences committed by the employee though in different terms.

I have gone through the CMA records and examined the available evidence there in. As per D6 exhibit (The investigation report dated 14th October, 2019) the investigation process against the applicant commenced from September 2019 and completed in October, 2019. Therefore, by the time the applicant was offered new terms of employment in January 2020 working on permanent basis but under probationary period of six months, the respondent knew very well what was intended to be achieved in dealing with the applicant. In my digest to the facts of the case, I agree with Mr. Galati that a probationary employee is in a practical interview. One fails or passes an interview just in the interview room. The failing candidate has no privilege of knowing why he has failed the interview called for. That was the old position in **Stella Temu's** case but retained in our jurisdiction by the case of **David Nzaligo Vs. International Microfinance Bank PLC** (supra). Whereas I agree that the probationary employee is in a practical interview, he is only assessed, evaluated and punished for the work he has been assigned during the practical period of his interview. As he is in new terms of employment, it is hardly possible for him to be punished or held incapable for old duties in which he was passed to have done successfully unless its investigation had validly commenced during the probationary period. As each case must be considered by its own facts,

in the circumstances of this case, it is unjustifiable by the respondent to change terms of the applicant's employment to new terms (making him vulnerable for termination on practical interview – probational employee) while investigations against him had already been commenced (Exhibit D6 read together with Annexture B -undisputed). This is like fooling one by giving him attracting terms but on the hand making him vulnerable for termination). As the applicant's termination working under probationary period was out of the scope of Code of Good Practice (Rule 10 (1) – (9), his termination is regarded as unfair labour practice as per law. The position would have been different had the investigation leading to the discovery of the alleged offence was discovered in the course of new employment.

Though the probationary employee cannot question or challenge termination of his employment under ELRA (section 35), if there is unfair labour practice he can challenge it by code of good conduct (Rule 10 (1) - (9) GN 42 OF 2007 (see Agness case (supra)). With this position, I consider it with issue no. 4. It was not proper for the Arbitrator to rule out that there was no unfair labour practice by the respondent in the circumstances of this case. I think the employer had

the best way to deal with him, should these accusations had merited. Otherwise, any choice has consequences.

With issue no. 2, whether there was discrimination during termination of the applicant. According to exhibit D6 (Investigation report), the following bank staffs: Samweli Kajigili and Humphrey Nyandindi of CRDB Tarime Branch were held responsible for approving **huge cash withdrawals** from account number 0152390320700 i.n.o AMANI GITETA AMANI and account number 0152214521700 i.n.o LAURENT MWITA DAUDI without confirming and verifying the source and nature of fund credited into customers' accounts and exposing the bank into potential loss of TZS 195,350,000.00. It was recommended that disciplinary actions should be taken against them. Other respondent's employees recommended for disciplinary actions were John Mshora, Charles Wanyancha, Joseph Manyama Komba who were held responsible for other offences such as opening bank account number 0152214521700 i.n.o LAURENT MWITA DAUDI and using Clearing and Forwarding Agent's card which is not recommended by the Bank (John Mshora). Mr. Charles Wanyancha suppressed the client's account for his personal interests and committed fraud against Bank's clients. Also disciplinary actions were recommended against him. Another disciplinary

action recommended for Bank's action was against Joseph Manyama Komba who was held responsible for concealing fraud information and failure to report the relevant authority on the offence committed. As if this is not enough, the investigation report also established to have held responsible the following Bank staffs: SOPHIA ELISONGUO KIMARO, ASTRIDIA RUMANYIKA, SALMA HAMAD KIBWANA and HURBERT ABRAHAM MAKUPA for approving huge withdraws from account numbers 0152390320700 and 0152214521700.

With this report, it is obvious that the investigating report established a number of employees responsible for various bank offences (CRDB Bank's policies and procedures and CRDB Bank's personnel Manual). Similarly, the testimony of DW1 and DW2 established some of the employees still going on with the work. Unfortunately, this is just an investigative report, this Court could not establish records in CMA what actions were taken against those other employees, but I may just hold that depending on each one's role played in the commission of the said Bank offences, the employer had an option of dealing with respective employee as per the gravity of the offence committed by each. What I have gathered from D6 exhibit, the applicant's accusations were stronger and deserved severe penal

measures. However, it is faulted on the timing of the charge and the position of the new terms of his employment.

With the issue whether the arbitrator analysed properly the evidence before she arrived in her decision, I think she did it. However, in my considered view, looking it from the other angle, it was unfair labour practice in the circumstances of this case for the employer to offer new terms to the applicant in and yet apply the old conducts to terminate his new employment. On that basis, though there is an analysis of evidence by the CMA's Arbitrator, however in the circumstances of this case the permanent contract is a new contract with new status of employment. All the previous rights, duties, obligations, offences died a natural death upon engagement to his new terms of employment. Thus, following the April termination, there is no offence established to have been committed by the applicant in the course of his probationary period for him to warrant termination pursuant to Code of Good Practice (Rule 10 (1) – (9), GN 42 of 2007. What has been established by the Respondent is the fact that he mounted investigation with the applicant while still serving in old contract. He decided then to offer a new contract with new terms tactically to make him easily fired under the umbrella of probationary

employee. Since section 35 of ELRA Act 6 of 2004, does not apply to employees working under probationary service, however it is not an open permit for him to be fired on previous terms while he is in probationary period and for investigations commenced prior to the offering of new terms.

That said, the revision application succeeds. The termination of the applicant for offences committed not during probationary period is equal to unfair labour practice. The applicant is hereby ordered to be reinstated to his place of work without loss of remuneration or be paid compensation equivalent to twelve months' salaries.

DATED at MUSOMA this 19th day of August, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 19th day of August, 2021 in the presence of the appellant, Mary Joachim, advocate for Galati, advocate for the respondent and Mr. Gidion Mugoa, RMA

F. H. Mahimbali

JUDGE