

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 773 OF 2019

BETWEEN

ANNA M. KITULA APPLICANT

VERSUS

SLEEP INN HOTEL LIMITED RESPONDENT

JUDGEMENT

Date of Last Order: 05/05/2021

Date of Judgement: 16/07/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 26/08/2019 by Hon. Igogo, M Arbitrator in labour dispute No. CMA/DSM/ILA/R.295/17/382. The application is made under section 91 (1) (a) (b), 91 (2) (a) (b) 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 applicant was employed by the respondent as an Assistant Receptionist on a one year contract started from 01/01/2016 to 31/12/2016. The relevant contract was terminated automatically upon expiry of the agreed term. Again on 01/02/2017 the parties entered into another one year contract which was agreed to end on 31/01/2018. The respondent alleged that, after entering into the second contract the applicant started to misbehave where she was warned thereto but she did not change her behavior. That on 01/03/2017 the applicant was notified to attend a disciplinary meeting which was to be held on 02/03/2017, however she refused to sign the relevant notice and to attend to the intended meeting. Dissatisfied by the applicant's conduct on 03/03/2017 the hotel's management decided to terminate the applicant's employment on the ground of poor working performance as reflected in the termination letter (exhibit A1). Aggrieved by the termination the applicant filed the dispute of unfair termination at the CMA. The CMA dismissed the applicant's claims on the ground that she was a probationary employee thus, she cannot claim for unfair termination. Again, being resentful with the CMA's decision the applicant filed the present application urging the Court to revise and set aside the CMA's award.

The application was argued orally. Both parties were represented by Learned Counsels. Mr. Joseph Mbogela was for the applicant while Mr. Frank Martin appeared for the respondent.

Arguing in support of the application Mr. Joseph Mbogela adopted the applicant's affidavit to form part of his submission. He submitted that, the issue before the Court is found in paragraph 15 of the applicant's affidavit that is whether the applicant was under probation period.

It was submitted that, the applicant was employed as a Receptionist for the contract of one year from January, 2016 to December, 2017. It was stated that the applicant went for annual leave in January, 2017 and resumed on the same January, 2017 where she was given another contract started from 01/02/2017 to 01/02/2019.

It was argued that, the applicant was not in probation because the respondent deposited the applicant's NSSF contributions for the month of January, 2017. It was submitted that, the applicant was in the same position as Receptionist in both the first and second contract and her salary did not change. It was also submitted that, the respondent was wrong to give the applicant two probation period and that was against

the law. It was added that, even if the applicant was in probationary period of six months her termination did not follow proper procedure.

It was further submitted that, according to the termination letter the applicant was terminated due to poor work performance however, the evidence adduced at the CMA was to the effect that the termination was due to misconduct. It was argued that Rule 10(8) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 (herein referred as GN 42 of 2007) requires the employer to give the employee reasonable time to improve which was not the case in this matter.

It was strongly submitted that, the respondent unfairly terminated the applicant. Therefore, the Learned Counsel prayed for the award to be quashed and set aside.

Responding to the application Mr. Frank Martin submitted that, the applicant was on probation period at the time of her termination. He submitted that, in the first contract the applicant was recognized as an Assistant Receptionist. It was stated that, the first contract was terminated upon expiry of the agreed term and, from 01/12/2016 the applicant was no longer an employee of the respondent.

The Learned Counsel went on to submit that, the applicant entered into another contract with the respondent with a new position and terms which started from 01/02/2017 and was expected to end on 31/01/2018. It was submitted that, in the second contract the applicant was employed as a receptionist and was no longer under supervision of someone else. He said, the only time to be considered that the applicant was not the respondent's employee was on January, 2017 before her contract was renewed.

It was further submitted that, the dispute arose at the beginning of the second contract where in such contract the applicant was under probation of six months. It was stated that, the dispute arose in March, 2017 therefore at the time of her termination the applicant was still on probation period. It was argued that, the issue of salary gained by the applicant was according to the terms of employment contract and parties are bound to it.

It was strongly argued that, the applicant wrongly claimed for unfair termination in CMA F1 while she knew that she was still in probation of six months. The Learned Counsel added that, the applicant

is not allowed by the law to claim for unfair termination as she did as provided under section 35 of the Act.

As regards to termination procedures it was submitted that, the same were followed even if the applicant was on probation period. He therefore prayed for the application to be allowed.

In rejoinder it was argued that, it is not true that the applicant's first contract was different from the second specifically on the position and salary scale. It was strongly submitted that, the applicant was on the same position as receptionist from the beginning of the first contract with the employer.

It was also submitted that, the issue of procedure was raised at the CMA but was not determined by the Arbitrator. He thus, 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 only two issues; whether the applicant was on probation period at the time of her termination and it is answered in affirmative whether she was entitled to claim for unfair termination against the respondent.

It is undisputed fact that the parties in this case entered into two different contracts. The first contract started from 01/01/2016 to 31/12/2016 where the relevant contract ended upon expiry of the agreed term and there was no dispute thereto. Both parties agrees that the dispute arose in the second contract which was entered on 01/02/2017 and was agreed to end on 31/01/2018. I have noted the applicant's submission that the second contract was for two years, however the record available in this court shows clearly that such contract was for one year as reflected in the employment contract (exhibit D1). Therefore, the applicant's allegation on the alleged term of that contract is not backed up with evidence.

The issue to be determined in this court is whether there was probation period in the second contract. I have keenly gone through the terms of the disputed contract and it is clearly stipulated that the applicant was on probation period of six months. This is in accordance with clause 2 of the relevant contract which I hereby quote for easy of

reference:-

'2. MUDA WA MAJARIBIO

Muda wa majaribio kwa mfanyakazi mpya au anaye ingia mkataba kwa mara ya pili atakua katika majaribio ya miezi sita na baada ya miezi sita ndipo barua ya kuajiriwa kikamili itatolewa na mwajiri.'

From the clause of the contract quoted above it is apparent that, the applicant was on probation period of six months as rightly submitted by the respondent's Counsel. The record reveals that the applicant was terminated on 03/03/2017 which was one month after entering into the second contract thus, it is certain that she was terminated while on probation period.

The relevancy of probation period to an employee is provided under Rule 10 (3), 10 (6) (a) (b) of GN 42 of 2007, I quote:-

'Rule 10 (3) - The purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.'

'Rule 10 (6) - During the 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 to provide guidance if necessary. The guidance may entail instruction, training and counseling to the employee during probation.'*

The same was also highlighted by this Court in the case of **WS Insight Ltd (formally known as WARRIOR SECURITY LIMITED) VS. Denis Nguaro**, Rev. No. 90 of 2019 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.'

Now the question to be addressed by the court is whether a probationary employee can claim for unfair termination? The answer is NO a probationary employee cannot sue for unfair termination because he/she is not in full employment protected under Part III sub part E of the Act, under section 35 of the Act it provides as follows:-

'Section 35 - The provision of this Sub-part shall not apply to an employee with less than 6 month's employment with the same employer, whether under one or more contract.'

This is also the position in the case of **Agness B. Buhere Vs. UTT Microfinance Plc**, Lab. Rev. No. 459 of 2015 (unreported) 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.'

Therefore, on the basis of the foregoing discussion it is my view that, the applicant wrongly sued for unfair termination as rightly found by the Arbitrator. It is an established principle that, an employee under probation is entitled to fair labour practice provided under Rule 10 of GN 42 of 2007, that in case of breach of the relevant provision an employee deserves compensation for such breach. However, in this case as it is shown in CMA F1 the applicant sued for unfair termination thus, in my view the dispute was improperly initiated at the CMA.

In the result, the court found that the applicant was on probation period at the time of her termination as discussed above. Therefore, she had no legal basis to lodge a complaint of unfair termination against the respondent as correctly awarded by the arbitrator. Thus, this application has no merit and the arbitrator's award is accordingly upheld.

It is so ordered.



I.D. Aboud, J.

JUDGE

16/07/2021