

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**DAR ES SALAAM**

**REVISION NO. 481 OF 2019**

**BETWEEN**

**GULF BADR GROUP (T) LTD ..... APPLICANT**

**VERSUS**

**FREDRICK MASSAWE ..... RESPONDENT**

**JUDGEMENT**

Date of Last Order: 05/05/2021

Date of Judgement: 27/05/2021

**Aboud, J.**

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 21/02/2019 by Hon. I.E. Mwakisopile, Arbitrator in labour dispute No. CMA/DSM/ILA/R.463/15/804. The application is made under section 91 (1) (a), 91 (2) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act), Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

Briefly, the respondent was offered employment by the applicant as an Office Manager on a condition of successful probation period of three months from 04/05/2015 to 04/08/2015 as reflected in the offer letter (exhibit G1). On 03/08/2018 the respondent served the applicant with the letter of unsuccessful probation period (exhibit G3), in the relevant letter the respondent was informed that his probation was unsuccessful therefore he was entitled to his last salary and other allowances. Aggrieved by the employer's decision the respondent on 26/08/2015 referred the dispute to the CMA claiming for breach of contract. At the CMA the respondent prayed for damages for breach of contract and compensation. Both parties presented their evidence at the CMA and on his findings the Arbitrator was of the view that the applicant failed to adhere procedures before firing the respondent as stated at paragraph 1 page 10 of the impugned award. Following such finding the Arbitrator awarded the respondent nine (9) months remuneration as compensation for breach of contract. Therefore, the respondent was awarded the total sum of Tshs. 54,111,429.00 (Fifty-Four Million One Eleven Thousand Four Twenty-Nine Shillings Only).

The applicant was dissatisfied by the CMA's award hence he filed the present application moving the Court to determine the following issues: -

- (i) Whether it was legally proper for the Arbitrator to consider a probation letter given to the respondent by the applicant as a binding employment contract between the parties.
- (ii) Whether it was legally proper for the Arbitrator to award the respondent Tshs. 54,111,429.00 without any factual and legal basis.

The matter was argued orally where both parties enjoyed the services of Learned Counsels. Mr. Ashiru Lugwisa was for the applicant while Mr. Gilbert Mushi appeared for the respondent.

Arguing in support of the application Mr. Ashiru Lugwisa adopted the applicant's affidavit to form part of his submission. He submitted that, the respondent was offered an employment post of Office Manager which was conditional to three months' probation as it is shown in annexure GB G1. He stated that the respondent accepted the offer and started working on 04/05/2015 unfortunately, he did not prove to be a worth candidate as he failed the probation period. It was submitted that, the respondent was notified of the employer's

concern on 13/07/2017 and such notice is annexed in the affidavit as GBG2.

It was submitted that, the respondent was afforded an opportunity to improve but he once again failed and the said offer was ultimately revoked on 03/08/2015. Regarding the Arbitrator's award it was submitted that, it was legally improper for the CMA to conclude that there was a breach of contract while in fact there was no such breach in this matter. It was argued that under the Law of Contract Act, [CAP 345 RE 2019] for the contract to be concluded there must be an offer and acceptance as provided under section 7 and 8 of the relevant Act. It was stated that in this matter the respondent was given an offer as per exhibit GBG1 on a condition that the respondent would qualify to be an employee if he succeeded in his probationary period.

It was further submitted that, as the record reveals the respondent failed the probation period and was not confirmed, therefore there was no proper contract which would have been breached as concluded by the Arbitrator. To strengthen his submission the Learned Counsel referred the Court to the case of **WS**

**Insight Ltd. (formally known as WARRIOR SECURITY LIMITED) VS. Denis Nguaro, Rev. No. 90 of 2019.**

It was also submitted that, the Learned Arbitrator assumed the jurisdiction she did not have when she focused her analysis on unfair termination while it is known to her and it is on record that the respondent was on probationary period. It was argued that Part III E of the Act excludes the probationary employees from benefiting the rights which are entitled to confirmed employees. Therefore, it was strongly submitted that, the impugned award was not only grossly huge and unjustifiable but there was no legal basis for awarding such a huge sum to the respondent. Thus, the Learned Counsel invited the Court to quash and set aside the impugned award for having been made illegally.

Responding to the application Mr. Gilbert Mushi also adopted the respondent's counter affidavit to form part of his submission. The Learned Counsel joined hands with his fellow Counsel that the respondent's employment contract was subject to three month's probationary period. He submitted that, the question to be asked before the Court is whether the respondent legally failed the probationary period. He argued that section 15 of the Act provides

obligation to the employer to provide some documents to the employee, he added that section 15 (1) (c) of the Act requires an employer to provide job description to the employee.

It was submitted that, in this case the respondent was never supplied with job description so it was next to impossible to be blamed for the alleged underperformance. It was further argued that Rule 10 of the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007 (herein GN. 42 of 2007) shows the procedures on how the employer should deal with the probationary employee. It was added that Rule 10 (6) (a) (b) of GN. 42 of 2007 places duty to the employer to evaluate performance of the employee and provide guidance from time to time.

It was strongly submitted that, it is in the record the employer never met the employee in question from time to time for the purpose of giving guidance. It was stated that the employer only gave the respondent notice of his concern four days prior to the expiration of the probation period. He added that, under such circumstance the employer's intention was not to evaluate the employee but rather was to terminate him as there was no notice for him to make improvements.

It was further argued that, Rule 10 (7) of GN. 42 of 2007 requires the employer to give the probationary employee opportunity to improve his performance, but the question in this matter is how could the respondent improve in four days. It was also argued that, Rule 10 (9) of GN. 42 of 2007 requires the employee to be represented in the process of evaluation by a fellow employee or a Union Representative which was not done in this case.

Moreover, it was submitted that since the employer failed to conduct himself as it is provided in law before concluding that the respondent failed the probationary period therefore, the Arbitrator rightly held that the applicant breached the respondent's contract and rightly awarded him.

As to the case of WS Insight (supra) referred by the applicant's Counsel it was submitted that, it was also held in the referred case that an employee under probation is entitled to fair labour practice provided under Rule 10 (7), 10 (8) and 10 (9) of GN. 42 of 2007 that in case of breach an employee deserves compensation for such breach.

It was also submitted the Counsel for the applicant submitted that probationary employee can not enjoy the rights like other confirmed employees. It was strongly submitted that, in numerous occasion this court has elaborated what should be the rights of the probationary employee once they are terminated. To support his submission, he cited the cases of **Agness B. Buhere Vs. UTT Microfinance Plc**, Lab. Rev. No. 459 of 2015 (unreported) and the case of **Salkaiya Seif Khamis Vs. JMD Travel Services (SATGURU)**, Lab. Rev. No. 658 of 2018, HC DSM (unreported). He therefore prayed for the application to be dismissed.

In rejoinder Mr. Ashiru Lugwisa argued that the Counsel for the respondent is misleading the Court because when the respondent complained at the CMA through CMA F1 which was lodged on 25/08/2015 he pleaded breach of contract and not unfair termination. He submitted that the fundamental principle is that parties are bound by their pleadings as was decided in **Makori Mganga Vs. Joshua Mwaikambo & another** (1987) TLR 88 where it was held that:-

*'In general, and I think that is elementary a party is bound by his pleadings and can only succeed according to what has averred in*



*evidence. He is not allowed to set up a new case'.*

It was further submitted that, there is no where the respondent pleaded about unfair labour practices. He stated that, had that been the case then Counsel for the respondent would correctly submitted on that aspect.

Regarding the case of **Agness Buhere** (supra) referred by the respondent's Counsel it was submitted that the same supports the applicant's position that a party can only succeed on what he pleads. It was added that even the case of **Salkaiya Seif** (supra) is distinguishable because what was pleaded in that case was unfair termination while in the case at hand what is pleaded is breach of contract. He therefore prayed for the application to be allowed.

After considering the rival submissions from both Counsels, I find that the Court is called upon to determine the following issue; whether the Arbitrator properly awarded the respondent and what reliefs are the parties entitles.

On the first issue, whether the Arbitrator properly awarded the respondent; as stated above the respondent was awarded 9 months

remuneration as compensation for the alleged breach of contract at the CMA. The applicant urged the court to quash and set aside such an award while the respondent's Counsel strongly persuade the Court to confirm the same. In this application it is undisputed fact that the respondent was offered employment as an Officer Manager on a condition of successful probationary period of three months. It is also undisputed fact that the respondent worked for the applicant for three months and the employment offer was terminated upon completion of such probationary period. The relevancy of probation period to an employee is provided under Rule 10 (3), 10 (6) (a) (b) of GN. 42 of 2007. The same was also highlighted by this Court in the case of **WS Insight Ltd** (supra) where Muruke, J., held that:-

*'Under normal practice an employer should subject an employee to a probationary period. During the period on probation, the employees, skills, abilities and compatibility are assessed and tested. The probation provides for an opportunity to test one another and to find out whether they can continue working with each other for a long period of time in a healthy employment relationship. At this point it is important to understand that, there are two employment*

*contracts. The first is during probationary period, and, if successfully completed, a confirmation is issued to the employee, culminating in the conclusion of a second employment contract.'*

In this application the applicant's witnesses testified at the CMA that the respondent's performance was assessed while he was on probation. This was testified by DW1 and also DW2 who was in the same office with the respondent. For easy of reference, I hereunder quote the testimony of DW1 at the CMA on his own verbatim:-

*'4. Unamfhamu mlalamikaji?*

*Alikuja kufanya kwa Gulf mwaka 2015*

*5. Kama nani?*

*Tulifahamishwa angekuwa office Manaager  
i.e Mwendeshaji wa ofisi ile.*

*6. Ikawaje?*

*Baada ya kufika pale akawa ameanza kazi  
lakini ilionekana hakuwa na ufahamu wa  
eneo hilo la kazi i.e sector hii ya utawala wa  
meli.*

*7. Nani aliona hilo?*

*Mwakilishi wa HR ambaye ni General Manager anaitwa Mohamed Lofty.*

*8. Mlichukua hatua gani?*

*Alifanya kazi kama mwezi 1 au 1½ ikaonekana aje katika kitengo changu.*

*9. Alipewa cheo gani?*

*Alikuja kujifunza tu kwangu awe chini yangu kama trainee'.*

The quotation above can be loosely translated as follows; the witness testified that the respondent started to work with the applicant's Company in 2015 where he was introduced as an Office Manager. That when the respondent started to work the Acting General Manager observed that he was not competent in his position. Thereafter the respondent was placed under DW1's supervision for the purposes of job learning.

From DW1's testimony which was not disputed by the respondent it is crystal clear that his performance was assessed all along. Again on 30/07/2015 the applicant notified the respondent on his concern that despite his attractive Curriculum Vitae his performance was alarming as per exhibit G2. The respondent responded to the employer's concern where he also raised his

concerns for failure to meet the required standard (exhibit F1). Despite the respondent's response on 04/08/2015 the applicant notified the respondent that his probation period was unsuccessful (exhibit G3). In his findings the arbitrator was of the view that, the respondent was not given enough time to improve from when he was served with the employer's concern to the date when he was informed that his probation period was not successful.

On the basis of the above analysis, it is my view that basing on the respondent's Curriculum Vitae which he clearly stated that he had 10 years' experience he was not entitled to any proposed time to improve. As it is in common practice, the persons employed in Managerial positions in any organization are expected to have enormous experience as it was the position to the respondent. Therefore, it is my considered view that the applicant was right to notify the respondent that he was not successful in the probation period. This is also the position of the law under Rule 18 (5) of GN. 42 of 2007 which provides as follows:-

*'Rule 18 (5) An opportunity to improve may be dispensed with if:-*

*(a) The employee is a manager or senior employee whose knowledge and*

*experience qualify him to judge whether he is meeting the standards set by the employer;*

- (b) *The degree of professional skills that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify termination'.*

In the circumstances of this case it is my view that, the procedures for terminating the probationary employee as they are provided under Rule 10 (8) of GN. 42 of 2007 have been observed to wit the employee was informed of the employer's concern, he was given an opportunity to respond to the same and he was given reasonable time to improve his performance from the time he was transferred from one department to another but he did not do so.

I have also noted the respondent's concern on job description, it is true that the law requires the employer to supply the employee job description as provided under section 15 (1) (c) of the Act. In my view, if the employer does not fulfil his obligation to give the employee job description it is the employee's duty to remind his

employer on the same. In this matter the respondent ought to have asked for job description before completion of the said contract. However, as the record shows the respondent raised his concern of job description and other working tools after the employer notified him that his performance is alarming on 30/07/2015 while the contract was to end on 03/08/2015. As stated above, the respondent was offered to be an Office Manager and with such a position he was expected to help the organization surpass its goals, lead teams, help them grow and maintain full control over their business and its performance at the same time. Therefore, in my view the respondent's conduct revealed that he was unfit for such a Managerial position.

I have considered parties submission on the Arbitrator's application of part E of the Act. Section 35 which forms part E of the Act provides as follows:-

*'Section 35. The provision 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'.*

From the wording of the provision above it is crystal clear that the relevant part does not apply to the employee at hand. Firstly, because his employment contract was for three months, secondly because he was a probationary employee and the principles of unfair termination does not apply to him. This is also the position in the case of **Agness B. Buhere** (supra) where it was held that:-

*'Section 35 of our Employment and Labour Relations Act 2004 precludes also employee who are under probation from the scope of relevant provision concerning unfair termination'.*

With due respect to the submission by the Learned Counsels, the provision quoted above was observed by the Arbitrator at page 10 paragraph 2 of the impugned award.

On the basis of the above discussion, it is my view that the respondent was not unfairly terminated from his employment as wrongly found by the Arbitrator. The respondent was not fully employed because he failed in his probation period and his employment offer was properly revoked.



On the last issue as to parties relief, as it is discussed above that the respondent did not breach any employment contract, so is my view that he is not entitled to any compensation as wrongly awarded by the Arbitrator.

In the result, I find there was no any breach of contract in this matter because the respondent failed on his probation period and therefore, his employment offer was revoked. So, I have no hesitation to say that this application has merit. Consequently, the Arbitrator's award of nine (9) months to the respondent is hereby quashed and set aside.

It is so ordered.



I.D. Aboud

**JUDGE**

27/05/2021