IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

APPLICATION FOR REVISION NO. 39 OF 2021

(Original Labour Dispute No. CMA/KLM/HAI/ARB/98/2020)

AIRLINE DIRECT LIMITED ..... APPLICANT

VERSUS

SNAFFLE SAMSON JANDWA ..... RESPONDENT

JUDGMENT

1/11/2022 & 11/11/2022

L.M. MLACHA, J

The applicant, Airlines Direct Limited, filed an application for revision against the decision of the Commission for Mediation and Arbitration for Kilimanjaro (the CMA) made in CMA/KLM/HAI/ARB/98/2020. The application is made under Section 91(1) (a) (b), 2(a) (b) (c) and Section 94(1) (b) (i) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 and Rule 24(1), (2)(a)(b)(c)(d)(e)(f), 3(a)(b)(c)(d) and Rule 28 (1) (a)(b)(c) (d) (e) of the Labour Court Rules GN No. 106/2007 and is supported by the affidavit of Shedrack Boniface Mofulu stating the grounds upon which the application is made. Para 4 of the affidavit presented 4 grounds which read thus:-

a) That the Commission erred in Law and fact in finding that the Respondent was confirmed into his employment service by default

on part of employer while there was no default on employers part and no confirmation letter was issued to the respondent.

b) That the commission erred in Law and facts in finding that the respondent was entitled to the remedies provided for under unfair termination while the respondent was still under probation period and not confirmed by the applicant.

c) That the Commission erred in Law and fact for failure to consider that the Respondent was under Probation period and the procedures for unfair termination are not applicable to the Respondent.

d) That the Commission erred in Law and fact by providing the Respondents with remedies for unfair termination while the respondent was under Probation period.

The respondent, Snaffle Samson Jandwa is resisting the revision and filed a counter affidavit sworn by himself. The applicant is represented by Mr. Shadrack Mofulu while the respondent has the services of Mr. Engelbert Boniface and Mr. Elisante Kimaro. The counsel made oral submissions to support their respective positions.

Submitting on ground one, Mr.Shadrack told the court that the CMA assumed that the respondent was confirmed in his job wrongly. He said that the respondent was employed and put on probation and was yet to be confirmed at the date of termination. Counsel referred the court to Section 10(4) of the Employment and Labour Relations (Code of Good Conduct) Regulations G.N. 42/2007 which allows a probation of a period not exceeding 12 months. He went on to submit that the offer letter given

to the respondent has a probation period of 3 months but he worked up to the 11th months without a confirmation letter. He was terminated on the 11th month. He referred the court to the decision of this court made in **W.S. INSIGHT LTD (Formerly Known as WARRIOR SECURITY LTD) v. Denis Nguaro,** Labour Revision No. 90/2019 (Muruke, J) where it was held that there is no automatic confirmation of employment in law. He concluded that the CMA erred in assuming that the respondent was confirmed automatically at the expiration of 3 months. Counsel submitted in ground two and told the court that the CMA erred in giving termination remedies to the respondent who was still under probation. In grounds three and four counsel submitted that an employee who is under probation is not entitled to remedies available to employees contained in part E of the Employment and Labour Relations Act. He referred the court to Sections 35, 36 and 37 of the Act which have remedies for unfair termination which he submitted that are not available to employees under probation. He referred the court to **Mount Kilimanjaro Safari Club v. Hannce Rodgers**, Labour Revision No. 108/2017 (Gwae J) page 4 and **Stella Temu v. TRA,** Civil Appeal No. 72/2002 (CAT) page 11 where it was said that employees who are under probation are not entitled to remedies for unfair termination.

Submitting in reply, Mr. Engelbert referred the court to the case of **The Concern for Development Initiative in Africa (For DIA) and another v. AMBERO CONSULTING Gessellschaff mbH and another**, Civil Appeal No. 26/2017 (CAT) page 16 and argued that parties must be bound by the terms of the contract. He told the court that reading through the employment letter, exhibit A1, he could see nowhere written

that after the lapse of 3 months, the employer may or may not confirm the employee in his job. He said that the applicant is bound by the letter. Responding to the submission made on rule 10(4) of GN 42/2007, counsel submitted that what is provided under rule 10(4) is that the probation period should not exceed 12 months. The law did not say that the probation period is 12 months. He went on to say that there was no evidence showing that the employer was not satisfied with his job performance. He said that even when it was found that the respondent was on probation period, still the employer was supposed to observe rule sub rule (5) of GN 42/2007 before termination. He submitted that the employer tried to give a notice of termination because he knew that he was not a probationary employee. He added that the employee was served with a notice of termination and terminated soon later in a period of 16 hours thereby denying him his right of defence.

Counsel submitted that there is no any provision which shows that an employee can be on probation endless. He referred the court to the record of the CMA on the evidence of Roseline Wandera and said that the employee was not confirmed because the business was not doing well. This was never communicated to the employee, he said. He argued that, the respondent was confirmed after 3 months.

Counsel submitted on ground two and said that Section 35 of the Employment and Labour Relations Act provides that Part E will not apply to employees under 6 months period of employment. He argued that the respondent who had worked for 11 months falls under the termination procedure provided under Part E. He said that the arbitrator was correct

to award him remedies available under Part E on that basis. He added that what was done by the arbitrator was logical and lawful.

Counsel invited the court extend the submission made on ground two to cover ground three. In ground four counsel told the court that the applicant has failed to show any misconduct on the part of the arbitrator. They have failed to show that the award is illegal in terms of Section 91(1) of the Employment and Labour Relations Act. He referred the court to **Damian Luhere v. R,** Criminal Appeal No. 501/2007 (CAT) quoted in the case of **The Concern For Development Initiative for Africa** (supra) page 21 where it was said that failure to challenge an important fact amounts to an admission. He asked the court to confirm the award of CMA.

Mr. Shadrack made a rejoinder submission and told the court that the cases cited by counsel for the respondent are distinguishable. Giving examples he said that one of the cases referred to contract for employment which is between two companies for services as opposed to the contract of employment which is between an employer and an employee. He said that the present case is not on breach of contract but termination of employment. It is for unfair termination not breach of contract, he stressed. He went on to say that Rule 10(4) shows the maximum period of probation which is 12 months. He added that the employee has to get a proper confirmation from the proper authority. He went ahead and said that exhibits A2 and A5 show clearly that the employer was not satisfied by the performance of the respondent in his work that is why he engaged someone to do the work. He was also

informed of his problems in compliance with rule 10(5), he submitted. That is the reason why he was not confirmed, he said. He added that there was no harm in giving him the notice.

I had ample time to read the decision of the CMA, the record, cited cases and the law. As it is obvious in the submissions, the main issue is whether it was correct on the part of the CMA to hold that there was an automatic confirmation of the respondent after the expiration of the period of 3 months. I think there was none. I will try to show. I will start with the EMPLOYMENT OFFER LETTER, exhibit B1. Para 2 carry the commencement date which was 2/8/2019. His duties and responsibilities were defined in para 6 to be; to plan, co-ordinate and ensure efficient completion of jobs details and any other duty as may be assigned to him. The contract had a probation period of 3 months. He worked for 11 months without confirmation. There were some e mail correspondences in between (exhibit A2, A5) showing that the employer was not happy with his job performance. On 15/7/2020 he was served with a warning letter, exhibit B2, entitled "POOR WORK PERFORMANCE", warning him and calling him to improve performance or else further disciplinary action could follow. Eight days later, that is on 23/7/2020 he was served with a notice of termination, exhibit B3 telling him that his services could be terminated on 29/7/2020. He was terminated after 11 months. He then sent the employer to the CMA and sued for unfair termination. The arbitrator had the view that the employer was irresponsible for failing to write the confirmation letter at the expiration of 3 months. He proceeded to find and hold that the employee was confirmed in his employment by default on the part of the employer to write the letter of confirmation. He

awarded him reliefs for unfair termination as contained under Part III sub part E of the Employment and Labour Relations Act as see in page 10 of the judgment of the CMA which reads thus:-

1. One month's salary in lieu of notice; Tshs. 1,454,893/=
2. Compensation of 12 months for unfar termination under **Section 40(1) (c) of the Employment and Labour Relations Act (Cap. 366 R.E. 2019),** Tshs. 17,458,716/=
3. He should be given a Prescribed Certificate of service

Total ..... 18/913,609/=

Counsel for the respondent supports the finding and decision of the CMA. Counsel for the applicant does not share the views.

I share the views of Muruke J made in **W.S. INSIGHT** (supra) and Gwae J made in **Mount Kilimanjaro Safari Club** (supra) that there is no automatic confirmation but I will add something. As pointed by counsel for the applicant, rule 10 (4) fix the maximum period under which an employee can be under probation which is twelve (12) months. That is to say the employer must confirm within twelve months or terminate the employee. Now if he proceeds to stay with him after the expiry of the period of 12 months he is deemed to have confirmed him under the operation of the law.

What about the period which is fixed by the contract? Parties are free to contract but they cannot contract against the law. They can fix any lesser period but the employer is still having a leeway under rule 10(4) to extend the period up to the maximum period of 12 months. In our case, they

fixed 3 moths but the employer could not confirm within the 3 months on difficulties between him and the employee. He kept him up to the 11th moth when he terminated him. I think that so long as the employee has a right to demand confirmation and the right to sue, he should have exercised any of those rights if he so wished, to get his confirmation. It was not correct to sit idle and demand automatic confirmation at the 11th month. I don't think that failure to write the confirmation letter gave the respondent an automatic confirmation so long as the period of 12 months provided under the law has not expired. But the circumstances in this case are clear that the employer did not refuse to confirm for no cause, he was not happy with the standards of performance. He expressed his dissatisfaction with the conduct of the employee in e mails and in a warning letter which was served on him. In a situation like that, any prudent employer could not rush to confirm the employee. All what he had to do was either to terminate the employee outright after 3 months or give him a chance for improvement within the range of 12 months provided under the law. He opted to give him a chance for improvement but the employee could not improve leading to his termination. I think the employer was kind enough. He should not be punished for being kind.

For advice and future guidance, I would say that, if the period of probation has expired and there is no reaction from the employer, the employees can write a letter reminding and demanding his confirmation. The employer will then confirm or give reasons why he is not confirming. Where no explanation is given for a considerable period of time, the employee can file a case at the CMA to enforce his right of confirmation under the contract because it is a right which is enforceable. I think that

this is what should have been done by the respondent. It was not proper to sit idle and wait till termination and claim to have been confirmed by default. That can only happen after the expiration of 12 months which is not the case here. Things could be different if the employer had continued to retain the employee after the maximum period of 12 months in which case he could have been confirmed in his employment by operation of the law. That disposes ground one.

Having found that there was no confirmation of employment, it follows that the CMA erred in awarding termination benefits to the respondent under Part III sub part E of the Employment and Labour Relations Act because he was not one of those who could benefit under the law by reason of being a probationary employee. That disposes grounds two, three and four.

That said, the decision of the CMA is found to be illegal, revised and vacated. It is ordered so.

L.M. MLACHA
JUDGE
11/11/2022

Court:- Judgment delivered. Right of appeal explained.

L.M. MLACHA
JUDGE
11/11/2022