IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 658 OF 2018

BETWEEN

SALKAIYA SEIF KHAMIS.....APPLICANT

VERSUS

JMD TRAVEL SERVICES (SATGURU).....RESPONDENT

JUDGEMENT

Date of Last Order: 08/06/2020

Date of Judgement: 14/08/2020

Aboud, J.

This is an application to set aside the decision of the Commission for Mediation and Arbitration (herein referred as CMA) delivered on 14/09/2018 by Hon. Igongo, M. Arbitrator in Labour Dispute No. CMA/DSM/ILA/R.330/18/281. The applicant filed this application under the provisions of Section 91 (1) (a), 91 (2) (a) (b) 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) Rule 24 (1), 2 (a), (b), (c), (d), (e), (f), 3 (a), (b), (c) and (d) and Rule 28 (1) (a) (b) (c), (d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007 (herein the

Labour Court Rules). The applicant moved the court on the following legal grounds:-

i. Whether the arbitration award issued by Hon. Igongo M, Arbitrator on 14th day of September, 2018 based on substantive and procedural law.

ii. Whether the Honourable Arbitrator failed in law and fact to analyse the documentary evidence submitted before her. That in the interest of justice the prayers set forth in the Notice of application and the chamber summons be granted.

iii. Whether or not the Applicant's employment contract is for fixed term contract of one year.

iv. Whether the commission for mediation and arbitration had no jurisdiction to determine the complainant's referred dispute.

v. Whether the complainant was under probation when the fixed term contract was terminated.

vi. Whether the Arbitrator erred in law not to grant the applicant's claims, in that the applicant applied for various claims plus wages being reinstatement for breaching of

the fixed term contract which was the main cause of the applicant's termination.

Brief background of the dispute can be summarized as follows; the applicant was employed by the respondent as an Administration Officer for a fixed term contract of one year commenced on 01/01/2018. Before that contract the applicant was under internship for almost a year with the respondent. On 20/02/2018 the applicant was terminated from work for dishonesty. Aggrieved by the termination she referred the matter to CMA where the Arbitrator found that, she was on probation period hence not covered under section 35 of the Act. Dissatisfied by the Arbitrator's award she filed the present application.

The application is supported by the applicant affidavit. Unfortunately the respondent did not challenge this application by filing neither a counter affidavit nor written submission.

During hearing the applicant was represented by Mr. Michael Deogratius Mgombozi, representative from the Trade Union, TUPSE. With leave of the Court the matter was argued by way of written submission.

Submitting in support of the application Mr. Michael Deogratius Mgombozi submitted that, the Arbitrator erred in law to agree with the respondent that the applicant was on probation period by relying on termination letter to (Exhibit A6). He stated that, the applicant was on a fixed term contract of one year commenced on 01/01/2018.

Mr. Michael Deogratius Mgombozi further submitted that, the Arbitrator failed to note that the applicant had the right to work provided under Article 22 of the Constitution of the United Republic of Tanzania, 1977. He cited a number of decisions on that aspect. He stated that the respondent's act of termination amounts to discrimination which was based on unfair reason and procedures.

Mr. Michael Deogratius Mgombozi said, the Arbitrator erred to bless unfair labour practice in the circumstance of this matter as the respondent had contravened section 8 (1) (b) (c), 37 (2) and section 36 (a) (iii) of the Act. He therefore prayed for the prayers sought to be granted.

After consideration of parties' submissions, court record, the relevant applicable Labour Laws and practice, I found the issues for determination in this matter are; whether the applicant was on

probation period when the fixed term contract was terminated, whether the applicant's termination was fair both substantively and procedurally and lastly is to what reliefs are the parties entitled.

On the first issue as to whether the applicant was on probation period when the fixed term contract was terminated. As stated above upon termination the applicant was on a one year fixed term contract (Exhibit A3) commenced on 01/01/2018. The Arbitrator in her finding found that the applicant was on probation period during termination of her employment by relying to termination letter (Exhibit A6). This is clearly reflected at page 6 of the award. I have carefully examined the relevant contract and there is no any provision which subjected the applicant to probationary period as found by the Arbitrator.

I fully agree with the Arbitrator that at clause 17 of the contract in question it was specifically provided that during the probation period any party can terminate the contract by giving 24 hours notice. However, the terms of the disputed contract did not state the probation period of the applicant, thus it was wrong for the Arbitrator to assume that the applicant was on probation period.

It has to be noted that in employment matters parties are guided by the terms of the signed employment contract. This is the position in the case **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004 (unreported), where it was held that:-

> "It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."

The same position was restated in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa Bema Enterprises**, Civ. Appl. No. 41 of 2009, CAT, where it was held that:-

> "Parties are bound by the agreements they freely entered into. No party would therefore be permitted to go outside of that agreement for remedy."

In this application since the probationary clause was not included in the parties' employment contract, the Arbitrator misdirected herself in relying on termination letter (Exhibit A6) to conclude that the applicant was on probation period at the time of termination. The relied exhibit A6 expressed that, the applicant was on probation period for three months. In my view the said probationary period was not part of the terms of contract between the parties as I discussed above. The respondent introduced this new clause upon termination of the applicant. In my view when parties have decided to change any terms of contract the same should be reflected in writing to avoid confusion that might arise during the existence of the contract, or after it has expired or terminated. This is the legal position as is provided under section 15 (4) of the Act, which is to the effect that:-

> "15.-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely:-

(a) name, age, permanent address and sex of the employee;

(b) place of recruitment;

(c) job description;

(d) date of commencement;

(e) **form and duration of the contract**;

(f) place of work;

(g) hours of work;

(h) remuneration, the method of its calculation, and details of any benefits or payments in kind, and

(4) where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the written particulars to reflect the change and notify the employee of the change in writing."

[Emphasis is mine].

However in the instant matter the employer did not prove such change. In this matter the respondent did not comply with the above

legal requirement to wit section 15 (1) (e) and 15 (1) 4 of the Act. It is not legally accepted to make any changes of the employment contract without involving the employee who in actual fact in case of any ambiguity of it terms will be in more disadvantageous position.

Turning to the second issue as to whether the applicant's termination was fair both substantively and procedurally. The Arbitrator did not determine such issue in the award. Upon finding that the applicant was on probation period, Arbitrator ruled that she is not protected under section 35 of the Act, which is in sub-part E of the relevant Act, the said sub-part E speaks about unfair termination of employer.

Thus, as discussed above the Arbitrator wrongly found the applicant to have been in probation period. As to the provision of section 35 of the Act indeed it does not apply to the employee with less than 6 months employment with the same employer as rightly stated by the Arbitrator. However, in the application at hand the applicant was on a one year fixed term contract, therefore it is my view the provision of section 35 of the Act was wrongly applied by the Arbitrator according to the circumstances of this matter.

It is a trite law that, employers have to terminate employees on fair and valid reasons as provided under section 37 of the Act. According to the termination letter (Exh. A6) the applicant was terminated for dishonest.

In termination letter, respondent's General Manager expressed that in spite of being warned by various management staff and himself, the applicant denied the truth and that she never received warning before. It is true from the record that, the respondent warned the applicant on her unacceptable work behaviour as is in Exhibit A4. In the relevant warning letter respondent also expressed that he informed the applicant about her unsatisfactory overall performance and asked to change and improve.

This matter was heard ex-parte at the CMA which shows, the respondent neglected to discharge his duty to prove fairness of the reason and procedure as required under section 39 of the Act. Section 39 of the Act provides that:-

> "In any proceedings concerning unfair all nation of an employee by an employer, the

employer shall prove that the termination is fair".

From the record of the matter at hand it is crystal clear that, the respondent had no valid reason to terminate the applicant and the procedures thereto were not followed. On the letter dated 09/02/2018 (Exhibit A4) the applicant was warned for not being present at the reception area and that her performance was unsatisfactory. The applicant replied to the warning with her letter dated 20/02/2018 (Exhibit A5) where she disputed the respondent's basis of such warning. On the same date 20/02/2018 the applicant was terminated from work for dishonest (Exhibit A6).

Therefore, from the above analysis the applicant was terminated with unfounded reason and the procedures for terminating her were not followed. As per our labour laws dishonest falls within the category of misconduct thus, the procedures for terminating an employee under misconduct ought to have been followed by the respondent as provided under Rule 13 of the Employment and Labour Relations Act (Code of Good Practice) Rules, GN. No. 42 of 2007 read together with guideline 4 of the same Rules.

In this application it is clear that the stipulated procedures were not followed at all. The respondent denied the applicant her right to be heard as prescribed in our laws. In the situation the respondent unfairly terminated the applicant which amounts to breach of contract.

It is trite law that a person shall be entitled to fair hearing and to the right to be heard before any decision is made against him/her. The right to be heard in any matter before the Court, including labour disputes is so fundamental and a Constitutional one as has been decided in a chain of cases. In the case of **Mbeya - Rukwa Auto parts and Transport Ltd. vs. Jestina Mwakyoma [2003] TLR no. 251**, it was held that:-

> "In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part:-
>
> (a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na

Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".

Also, in case of **Abbas Sherally & Another vs. Abdul S.H.M Fazalboy,** Civil Application No. 33 of 2002, the Court held that:-

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".

"It has long been settled that a decision affecting the individuals rights which is arrived at by a procedure which offended against

principles of natural justice, is outside jurisdiction of decision-making authority."

The Court also considered that the employment contract between the parties was fixed contract, so even if the respondent had in mind that can terminate the applicant at any time, they had to observe what is in clause 17 of their employment contract, which states that:-

"Under the circumstance of the case, that there was employer and employee agreement that termination had to be on notice, they were bound to comply with the provisions of section 41 (3) and 41 (5) of the Act, which provides that:-

"S. 41 (3) Notice of termination shall be in writing, stating:-

(i) The reasons for termination and

(ii) The date on which the notice is given".

"S. 41 (5) Instead of giving an employee notice of termination an employer may pay

> the employee the remuneration that the employee would have received if the employee had worked during the notice period".

It should be noted that termination of employment at the employers will is not party of our labour laws. It is the employee's right to expect that if everything remains constant he or she will be in service throughout the contractual period and where such right is breached there are some remedies as provided in the Act.

On the last issue as to parties' relief, the applicant prays before this court to be reinstated in her employment. However, such prayer was not included in the CMA Form No. 1. It is worth noting that parties are bound by their pleadings. The Court is bound to determine what is stated in the CMA Form No. 1. This is the position in the case of **Anthony Ngoo and Davis Anthony Ngoo vs. Kitinda Kimaro**, Civ. Appl. No. 25 of 2014 (unreported).

> "The court cannot make out a new case altogether and grant relief neither prayed for

in plaint nor flows naturally from the grounds of claims stated in the plaint".

Therefore, the applicant's prayer of reinstatement will not be considered by this court as the same was not included in the prayers sought in CMA F1. At the CMA the applicant prayed for compensation of the remaining period of contract and payment of general damages to the tune of Tshs. 15,000,000/=. On the basis of the above discussion because it is proved that the applicant termination was based unfair reason and procedures, it is my considered views that she is legally entitled for the compensation award.

It is an established principle that the compensation award in any unfair termination of fixed term employment contract is based on the remaining period of such contract. This is the position in the case of **Benda Kasanda Ndassi vs. Makafuli Motors Ltd.**, Rev. No. 25/2011, High Court Labour Division. DSM (unreported) where it was held that:-

"In the circumstances when termination is unfair and is of a fixed terms contract, the

award of compensation of remaining period is appropriate".

This is also the position in the case of **Good Samaritan vs. Joseph Robert Savari Munthu, Rev. No. 165/2011** High Court, Labour Division, DSM (unreported) cited by the Arbitrator, where it was held that:-

> "When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action was loss of salary for the remaining period of the employment contract which was 21 months".

On the basis of the above position, the applicant is entitled to compensation of ten (10) months and 11 days being the salary of the remaining period of the contract.

Regarding the relief of general damages, they are damages that the law will presume to be the direct, natural or probable

consequence of the act complained of. This is the position stated in the case of **Tanzania Saruji Cooperation Vs. African Maible Company Limited**, (2004) TLR 155. In this application it is crystal clear that, the applicant did not prove such damages as claimed.

The applicant is also entitled to one month salary in lieu of notice as well as leave payment, because they are compulsory statutory entitlements.

In the result the applicant's termination was unfair both substantively and procedurally and, I find this revision have merit. The Arbitrator's award is hereby revised and set aside. The respondent is ordered to pay the applicant compensation of 10 months and 11 days being the salary of the remaining period of the contract, one month salary in lieu of notice as well as leave payment.

It is so ordered.

I.D. Aboud

JUDGE

14/08/2020