

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 82 OF 2020

JAFFAR KINEGA.....APPLICANT

VERSUS

CNBMI TANZANIA LTD..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Kinondoni)

(Mwakisople: Arbitrator)

dated 24th January 2020

in

REF: No. CMA/DSM/KIN/R.463/19/241

JUDGEMENT

16th November & 22nd December 2021

Rwizile J.

This application emanates from the decision of the Commission for Mediation and Arbitration. It is filed by the chamber summons, with notice of application supported by an affidavit of the applicant. It has been factually

stated that the applicant was employed as a sales representative by the respondent in a fixed term contract of six months.

The contract was entered on 1st March 2019. On 28th May, however, it was terminated for failure to meet the required target. The applicant considered it unfair termination. He filed a dispute with the Commission claiming for compensation due to unfair termination. Benefits claimed were styled thus; payment of 12,600,000/= as the remaining period of 9 months which is a notice of one month which is an amount of 1,400,000/=, leave pay, the sum of 1,400,000/=, severance pay at the tune of 376,923/=, insurance at the tune of 6,000,000/= and a certificate of service.

The commission upon hearing the parties, was of the decision that termination followed the procedure since the applicant was in probation. His application therefore was dismissed. Not satisfied, he has preferred this application challenging the decision. At paragraph 4 of the affidavit supporting the application, four issues for this court to determine were raised. They are in the following terms;

- i. Whether the honourable arbitrator analysed evidence that a proper procedure was followed in terminating the applicant*

- ii. *Whether there was a valid contract of employment under a fixed term that is less than one year*
- iii. *Whether the target set by the respondent was affordable and achievable as well as being realistic*
- iv. *Whether the applicant was a probationary staff who was on practical interview.*

At the hearing, however, the applicant whose representation was entered by Mr. Hemed a personal representative appeared to argue together, grounds (i) and (iii) while grounds (ii) and (iv) as well were argued together. In brief, Mr. Hemed submitted in the first set of grounds that the applicant had worked for 3 months. He said, rules governing probationary period were not complied with. He referred to Rule 10(4) of the Code of Good Practice GN No. 42 of 2007, and said, it was not followed. In Mr. Hemed's view, probationary period may be extended to 12 months to afford the employee a chance to improve. Under section 73(1) of the Law of Contract Act, it was submitted, the party who breaches the terms of the contract has to pay compensation. He argued further, that the same section should be read with section 14(1) (b) of the Employment and Labour Relations Act. He sought support in the case of **John Cyprian vs Palm Beach Casino**, Revision No.

696 of 2019 at page 8-12, and the case of **NBC vs Maria Singano**, Revision No. 489 of 2020 at page 6-7

Lastly Mr. Hemed argued that the parties' relationship was based on contract. The stated goals, if not met and termination is merited, the respondent was to follow termination procedures including giving him the right to be heard. He submitted that the evidence be brought to prove the law and rules were complied with when dealing with termination of a probationary employee. He therefore asked this court to set aside the award.

For the respondent came one Agatha a Human Resource officer of the respondent. She submitted that the contract was not terminated, rather the probation period of three months came to an end. She said, the respondent paid him terminal benefits. She asked this court to dismiss the application.

By way of rejoinder, Mr. Hemed admitted that the contract had a three months' probation period which came to an end. So, termination occurred thereafter. He asked the court to grant this application.

Having heard the parties, it can be stated here that, in law there are three types of contracts; contracts for unspecified period, for specific period and for a specific task. This is in accordance with section 14 of the Employment

and Labour Relations Act. All these types of contracts can be terminated based on clauses of the same or by operation of the law as clearly stated under section 36 of the Employment and Labour Relation Act. Therefore, in all forms of termination, the law must be complied with. Failure of which, the employer has the duty to prove termination was fair as under section 37 (2) and 39 of the ELRA.

But under rule 9(1) and (4) of the Code of Good Practice, GN No. 42 of 2007, the employer is bound to follow the fair procedure before terminating an employee. She may terminate for reasons that are justifiable in terms of conduct, capacity, compatibility or operational requirement.

The applicant as it has been submitted by the parties was on probation. His contract is alleged to have been for a period of 6 months with a period of three months' probation. The applicant was terminated when his period of probation came to an end. The reason was, he failed to meet the agreed goals. There is evidence that parties had agreed targets that based on the experience stated at the time of applying for employment. He was alleged performed less than it was expected of.

Under rule 10(1) of the Code of Good Practice, employees who are under probationary periods of not less than 6 months, their termination shall be provided under the guidelines. But the applicant was in a probation of three months and therefore not covered by this rule. It follows therefore that termination of such employment may solely be based on the terms of contract itself. I agree with the commission that based on the nature of business, the period set for probation was enough to prove, if the applicant is capable of doing a good job. Therefore, there was no reason to follow the termination procedure envisaged by the Law as under section 37(2) of ELRA. This, I think is important and is in line with rule 10(3) of the Code, as rightly held by the commission. It can be added, that indeed, the probation time is a kind of practical training. Its termination is as long as it can last. Since it was for three months and was terminated as such, then terms of the contract itself should be followed. That being the cases, the application has no merit. It is dismissed as the commission did. Parties to bear own costs.



A.K.Rwizile
JUDGE
22.12.2021