

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM**

**REVISION APPLICATION NO. 641 OF 2019**

**BETWEEN**

**MAGANA MIGIRE ..... APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 20/11/2020*

*Date of Judgment: 14/12/2020*

**Z.G.Muruke, J.**

This application originated from a labour dispute No. CMA/DSM/ILA/199/15/599 before the Commission of Mediation and Arbitration (herein CMA). The dispute was determined on favour of the respondent in the award dated 28<sup>th</sup> June, 2019. MAGANA MIGIRE the applicant, being dissatisfied, filed the present application calling upon this court to revise the CMA's award. The applicant's affidavit was filed to support the application while, in opposing the application the respondent filed a counter affidavit sworn by Doxa Mbapila, their Principal Officer.

It is on records that, the applicant was employed by the respondent on 2<sup>nd</sup> February, 2015 as Pan African Graduate trainee. He secured the said position after applying for the same through online applications which was

accompanied with several interviews. Few days after starting to perform his duties, the respondent discovered misrepresentation by the applicant on regard to the academic qualifications that he was not a postgraduate holder, the qualification meant by the respondent for the said position. On 6<sup>th</sup> February, 2015 and 12<sup>th</sup> February, 2015 the applicant was consulted concerning the misrepresentation. On 17<sup>th</sup> February 2015 the applicant's employment contract was terminated. Being aggrieved with termination the applicant referred the matter to CMA where decision was on respondent's favour, hence the present application.

With leave of the court the matter was argued by way of written submission. Both parties were represented, where Advocate Migire Migire represented the applicant while Advocate Emmanuel Nasson represented the respondent.

Submitting in support of the application the applicant's counsel prayed to adopt the affidavit in support of the application to form part of his submission. Starting with the 2<sup>nd</sup> ground he submitted that, the arbitrator erred in law by stating that the applicant ought to have filed a dispute under unfair termination, while the applicant was a probationary employee hence not covered under Sub part E of the Employment and Labour Relations Act , Cap 366 RE 2019(herein Cap 366 RE 2019). The applicant was correct to institute the dispute under common law for breach of contract as per Section 88 (1) (b) (i),(ii) of Cap 366 RE 2019, referring the case of **Darius Mangope v South African Football Association**, Case no.J2752-09.



On the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds applicant's counsel jointly submitted that the arbitrator concluded that the applicant was fairly terminated and there was no breach of contract, by relying only on the respondent's evidence, Exhibit D4 and D2. She failed to analyze the clauses which were alleged to be breached in a contract. On conditional offer and probation clause under exhibit P7 (contract of employment) which provides for conditions which can cause premature termination of the contract, the issue of verification of academic qualification was not among the conditions. Hence the respondent had no valid reason for breaching their contract and the arbitrator erred into not finding that the respondent breached the contract of employment.

Further it was submitted for the applicant that the arbitrator erred in her analysis of evidence before CMA, and arrived to her decision without relying on any provision of the law but on her personal opinion contrary to Rule 27(3) (d) and (e) of the Labour Institution (Mediation and Arbitration Guidelines) Rules GN.64/2007. In arriving to her decision the arbitrator only considered the respondent's evidence and ignored the applicant's evidence tendered before her.

On the 5<sup>th</sup> ground the applicant's counsel submitted that, despite the fact that the applicant has proved and justified his claims, the arbitrator erred in law and fact on failure to award damages of 100 million Tshs. as prayed by the applicant in CMA F1. The applicant have suffered damages due to the breach of the said contract. He thus prayed for the grant of the application.

Responding to the applicant's submissions, the respondent's counsel started by submitting that the position stated by the arbitrator in regard to unfair termination was a mere *obiter dictum*. It had no binding effect and the dispute was determined on breach of contract as filed. The applicant was a permanent employee but terminated within a probationary period, hence not covered under part E of Cap 366 RE 2019. The probationary employees are not entitled to enjoy rights and benefits as a conformed employee, citing the case of **David Nzaligo v National Microfinance Bank PLC**, Civil Appeal No. 61/2016(unreported)

On the 2<sup>nd</sup> ground submitted that it was the arbitrator's finding that, the reason for termination was applicant's false information in the process of seeking employment from the respondent. He stated he was a post graduate holder while he was not as evidenced under Exhibit D2(the system killer Q Screenshot. The position was intended to post graduates holders and not under graduates. He further submitted that, the misrepresentation led the applicant to secure the position which he was not qualified to. Additionally counsel submitted that, it is a trite law that when a part has entered into a contract by misrepresentation the contract becomes voidable on the respondent. And the contract being voidable, means the innocent part may terminate the agreement. Since the termination was done on probation period then the applicant was still under assessment, citing the case of **David Nzaligo v National Micofinance Bank**.(supra)

Concerning the 3<sup>rd</sup> issue the respondent's counsel submitted that, it is not true that the arbitrator's decision was based on her opinions and one party's evidence. The arbitrator considered all the relevant evidence concerning the issue of misrepresentation and the award contains summary of the parties' evidence.

On the last ground learned counsel argued for the respondent that, there is nowhere in the award that the arbitrator had ruled that the respondent breached a contract and ordered the applicant to be compensated for that breach. Since the applicant had failed to prove how did the respondent breach the contract and had failed to prove the loss of 100,000,000/= he is not entitled to any damage since he is the one who misrepresented his academic qualification.

In rejoinder applicant's counsel reiterated his submission in chief.

After careful consideration of the parties' submissions, records and relevant laws, this court is called upon to determine the following issues;

- i. Whether the respondent breached the contract with the applicant?
- ii. What are reliefs of the parties?

In regard to the 1<sup>st</sup> issue the applicant alleged that the respondent breached their contract for premature termination on the reason not stated in their contract. CMA found that there was no breach of contract as alleged by the applicant.

The law under Section, 18(c) of the Law of Contract Act, Cap.345 RE 2002(Cap 345 RE 2002) defined misrepresentation as;



S.18 (c) Causing, however innocently, a part to an agreement to make a mistake as to a substance of the thing which is the subject of the agreement.

Applying that position in the case at hand, the subject of employment contract was the qualification of an employee to wit post graduate. The applicant therefore fraudulently obtained such employment contract by deceiving the respondent as evidenced under exhibit D2. The applicant selected the two options of postgraduate and honours degree to be his qualification while he knew it was not true. The respondent believed the misrepresentation and hired the applicant. Therefore the respondent is an innocent party who cannot be punished for the misrepresentation done by the applicant. Therefore it was proper under section 19 of Cap 345 for the respondent to terminate the contract as the contract became voidable at his option after he discovered the misrepresentation.

In the case of **University of Dodoma v David Andrew Heller & Another**, [2014] LCCD 23. It was held that;

In my view failure by the respondent (employee) to meet the requirement in attaining a master degree in order to perform the work of teaching student at the university is by and large a form of incapacity which may lead later on poor work performance..."

Therefore in line with that position, the applicant had not attained the required qualification therefore it was proper for the respondent to reasonably terminate his contract. Additionally even the applicant himself does not dispute that he is not carrying the required qualification but

opted to misrepresent the respondent. The fact that the issue of verification of academic qualification was not among the conditions for premature termination of a contract, does mean he did not make the misrepresentation and it does not bar the respondent to act upon it.

In regard to the relief of the parties, the applicant claimed 100,000,000/= as compensation for damages he suffered after the respondent's breach of the contract. Since it is also the finding of this court that there was no breach of contract on the respondent's part, the applicant is not entitled to any compensation, as he cannot benefit from his own wrong. On that basis I find that there is no breach of contract, I uphold CMA's award to that extent.



Z.G.Muruke.

**JUDGE**

14/12/2020

Judgment delivered in the presence of Migire Migire for applicant and Hamisa Nkya for respondent.



Z.G.Muruke.

**JUDGE**

14/12/2020