

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 890 OF 2019**

**BETWEEN**

**NGELEKI MALIMI NGELEKI.....APPLICANT**

**VERSUS**

**DIMENSION DATA TANZANIA LTD.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 02/06/2021*

*Date of Judgment: 16/08/2021*

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

On 12<sup>nd</sup> July, 2017 the applicant herein was employed by the respondent as an Application Support Engineer on a one year (1) fixed term contract ending on 11<sup>th</sup> July, 2018. The contract was subject to three months' probation. After the lapse of probation period, the applicant continued to work with the respondent until 24<sup>th</sup> August, 2018 when he was verbally notified by the country Manager that, they are not going to renew his employment contract.

The applicant alleged that he was dissatisfied with the notice as the same was supposed to be issued one month before ending of a contract. He referred the matter before CMA, where decision was against him. He

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thus filed the present application seeking for the revision of the CMA award on the following grounds;

- i. Honourable arbitrator erred in law by finding out that, the applicant at the time was terminated he was not confirmed by the respondent as application support engineer, that he was still under probation by failure to analyse the evidence.*
- ii. Honourable arbitrator erred in finding out that, the applicant was not terminated by the respondent only that his contract of employment came to an end.*

The application was supported by the applicant's affidavit. The respondent challenged the application with a counter affidavit sworn by Johnson John Mwamba.

As regard to the 1<sup>st</sup> ground Advocate Sophia B. Rolya, submitted that the arbitrator held that the applicant was on probation period while applicant worked for a period of one year and one month. The law provides for time limit for probation not to exceed twelve (12) months, referring Rule 10 (4) of Employment and Labour Relations (Code of Good Practice) GN.42/2007. The respondent's act of having the applicant for more than twelve months and terminating him without following procedure for employee who is under probation amounts to unfair labour practice. Counsel further stated that, the arbitrator erred to hold that, the employee who is under probation if not confirmed by his employer is still under probation.

Further, it was stated that, all the evidence adduced by the respondent do not show that the procedure under Rule 10 (1-9) of

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GN.42/2019 were followed, he referred the case of **Agness Buhere v. UTT Micro Finance Plc**, Rev. No. 459/2015.

As regard to the 2<sup>nd</sup> ground, it was stated that arbitrator erred in law by finding that, the applicant was not terminated by the respondent only the contract came to an end. That the applicant was employed on 12<sup>th</sup> July, 2017 and terminated on 24<sup>th</sup> August, 2018. The contract was supposed to end on 12<sup>th</sup> July, 2018 but the respondent failed to issue the applicant with one month notice to inform him about non-renewal of the contract. The applicant worked with the applicant up to 24<sup>th</sup> July, 2018 when he was verbally terminated. The fact that the applicant was not served with notice and he was paid full salary for July, 2018 he had expectation of renewal of a contract.

In rebuttal, Mr. Tazan Keneth Mwaiteleke, the respondent's counsel prayed to adopt the counter affidavit to form part of his submission. He submitted that the respondent's decision not to renew the applicant's fixed term employment contract, was substantially and procedurally fair to the applicant who was still under probation. The applicant had no right to challenge the termination under the principles of unfair termination. That, the applicant was under a fixed term contract with three (3) months' probation period. He remained with that status of a probationary employee since he was not confirmed by the respondent until the expiry of a fixed term. There is no automatic confirmation, referring the case of **Commercial Bank Of Africa (T) Ltd v. Nicodemus Mussa Igogo**, Rev.No.40/2012.

Further it was submitted that, the applicant being a probationary employee is not covered under the principles of unfair termination, citing

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the case of **David Nzaligo v. National Microfinance Bank Plc**, Civil Appeal No.61/2016. That, the case of Agness Buhere is distinguished in this case as the issue of unfair labour Practice was not pleaded and there is no evidence which was tendered to support the same. Therefore, the arbitrator was right to dismiss the dispute. He thus prayed for dismissal of the application.

In rejoinder, the applicant's counsel reiterated her submission in chief and further stated that, the cited case of **Nickson Yared Enus v. Symbion Power LLC**, Rev.No.32/2013 supports the position of this case as the applicant had reasonable expectation of renewal of Contract.

Having carefully considered the rival submission of the parties, records and the relevant laws, I will determine this matter basing on the grounds of revision as prescribed above.

Starting with the first ground the applicant's counsel alleged that, the arbitrator failed to analyse the evidence and arrived to a decision that, the applicant on his termination was a probationary employee as he was still unconfirmed by the respondent as application support engineer. The respondent's counsel rebutted the same as he stated that the arbitrator was correct into his decision as there is no automatic confirmation.

It is undoubted that the applicant was employed in a one-year fixed term contract, commencing with a three months' probation period. The applicant continued to work for the respondent even after the lapse of a probation period. It is crystal clear that, the applicant was not issued with a confirmation letter hence he was still a probationary employee. As

A handwritten signature in blue ink, appearing to be 'J. K. N.', is located in the bottom right corner of the page.

stated by the respondent's counsel, it is a principle of law that there is no automatic confirmation of employment.

In his CMA F1 the applicant claimed for unfair termination. It is a settled law that, principles of fairness of termination as provided under part III E of Employment and Labour Relations Act, CAP 366 RE 2019 do not apply to the probationary employee. This position has been insisted in a range of court decisions. The court of appeal in the case of David Nzaligo v. National Microfinance Bank PLC, Civil Appeal No. 61 of 2016 CAT, held that :-

*'At the time the appellant was still in probation, we are of the view that, a probationer in such a situation, cannot enjoy the right and benefit enjoyed by a confirmed employee. Since The respondent was still a probationer at the time he resigned, and he cannot benefit from remedies under Part III E of the ELRA.'*

Also, in the case of Commercial Bank of Africa (T) LTD Vs. Nicodemus Musa Igogo , Lab Rev.NO.40/2012, it was held that :-

- I. A probationary employee, remains with that status until confirmed with the proper authority.*
- II. Fair termination Procedure are not applicable to the employees on probation"*

Moreover, this court in cases of **TRA Saccoss Ltd V Bonaventura Lupindu Rev 934 of 2018** and **Mohamed Kitabuddin Vs JD United Manufacturing Co Ltd & Tanzania Tooku Garments Limited, HC Lab. Rev. No. 934 of 2018(unreported)** It was held that :





"Probation period is kin to '**engagement before marriage**'. As the saying goes '**The job interview is not over until employee has gone through the probation.**'"

With the above observation I find the arbitrator was correct to hold that, the applicant is not covered under S.37 (2) of CAP 366 RE 2019 as he was a probationary employee. I thus find no need to fault the arbitrators' findings.

With regard to the second ground, the applicant counsel faults the arbitrator's finding that, the applicant was not terminated by the respondent only that his contract of employment came to an end. It is alleged that the applicant worked for one month after the expiry of a contract term, he therefore had expectation of renewal.

I have keenly examined the records and noted that it is undisputed that on May 2018 after he was suspected of fraud, the applicant was notified by the Country Manager that his contract will not be renewed. Also, the applicant was aware of the date when the contract was coming to an end. On records, there is no evidence to prove that he worked with the applicant even after the expiry of his employment contract. It is my considered view that, the applicant had verbal notice of non-renewal of a country, therefore he cannot allege to have reasonable expectation of renewal of the same. As found by the arbitrator the applicant was not terminated instead the contract came to an end.



On basis of the above discussion, I find the application with no merit, I hereby dismiss the same. Consequently, CMA award is hereby upheld. It is so ordered.



  
Z.G. Mruke

**JUDGE**

16/08/2021

Labour Court TZ.