IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT DAR-ES-SALAAM
REVISION NO.698 OF 2019

(Originating from Dispute CMA/DSM/KIN/551/18)

EROLINK LTD.....APPLICANT

VERSUS

YOKAYAZI HENJEWELE .....RESPONDENT

JUDGEMENT

Date of Last Order: 07/08/2020
Date of this judgement: 27/10/2020

NANGELA, J.:

This revision case was filed under section 91(1) (a), (2) (b) and (c), 91(1) (4)(a) and (b) and 94(1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 ,Cap.366 [R.E.2019] and Rules 24 (1), (2) (a), (b), (c), (d), (e), and (f) and 24 (3) (a), (b),(c) and (d); Rule 28(1)(c), (d), and (e) of the Labour Court Rules, G.N.No.106 of 2007.

The case was filed by way of a Notice of Application and a Chamber Summons which is supported by an affidavit of Mr. Ahmed John, a human resource manager of the Applicant. The Applicant appointed Mr. Evold Mushi, and Priscus Richard of Lawfront Advocates to represent as him in this matter. The Applicant is seeking for the following orders of this Court:

1. this honourable court be pleased to call for the records, revise and set aside the Arbitrator's award dated 16th July 2019 by Hon. Kiangi, N (arbitrator) in Labour Dispute CMA/DSM/KIN/551/18 on grounds set forth

on the annexed affidavit and on such other grounds to be adduced on the hearing date.

2. The arbitrator's award be revised and set aside for it has been improperly procured, unlawful, illogical and irrational.
3. This Honourable Court be pleased to determine the matter in the manner it considers appropriate and give any other relief it considers just to grant.
4. This Honourable Court be pleased to give any other relief it deems fit and just to grant.

On 24th October 2019, the Respondent, one in the name of Yokayazi Henjewele, filed a notice of opposition in line with the requirements of Rule 24 (3) of the Labour Court Rules, G.N.No.106 of 2007. He filed a counter-affidavit and also notified this Court that he will represent himself. Since the pleadings were completed, the matter was fixed for hearing on 06th August 2020.

On the material date, the parties appeared before this Court. The Applicant enjoyed the services of Mr. Godfrey Tesha and Ms. Linda Mafuru, learned Advocates while the Respondent (Mr. Henjewele) appeared in person. Mr. Henjewele informed the Court that, although he was ready for the hearing of the case, earlier he had raised a prayer before Madam Justice Muruke, J., requesting that the matter be disposed by way of filing written submissions. He argued, further that, since he was unrepresented, he would like to have ample time to compose his legal arguments and sufficiently address the legal issues pertaining to the determination of this application. Mr. Tesha did not object to the prayer and added that the parties be given two weeks to file their submissions.

In view of the prayers by Mr. Henjewele, I granted the parties leave to file written submission. The Schedule of filing was as follows:

1. The Applicant was to file its written submission on or before 19th of August 2020 and serve the Respondent, not later than 3.30 PM of the date of filing.

2. The Respondent was to file its written submission on or before 1st of September 2020 not later than 3.30 PM of the date of filing.
3. Rejoinder submission (if any) be filed on or before 8th September 2020.
4. Judgement on 25th September 2020 at 9.00.

The parties duly complied with the directives of this Court in respect of the filing of their written submissions; including rejoinder submission by the Applicant's learned counsel. I am now called upon to address the legal issues raised in their submissions.

To begin with, the Learned Counsel for the Applicant opened his submission in-chief by a prayer to adopt the affidavit filed in support of this application to form part of his submission. Submitting on the grounds of this revision, it was argued that, the honourable arbitrator erred in law and in fact by failing to evaluate the evidence of the Applicant (EROLINK LTD). It was contended that, such evidence, clearly shows that there was no breach of contract of the respondent but rather the latter failed to perform his duties. Reference was made to *"Exh.P-1"*, the employment contract, and, it was argued that, Mr. Henjewele was on probationary terms and worked only for less than six months. He was employed on 1/12/2017 and his contract was terminated on 9th April 2018.

It was EROLINK's submission that, according to section 35 of the ELRA, Cap.366 [R.E.2019], an issue of unfair termination does not apply to an employee with less than 6 months in the employment. It was also argued that, after Mr. Henjewele had referred the dispute to the Commission for Mediation and Arbitration (CMA) on the ground of breach of contract of employment and unfair labour practice, the honourable arbitrator held that there was such breach of contract but did not show or explain how it was occasioned. In other words, what EROLINK is alleging is that, the findings were unsubstantiated.

It was contended further, that, for one to be liable for breach, there must be proof of the existence of terms and conditions of contract so far breached. Be that as it may, it was

EROLINK's contention that the contract was terminated on the ground of poor performance during the probationary period and, that, Clauses 5.1 and 5.2 of the contract gave EROLINK right to terminate the contract of employment of Mr. Henjewele, upon satisfaction that the latter was incompatible or incapable of executing the job he for which he was contracted to carry out.

EROLINK has argued that, Clause 5.1 of the Contract anticipated that possibility and gave right to terminate by giving the other party a due notice of one months or a month's salary in lieu of notice. Reference has been made to the Court of Appeal decision in the case of *Joseph M. Mutashobya v M/s Kibo Match Group Ltd [2004] TLR 242* to support the Applicant's submission regarding rights of the employer to terminate a contract.

It was also argued that, since the terms of termination of employment were in the contract, then, EROLINK exercised its rights under the contract and cannot be held to have breached the contract. Besides, it was submitted that, there was no dispute that the contract was terminated due to poor performance of work on the part of Mr. Henjewele.

EROLINK also contended that, the arbitrator erred when he based her decision regarding breach of contract of employment on *Rule 10 (6) of the Code of Good Practice, GN. 42 of 2007.* It was argued that way, because Mr. Henjewele was on employment for a period of less than 6 months, and was not covered under Cap.366 [R.E.2019]. EROLINK contends, therefore, that, since Mr. Henjewele is not covered under the main Act, he cannot be covered under its regulations or rules. It was argued, as well, that, Rule 8(1) (c) of GN 42 of 2007 gives the employer right to terminate a fixed term employment contract without following the procedures of termination of such a contract.

To buttress its submission, the Applicant referred this Court to section 36 of Cap.366 [R.E.2019]. EROLINK argued that poor performance of duties amounted to a material breach of the contract; hence, it was entitled under the law to terminate Mr. Henjewele. As regards the reliefs ordered by the arbitrator, EROLINK argued that, the order that the Respondent be paid

TZS 37,000,000 as subsistence allowance was erroneous since the claim was not proved by the Respondent.

EROLINK referred to a number of cases where issues regarding treatment of employees during their probation and payment of subsistence allowance were concerned.

The cases cited to support the submissions include: *Stella Temu v Tanzania Revenue Authority, CAT, [2005] TLR 178; Stanbic Bank (T) Ltd v Irene Walala, Revision No.36 of 2012, HC Labour Division (unreported); David Nzaligo v National Microfinance Bank PLC, CAT (DSM), Civil Appeal No.61 of 2016 (unreported)* and *Attorney General & 2Others v Eligi Edward Massawe & 104 Others, Civil App.No.86 of 2002, CAT (DSM), (unreported).* Eventually, EROLINK requested this Court to revise and set aside the decision of the arbitrator.

Mr. Henjewele (the Respondent) filed a rebuttal submission. He sought the leave of the Court and adopted the contents of his counter affidavit. He submitted that, he was an employee of *EROLINK* and *Multichoice (T) Ltd*, with their privately known contractual relationship and arrangement regarding dual employership. He submitted, however, that, the CMA found that, he was an employee of EROLINK, with a fixed term contract of two years which was prematurely, illegally and uncontractually terminated on the pretext of underperformance during the 4th month and 9 days of being a probationary employee.

Mr. Henjewele submitted further, that, the claim before the CMA was one based on 'breach of contract of employment relating to unfair labour practice' and not unfair termination. He argued that the contention that the arbitrator erred in law and fact for failure to evaluate evidence is vexatious, unsubstantiated and abuse of court process, thus lacks merit. It was his argument, instead, that, the arbitrator correctly evaluates the evidence on record and arrived at correct findings.

According to Mr. Henjewele, during the hearing before the CMA, the Applicant (ERONLINK) failed to prove the claim and provide the reasons for terminating Mr. Henjewele by issuing him

the termination letter, *Exh.P3*. In short, he contended that, ERONLINK failed to prove the alleged Respondent's poor performance. He submitted that, apart from tendering the employment contract, *Exh.P1*, ERONLINK did not tender any exhibit to prove existence of agreed targets which Mr. Henjewele is accused of failing to meet.

Besides, Mr. Henjewele argued that, the procedures of gauging performance were untenable and contrary to labour laws with regard to probationary employee. He contended that, the breaches which he had committed by EROLINK were breach of Clauses 1, 5.3 and 15.1 of the Contract (*Exh.P.1*). Referring to the principle of sanctity of contract, he argued that a valid contract is valid between the parties and can only be modified by consent or if the law so provides. He referred this Court to *Cheshire and Fifoot on Law of Contract, 4th Edn*, pp.21 and 22 where the learned author states, regarding the sanctity of contract, that:

> "A contracting party ... is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged by what is in their mind, but by what they have said or written or done."

Mr. Henjewele contended further that, the Clauses referred to herein above, are in line with the section 13 (1) and (2) of the ELRA, Cap.366 [R.E 2019] which sets out the minimum employment labour standards. He argued, however, that, parties are at liberty to maximize their terms in as much as they are favourable to the employee. To strengthen his submissions, he further placed reliance on Rule 3 of the *Employment and Labour Relations (Code of Good Practice), GN. No. 42 of 2007*. As regards the alleged acts of unfair labour practice, Mr. Henjewele submitted that, before the CMA he made it clear that he was never given or made to sign for agreed targets which he was supposed to meet or fulfil. He contended, therefore, that, the process leading to his termination was far from being in line with the express provisions of Regulation 6 (3), (5) and (6) of the ELRA,(Code of Good Practice), GN.42 of 2007.

In a further submission, Mr. Henjewele stated that, he was only summoned by an e-mail (*Exh.P4*) dated 12th March 2018 to attend a performance session and not for consultative meeting as stated in the termination letter (*Exh.P.3*), and, that, subsequently, on 6th April 2018 he was terminated. In view of that, he contended that, such termination was unfair and in violation of Rule 6 (6) of the *ELRA, (Code of Good Practice)*, GN.42 of 2007. On this regard, he referred this Court to its decision in the case of *Agness B. Buhere v UTT Micro Finance PLC, Rev.No.459 of 2015, Labour Court Division (DSM) (Unreported).* In that case, Mipawa, J., held that, an employee who is on probationary terms:

> "can sue or file a dispute for unfair labour practice relating (or concerning) to probation. Any acts of the employer, which are inconsistent or contrary to rule 10 (1) – (9) of the Code, constitute unfair labour practice on rotational employees, because, probationers, like other employees, are entitled to evaluation, instruction, training, guidance, or counselling, an opportunity to make representation prior to termination and assistance by a trade union representative or fellow employee."

Mr. Henjewele stated that, the cases cited by EROLINK are distinguishable and are overtaken by event as they do fall in line with the current labour philosophy and jurisprudence in Tanzania which has significantly changed since 2004 following the enactment of the ELRA, Cap.366 [R.E.2019] and the *Labour Institutions Act*, Cap.300 [R.E.2019]. In particular, he submitted that, in the case of *Joseph M. Mutashobya v M/s Kibo Match Group Ltd [2004] TLR 242*, although the circumstance are similar, the Court had acted on the basis of the terms of the contract which provided for power to the employer to summarily dismiss the employee under the repelled Employment Ordinance and the Security of Employment Act, Cap.574. He also distinguished the case of *Stella Temu v Tanzania Revenue Authority, CAT, [2005] TLR 178*, arguing that the appellant in that case was on probationary term as a result of secondment and not a fresh employee. He argues further that the appellant's termination in that case was due to her absence from duty without official leave.

As regards the case of *David Nzaligo v National Microfinance Bank PLC, CAT (DSM), Civil Appeal No.61 of 2016 (unreported),* Mr. Henjewele submitted that, this case is as well distinguished from the case at hand because, while the appellant was held to still be a probationary employee, he resigned and sued for unfair termination while in the instant case, the Respondent was terminated while under probation and has sued for breach of contract and unfair labour practice. Mr. Henjewele contended, therefore, that, the *ratio decidendi* in that case, which is to the effect that, a probationary employee does not benefit from section 35 part E of the ELRA, Cap.366 [R.E 2019], does not extend to probationary employee suing for breach of contract and unfair labour practice, as it was held in the *Agness B. Buhere's case (supra).*

As regard the issue of payment of subsistence allowance, Mr. Henjewele submitted that, the submissions by EROLINK on that point were misconceived. He argued that, the contract of employment admitted as Exh.P1 shows, on its Clause 2, that, the Respondent was recruited from Dar-es-Salaam and Clause 3 states that his duty station was in Dodoma. He contended that, an award of subsistence expenses is consequential upon termination and statutory one as per section 43(1) (c) of the ELRA, Cap.366 [R.E.2019]. He submitted that, the case of *Attorney General & 2Others v Eligi Edward Massawe & 104 Others, Civil App.No.86 of 2002, CAT (DSM), (unreported),* is no longer a good law. In his view, the award was correct in terms of section 43 (1) (c) of Cap.366 [R.E. 2019].

To clarify on that point, Mr. Henjewele argued that, the calculations were mathematically the award of TZS 37,000,000 by the CMA was based on the Respondent's basic salary, i.e., TZS 2,500,000 x 15 months, (from the 1st of May 2018 up to 16th July 2019 when the award was delivered). He argued that, section 43 (1) (c) of Cap.366 [R.E 2019] should be read with Regulation 16 (1) of ERLA, (General) Regulation, 2017. The Regulation provides that

> "The subsistence expenses provided for under section 43(1) (c) of the Act shall be quantified to daily basic wage or as may, from time to

time, be determined by the relevant wage board."

Mr. Henjewele referred this Court to the decision of the Court of Appeal in the case of *Juma Akida Seuchago v SBC (Tanzania) Ltd, Civil Appeal No. 7 of 2019; CAT (Mbeya) (unreported).* In that case the Court of Appeal stated as follows:

"we are firm, therefore, that, the learned High Court Judge in the present case rightly found that the appellant was to be paid on the basis of the basic wage salary for the period of three months he awaited to be repatriated."

The Court of Appeal in *Juma Akida's case (supra)* cited the decision of this Court in the case of *Communication and Transport Workers Union of Tanzania (COTWU) (T) v Fortunatus Cheneko, Complaint No.27 of 2008 (unreported)* (Mandia, J)(as he then was) and *Tanganyika Instant Coffee Co. Ltd v Jawabu W. Mutembei, Rev.No.210 of 2013, (HC) (unreported)* (Mipawa, J. (Rtd). These cases interpreted section 43 (1) (c) of the ERLA, Cap.366, [R.E.2019].

Mr. Henjewele submitted that, the daily subsistence allowance payable to him has increased, as of now, from TZS 37,500,000 to TZS 72,000,000/=as the number of months are no longer 15 but have gone to 29 months and may still increase at the date when the Court renders it judgement. He thus prayed that the same should be adjusted to TZS 125,750,000 plus statutory amount to be assessed by the Court for transport of the respondent and his family from Dodoma to Dar-es-Salaam, (i.e., TZS 37,500,000 +35,000,000) + Other awarded reliefs of TZS 53,750,000 + to be assessed transport expenses) or the higher side as the Court may deem fit to grant. Mr. Henjewele requested this Court to uphold the award as per his request in the CMA Form 1.

On 8th September, 2020, the Applicant's learned counsel filed a rejoinder submission. In that rejoinder submission, EROLINK argued that, Mr Henjewele is mixing up things in a manner that is not appropriate. In particular, it was contended that, the issue of being a probationary employee does not arise but the focus, instead, is on an employee who has less than 6 months' employment. EROLINK reiterated its submission in chief making

reference to section 35 of Cap.366 [R.E.2019] and rejoined that, whether one is under probation or no probation, being an employee of less than six (6) months period in the employment disqualifies one from enjoying the protections offered under Part III sub-part "E" of the Act.

It was submitted that Mr. Henjewele worked only for 4 months and cannot claim or enjoy the protections under the ELRA, Cap.366 [R.E.2019] and EROLINK was not obliged to follow the procedures provided for under the regulations or GN.42 of 2007. EROLINK relied on the decision of this Court in the case of *ZENUFA Laboratories Ltd v Geofrey Mathew, Rev. No484 of 2019 , HC Labour Division, DSM (unreported)* where the Court, at page 6 made a finding to that effect and stated that:

> "Having found so, it means that the respondent could not get any remedy as provided for under Part III sub-part E of ELRA. Therefore, the issue of substantive and procedural fairness on termination, including relief as per section 40 of ELRA does not come into play."

EROLINK rejoined further that, if Mr. Henjewele was not protected by the law, then the parties' rights were protected by their contract. EROLINK referred to Clause 5.1 and Clause 5.2 of the contract of employment. It was a further rejoinder that the Mr. Henjewele was at his own fault because when he was asked to follow the handing over procedures he did not do so and for that matter he could not be given his terminal dues. It was EROLINK's further rejoinder submission that, since the contract provided for right to termination, the termination notice issued to the Respondent (Mr. Henjewele) was rightly issued under the provisions of the contract. This Court was invited to rely on the case of *Delta Africa Ltd v Vodacom Tanzania PLC, Comm. Case. No.95 of 2017, HC, Comm. Division (DSM) (unreported)* where it was stated that:

> "termination clause in the contract [gave] power to a party to terminate the contract for his/her convenience without being held liable for his/her act of termination of the same, provided that he/she gives the other party three months notice."

As regards the issue of payment of subsistence allowance, EROLINK reiterated its submission in chief and rejoined further that, Mr. Henjewele was instructed to handover the properties of the Applicant and refused to do so and has so far referred the dispute to CMA not in Dodoma but in Dar-es-Salaam where he was recruited. In that regard, it was rejoined that he is living in Dar-es-Salaam where he referred his dispute and this is the same place where he was recruited.

EROLINK rejoined further by raising a new issue of jurisdiction of the CMA which heard and determined the dispute. It was contended that, as the facts indicates, the cause of action arose in Dodoma since Mr. Henjewele was employed and was working in Dodoma as Zonal Sales Executive/Regional sales Coordinator for central Zone at Dodoma. This Court was referred to Rule 22 (1) of *Labour Institutions (Mediation and Arbitration) Rules, GN 64 of 2007* and the decision in the case of *Coca-Cola Kwanza Ltd v Paulo Kingu and Others, Rev.No.13 of 2017 (unreported).*

It was argued, therefore, that, the act of moving the labour dispute to Dar-es-Salaam without leave of the CMA was contrary to the law and renders the decision of CMA- Kinondoni void.

Since the above issue was of crucial importance but novel to the proceedings, and since it was raised by one party after I had received submissions in chief from both parties, I found it necessary to recall the parties. As such, the judgement which was set to be delivered on 25th September 2020 was further adjourned to allow the parties' time to address this important issue touching on jurisdiction of the CMA. On the 25th September, 2020, the parties were required by this Court file additional submissions on the preliminary objection based on jurisdiction of the CMA.

In its submission, EROLINK submitted that, according to rule 22(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN 64 of 2007, disputes need to be mediated or arbitrated by the CMA at its office having responsibility for the area in which the cause of action arose, unless the CMA directs otherwise. Rule 8 of the same GN 64 of 2007 further states that, a

party to the dispute shall file documents with the Commission at its head office or in the area in which the dispute arose.

It was submitted that, according to *Exh.P2* (the employment contract) the Respondent was working at Mutichoice (T) Ltd as a Regional Sales Executive /Regional Sales for Central zone and his office (place of work) was at the city of Dodoma within Dodoma region. It was further submitted that, the offence of poor performance, alleged to have been committed by the Respondent, was committed while he was working in the Dodoma region. It was submitted, therefore, that, since the cause of action took place in Dodoma, the dispute ought to have been mediated and arbitrated at the Dodoma CMA and not at the Kinondoni CMA in Dar-es-Salaam Region. This Court was referred to the case of Coca-*Cola Kwanza Ltd v Paulo Kingu and Others, Rev.No.13 of 2017 (unreported).* This Court was invited to declare the Kinondoni CMA decision a nullity.

Responding to the objection by way of a *surrejoinder,* Mr Henjewele conceded that it true the termination took place in Dodoma and that is where he was employed. However, he submitted that at no time was complaint heard at CMA Kinondoni, Dar-es-Salaam. He argued that, Rule 22 of GN 64 of 2007 allows the CMA to direct otherwise. He stated that, on 16th July 2018 he lodged an application to have the matter arbitrated by CMA in Dar-es-Salaam, and that, the Applicant's advocate did not object to the prayer. Hence, orders were made to have the matter arbitrated in Dar-es-Salaam.

I have indeed examined the record and I find that the cause of action arose in Dodoma. I have also noted that the matter was filed and determined by CMA, Kinondoni Dar-Es-Salaam. The issue that arises from this is whether it was appropriate for the CMA Kinondoni to determine the application to have the matter heard in Dar-es-Salaam and not Dodoma.

As pointed out herein, Rule 22 (1) and (2) of GN 64 of 2007 provides that:

> "22(1) A dispute shall be mediated or arbitrated by the Commission at its office having responsibility for

the area in which the cause of action arose, ***unless the Commission directs otherwise***.

(2) The Commission shall determine the venue for mediation or arbitration proceedings." (*Emphasis added*),

As it might be noted, the above provision allows the Commission to depart from the general rule that mediation or arbitration shall be mediated where the cause of action arose. In principle, the directive to have the dispute arbitrated in Dar-es-Salaam should not have been issued by was the CMA office having responsibility for the area in which the cause of action arose.

The arbitral proceedings, however, could have been held in any other place provided that a directive was sought by the Applicant from the CMA Dodoma and the reasons offered by the Respondent before the CMA, would have sufficed to have the matter transferred to Dar-Es-Salaam. Unfortunately, that did not happen. Since it did not happen that way, has there been prejudice to the parties? In my view, the answer is no based on the circumstances of this case, the fact that all the parties were in Dar-es-Salaam and since the Applicant's learned counsel did not object to the prayer to have the matter arbitrated in Dar-es-Salaam and not in Dodoma. In view of that, I find that the objection raised by the Applicant should fail.

Having resolved the issue on jurisdiction as I did herein above, it is clear to me that, there is no dispute that, Mr. Henjewele was under probationary status, when his employment was brought to a halt. The claims that ensued from that act of termination are that his contract was breached and that the act amounted to unfair labour practice. Although the Applicant EROLINK has made submissions in relation to the act of unfair termination, there is nothing in this review application in relation to unfair termination, other than the claims I have stated herein above.

From such claims, there arise issues of diverse nature and concern to this review application, calling for the attention of this Court. Such issues are as follows:

(1) Whether the honourable arbitrator erred in law and in fact by failing to evaluate the evidence of the Applicant (EROLINK LTD) and if so, whether the learned arbitrator's findings regarding breach of contract were unsubstantiated.

(2) Whether the Applicant was entitled to terminate the Respondent under the Contract of Employment, and if not, whether the termination amounted to a breach of the contract.

(3) Whether Mr. Henjewele, being a probationary employee not covered under the provisions of Cap.366 [R.E.2019], could still be covered under its regulations or rules.

(4) If the above issue No.3 is answered in the affirmative, whether Mr Henjewele is entitled to the payment of subsistence allowance to the fullest amount he has prayed for.

(5) What relief are the parties entitled to.

Beginning with, let me respondent to the **FIRST ISSUE**- which is: *Whether the honourable arbitrator erred in law and in fact by failing to evaluate the evidence of the Applicant (EROLINK LTD).* In so doing, I find it pertinent to reiterate what I stated in two of my previous decisions, one being *Sae Power Lines Ltd v Leonard Kaguti & 33 Others, Labour Rev. No 487 of 2019 (unreported)* and *John J. Cyprian v Palm Beach Casino, Rev. Application No. 696 of 2019 (unreported),* regarding the issue of evaluation of evidence.

In those tow decisions, this Court acknowledged the imperative need for a decision maker, such as an arbitrator, to appropriately and effectively evaluate the evidence before him prior to arriving in any conclusion. This is a matter of principle. The Court held a view, however, that:

> "a decision maker is not expected to reflect each and every detail of the evidence he or she has received in an arbitration award in order to justify that he/she evaluated all the evidence before him or her. Undoubtedly, this is not required of courts of law and, obviously, cannot be required in a process which is fashioned to be expeditious. As a point of departure, therefore, the mere failure by an arbitrator to deal with a particular aspect of evidence in the award is not itself indicative of a

> failure to apply his mind to the evidence laid before him. Even so, this Court is not relieved of its duty to assess the justifiability of the award by looking at the entire record and the evidence which was laid before the arbitrator and come up with its own independent findings. In fact, in revision proceedings like the one at hand, this Court acts as a first appellate court would do, that is to say, it has a duty to evaluate the entire evidence afresh and come up with its own independent findings. I shall therefore subject the available evidence on record to a fresh look taking into account the submissions made by the parties herein."

In this instant revision, EROLINK contends that the evidence before the Arbitrator had clearly shown that the Respondent had failed to perform his duties and that was the reason why the contract was terminated. However, the Arbitrator held that there was a breach of contract as the termination was made without assigning reasons to it. However, in my view, that finding by the arbitrator was erroneous since the letter of termination **had given clear reasons** for such termination. For that matter, I am in agreement with the Applicant (EROLINK) that, the arbitrator did not assess the evidence properly and therefore erred in law. And, as I said, it is now the duty of the Court to assess it and make my own findings as I shall do in the course of dealing with the subsequent issues.

The **SECOND ISSUE:** is *whether the Applicant was entitled to terminate the Respondent under the Contract of Employment, and if not, whether the termination amounted to a breach of the contract.*

I have looked at *Clause 5.1* and *Clause 5.2* of the contract of employment and I am confident that, as correctly argued by the Applicant (EROLINK), both in law and even under the contract governing the parties' relationship, the employer (EROLINK) was entitled to terminate the employment. Under the contract, **Clause 5** provides for probationary period. **Clauses 5.1 and 5.2** of the Contract provided as follows:

> "5.1: This **contract is subject to a probationary period of six (6) months**. The purpose of this probation period is to assess whether the employee

has the capacity or compatibility required for the job.

5.2: Where an employee has been proved to be incapable or incompatible to the job, or does not attain the required standards and **the contract is terminated during the first month of employment**, seven days' notice shall be issued, together with detailed reasons or other period as the case may be, depending on the circumstance and nature of the contract.

In the instant case, the Respondent's probationary period was for six (6) months after which he was subjected to an assessment. According to the decision of the decision of the Court of Appeal of Tanzania in the case of *Stella Temu v Tanzania Revenue Authority, CAT, [2005] TLR 178; at 189,* a probationary period was termed as a period of "*a practical interview*".

As it may be observed from clause 5.1 of the contract, if one was to rely on the contract to determine an issue related to termination during the probationary period, such termination should have occurred during the *first month* of the Respondent's employment. However, in this instant case it took place in the *fourth month* of the probationary period.

For the reasons above, it is clear to me, that, the guiding principles for the determination of the appropriateness of such termination cannot be the underlying contract but the law, and, in this case, the *Employment and Labour Relations (Code of Good Practice) Rules, 2007 (G.N. No 64 of 2007).*

According to Rule 10 of the *Code of Good Practice Rules* states as follows:

"10-(1) All employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines."

10-(6) During the period of probation, the employer shall:

(a) Monitor and evaluate the employee's performance and suitability from time to time;

(b) Meet with the employee **at regular intervals** in order **to discuss** the employee's evaluation and **provide guidance** if necessary. The

guidance may entail **instruction**, **training** and **counselling** to the employee during probation.

10-(7) Where **at any stage during probation period**, the employer is concerned that the employee is not performing to standards or may not be suitable for the position the **employer shall notify the employee** of that concern and **give the employee an opportunity** to respond or opportunity to improve.

10-(8) Subject to sub-rule (1) the **employment of a probationary employee shall be terminated** if:

(a) the **employee has been informed** of the employers concerns;

(b) the **employee has been given an opportunity** to respond to those concerns;

(c) the **employee has been given reasonable time to improve** performance or correct behaviour and has failed to do so." (*Emphasis added*)

From the above quoted provision, it is clear that an employer may terminate an employee who is on a probationary period. However, such termination will not constitute unfair labour practice if it is done in accordance with the above stated principles. That being said, the question that follows is whether EROLINK, being the employer of the Respondent adhered to such principles to their letter or fullest extent. This is a question requiring proof and not just mere assertion.

According to the evidence on record, the Respondent conceded to have been called for a performance assessment session as per *Exh.P4*. The meeting held on 14th March 2018 and whose outcomes were that the Respondent exhibited performance failures in three key areas, namely: *failure to deliver monthly targets, failure to manage leadership change* and *failure to improve & implement timely new strategies such as Military strategy and Mega Dealers Revamp*. Subsequently, a letter of termination *Exh.P3* was communicated to him with reasons as to why a decision was taken.

A quick assessment of the said letter within the existing legal spectacles and the circumstances under which it was issued, tells it all: the Applicant, EROLINK did not adhere to the dictates of Rule 10 (6), (7) and (8) of the *Employment and Labour Relations (Code of Good Practice) Rules, 2007 (G.N. No 64 of 2007).* A correctly stated by the Respondent in his testimony before the CMA, nowhere was he given monthly targets to deliver or key performance indicators (KPIs) to be met and no evidence was led by the Applicant (EROLINK) to demonstrate its adherence to the dictates of Rule 10 (6) to (8). For that reason, the finding that EROLINK committed an act of unfair labour practice was proper and I hereby confirm it.

To respond to the **SECOND ISSUE**, however, one has to respond to the next question: whether the confirmed act of unfair labour practice constituted a breach of the underlying contract. The answer is a straight forward "NO". The reason for that rejection is that, the employer is entitled to terminate an employee who is on his probationary period if such employee exhibits poor performance. However, that right must adhere strictly to the requirements set out in the *Employment and Labour Relations (Code of Good Practice) Rules, 2007 (G.N. No 64 of 2007).* Failure to adhere to it will constitute an unfair labour practice in relation to the probation and the employer will be held liable for that. See the decision of this Court in *Agness B. Buhere v UTT Micro Finance PLC, Rev.No.459 of 2015, Labour Court Division (DSM) (Unreported).* The finding by the arbitrator, that there was an unfair labour practice, is, therefore, confirmed. That suffices for the second issue.

The **THIRD ISSUE**: *Whether Mr. Henjewele, being a probationary employee not covered under the provisions of Cap.366 [R.E.2019], could still be covered under its regulations or rules.*

It is indeed a correct legal position that an employee who is on his or her probationary period and who is terminated from employment before being confirmed to his/her employment cannot raise a claim under "**Part III Sub-part E**" of *Employment and Labour Relations Act, [Cap.366 R.E.2019].* This is clear under section 35 of the Act, which provides very categorically, that:

> "The provisions of this Sub-Part *shall not apply to an employee with less than 6 months' employment* with the same employer, whether under one or more contracts." (Emphasis added).

The said provision was considered by the Court of Appeal in the case of *David Nzaligo* (supra) and the position clear as per the law. See also the case of *Stanbic Bank (T) Ltd v Irene Walala, Revision No.36 of 2012, HC Labour Division, (unreported).* However, although Part III of the Cap.366 R.E.2019 does not apply, this does not mean that generally the law is silent or does not provide for those who under a probationary period. No. It does consider their insecurity, and their affairs and principles regarding how they should be terminated, fall under Rule 10 (1) to (9) of the *Employment and Labour Relations (Code of Good Practice) Rules, 2007 (G.N. No 64 of 2007).* They can sue or file a dispute for an unfair labour practice relating to their probation. Mr Henjewele could, therefore, still be considered under the rules. The **THIRD ISSUE**, therefore, is responded to in that aforesaid manner and nothing more. All said and done, let me turn to the fourth issue.

The **FOURTH ISSUE** is: *if the above issue third issue is answered in the affirmative, whether Mr Henjewele is entitled to the payment of subsistence allowance to the fullest amount he has prayed for.*

As observed herein, the third issue was decided in the affirmative. Mr Henjewele's employment termination while on probation did not adhere to requirements of Rule 10 (1) to (9) of the *ELR Code of Good Practice Rules,* GN 64 of 2007. Whether he is entitled to claim for subsistence allowance following the unfair labour practice perpetrated on him by the Applicant (EROLINK) is an issue to be examined in the context of the existing la and the circumstances of this case.

Essentially, issues pertaining to payment of subsistence allowance fall under **Part III sub-part F** of the *Employment and Labour Relations Act, [Cap.366 RE 2019].* This part is termed as "*Other Incidents of Termination*). Subsistence allowance refers to allowance payable to an employee upon repatriation, following termination of employment to the former employee's place of engagement, (see: *Civil Appeal No. 62 of 2000 between Nicholaus*

Hamisi and 1013 Others and (i) Tanzania Shoe Company Ltd. and (ii) Tanzania Leather Associated Industries (unreported)).

Section 43 of the *Employment and Labour Relations Act, [Cap.366 RE 2019]* provides that:

> "43.-(1) Where an employee's contract of employment is ***terminated at a place other than where the employee was recruited***, the employer shall either-
>
> (a) transport the employee and his personal effects to the place of recruitment;
>
> (b) pay for the transportation of the employee to the place of recruitment; or
>
> (c) ***pay the employee an allowance*** *for* transportation to the place of recruitment in accordance with subsection (2) and *daily* ***subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.***
>
> (2) An allowance prescribed under subsection (1)(c) shall be equal to **at least a bus fare** to the bus station nearest to the place of recruitment.
>
> (3) For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent." (Emphasis Added).

In this instant case, the Respondent claims for payment of **TZS 72,000,000** as subsistence allowance (a calculation which was based on the number of months his repatriation has been delayed from Dodoma to Dar-es-Salaam, a place where he was recruited. He has also asked for **TZS 53,750,000** as other awarded reliefs plus transport expenses to be assessed by this Court. As I reflected on the issue, I wondered whether an employee who has already moved his case to where he was recruited will be entitled to be paid subsistence allowance as if he was still in his place he was stationed after recruitment.

In the course of considering that question, one would have wished the legal position to support a view that, an employee who claims for payment of subsistence allowance should be paid only if, in the course of waiting to be repatriated to his place of recruitment, he remained in his station of work waiting to be paid. Put in other way, one would have wished that the law was to the

effect that where an employee claiming for subsistence allowance, he would only be paid for the days he remained in his working station waiting to be repatriated. And, indeed, the rationale for such a view is not a lopsided one. Subsistence allowance is known to be an allowance payable to an employee terminated from employment in order to cover all his daily expenses whilst he waits (*in his work station*) to be paid his repatriation costs to where he was recruited. However, that is not the current legal position.

As the law stands today, section 43 of the *Employment and Labour Relations Act, [Cap.366 RE 2019]*, which, among other things, caters for the payment of subsistence allowances to an employee terminated, does not put any restriction as the one thought of in the preceding paragraph. Instead, an employee entitled to be paid subsistence allowance need not be tied all along to the place where he was stationed, i.e., where the termination took place. He can be paid, even if, immediately after his termination from employment, he, on his own, moved to his place of recruitment. That has remained the position well supported by the decision of the Court of Appeal in the case on *Gasper Peter v Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No.35 of 2017* **[2019] TZCA 28; TANZILII (27 February 2019)**, and this Court is obliged to follow it.

That being said, what amount therefore should be paid for to the Respondent as subsistence allowance? That question is not difficult and I need not invent the wheel. In the ***Juma Akida's case*** *(supra)*, the Court of Appeal decision answered the question: *"how much should be paid?"* and, citing several cases, such as *Communication and Transport Workers Union of Tanzania COTWU (T) v. Fortunatus Cheneko, Complaint No. 27 of 2008 (HC); Paul Yustus Nchia v. National Executive Secretary Chama cha Mapinduzi, Civil Appeal No.85 of 2005* and *Gaspar Peter v. Mtwara Urban Water Supply Authority (Mtuwasa), Civil Appeal No. 35 of 2017 (both unreported)*, the Court endorsed payment to the claimants on the basis of the monthly basic wage salary and affirmed that to be justifiable and was still is, good law today.

In this instant labour revision, the Respondent's monthly basic wage salary according to *Exh.P1* (clause 7.2) was **TZS**

2,500,000/-. The arbitrator had computed it to the tune of **TZS 37,500,000** (**i.e.,** *2,500,000 x 15* months). In my view, this was justified and I will hereby confirm that amount as proper according to the law. The **FOURTH ISSUE** which was raised earlier herein, therefore, is settled in the manner and to that extent stated herein above.

The **FINAL ISSUE** is: *What (other) relief are the parties entitled to.* This, as well, is a pertinent question. So far I have resolved that the Respondent is entitled to be paid subsistence allowance. In my findings concerning the second issue discussed herein, it was clear that, although there was no breach of contract because the Contract had allowed for termination of employment during the period when an employee was under probation, I also made a finding that, the manner the said termination was carried out was improper and amounted to an unfair labour practice. That being said, the Respondent is entitled to relief. However, the question that follows is: *what type of relief?*

As it was made clear from the contract, the Respondent was employed for a fixed period of two years. However, the two years period was subjected to *a six months probationary period.* It is a resolved fact that a probationary period is akin to a period of "*a practical interview*". If one qualifies in that period his contract will continue to run. If not, it will come to a halt but the halting of it must follow the prescribed principles of terminating an employee during the probationary period, failure of which that will amount to an unfair labour practice. It is clear in this application that, the Respondent did not serve up to the full six months' period when he would have (presumably) had his employment status confirmed. Instead, he was terminated on the fourth month.

In the award, the arbitrator ordered the Applicant to pay **TZS 50,000,000/=** which was equal to the period of remaining 20 months of the Respondent's contract on the ground that the contract was unlawfully breached. He was also paid **TZS 750,000** as salary payable to him for the 9 days he served in the months of April and **TZS 2, 500,000** as a one month's salary, in lieu of notice of termination. He also give the Respondent a certificate of service and ordered to pay for transportation of personal belongings as per section 43 (1) of the ELR, Cap.366 and subsistence allowance (which I have looked at and made a decision).

In my view, the payment of **TZS 50,000,000** can no longer be justifiable because, as I held herein, the Applicant was entitled

to terminate the Respondent be it on the basis of the Contract (had it been done within a month as per clause 5.1 of the Contract (Exh.P.1) or on the basis of the law (i.e., under Rule 10 (8) of the *ELR (Code of Good Employment Practice) Rules GN. No. 64 of 2007*). The problem was, as I stated, that the procedures or the guiding principles were not strictly followed, and, therefore, amounting to unfair labour practice under the GN. 64 of 2007.

In view of the above, I would only award the Respondent **TZS 5,000,000/=** (*five million Tanzania Shillings only*) being payment for the remaining two months probation period, meaning that, had the Applicant (EROLINK) followed the procedures and granted the Respondent opportunity to improve as well as training and evaluated him at the end of the sixth months period and make finding which it made prematurely, the contract would have come to an end as per the requirements of Rule 10 (8) of the *ELR (Code of Good Employment Practice) Rules, G.N. No. 64 of 2007*).

As regards the rest of what the CMA awarded, the same will remain, i.e., (TZS, 750,000 as salary for 9 days; Certificate of service; and Transportation of personal effects from Dodoma to Dar-Es-Salaam by railway haulage or even by truck, which, in my view cannot exceed rough estimate of **TZS 3, 000,000/=.**

In totality, therefore, the payable monetary amount to the Respondent is TZS **(37,000,000 + 5,000,000 + 2,500,000 +750,000 +3, 000,000)** which is equal to **TZS 48,750,000 (Forty Eight Million Seven Hundred and Fifty only).**

In the upshot, this Court settles for the following orders:

(1) That, the findings, decision or orders made in respect of the Arbitrator's award dated 16th July 2019 by Hon. Kiangi, N (arbitrator) in *Labour Dispute CMA /DSM/KIN/551/18*, are hereby revised and/or confirmed to the extent possible and for the reasons as detailed in this Judgement.

(2) That, the Respondent' termination during his probationary period did not amount to a breach of his contract but amounted to an unfair labour practice since the detailed principles under Rule 10(1) to (9) of the

ELR (Code of Good Employment Practice) Rules, G.N. No. 64 of 2007) were not strictly adhered to.

(3) The Respondent is entitled to relief and the Applicant (EROLINK) is hereby order to pay the Respondent a total of **TZS 48,750,000 (Forty Eight Million Seven Hundred and Fifty only)** (whose details are given herein)

(4) Each part shall bear its own costs.

It is so ordered.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania (Commercial Division)
27/10/2020

Ruling delivered on this 27th day of October 2020, in the presence of the Advocates for the Applicant and the Advocate for the Respondent.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania (Commercial Division)
27/10/2020