IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 933 OF 2019

BETWEEN

EMILIANA L. MAKALLA..... APPLICANT

VERSUS

MARIE STOPES TANZANIA ..... RESPONDENT

(Originating from Labour Dispute No. CMA/DSM/KIN/18/R.371/109)

JUDGMENT

Date of Last Order: 11/08/2021

Date of Judgment: 10/09/2021

I. Arufani, J.

The applicant filed in this court the instant application urging the court to be pleased to revise and set aside the award and order issued by the Commission for Mediation and Arbitration (hereinafter referred as the CMA) in Labour Dispute No. CMA/DSM/KIN/18/R.371/109. The application is made under sections 91 (1) (a) and (b), 91 (4) (a) and (b), and 94 (1) (b) (i) of the Employment and Labour Relations Act, (henceforth referred as the ELRA), Rules 24 (1), 24 (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a), (b), (c) and (d), 28 (1) (c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007. He prays that, after setting aside the award and

the order, the court be pleased to determine the dispute in the manner it considers appropriate and grant any other relief it may deem fit to grant.

The genesis of the matter as per the record of the matter is to the effect that, the applicant was employed by the respondent to work as a Client Call Centre Coordinator. Her employment was for two years commencing from 5th June, 2017 to 4th June, 2019 and she was required to be under probation for six months, the period which was extended for more three months. The applicant's employment was terminated on 12th March, 2018 on ground of poor performance of work. The applicant was aggrieved by the decision of the respondent and on 28th March, 2018 she referred the matter to the CMA. The reliefs the applicant was seeking before the CMA was payment of 20 months' salary being compensation for unfair termination of her employment, unpaid annual leave and general damages.

Upon full hearing of the matter the CMA dismissed the applicant's claim after finding termination of her employment was made on valid reason and fair procedure provided under the law was adhered to. The applicant was aggrieved by the decision and award

issued by the CMA and filed the instant application in this court seeking for the above stated reliefs. The matter was ordered by my learned sister, Hon. Muruke, J. to be argued by way of written submission and after the Honourable Judge being transferred to another station the matter was reassigned to me to continue with hearing up to its final disposal.

The applicant stated that, her contract of employment was terminated after expiration of probationary period. He cited section 99 (3) of the ELRA and Rules 10 (7), (8) and (9) of the GN. No. 42 of 2007 and argued that, there is no evidence adduced before the CMA showing the procedures provided in the cited provisions of the law and particularly sub rule (9) of Rule 10 of the GN. No. 42 pf 2007 were complied with before termination of her employment. She stated that, there is no evidence adduced to show the respondent proved her poor performance as required by section 39 of the ELRA read together with rule 9 (3) and 17 (3) of the GN. No. 42 of 2007.

The applicant argued further that, there is no evidence adduced by the respondent to show there was disciplinary hearing, warning and suspension given to her. She also stated that, she was not afforded an opportunity to be heard prior to termination of her

employment as the law states that, it is unfair to punish an employee without giving her an opportunity to defend her case. She referred the court to Rule 13 (5) of the GN. No. 42 of 2007 and argued that, the respondent omitted to comply with the law relating to the procedures and laid down guidelines of terminating employment of an employee.

The applicant argued that, section 37 (1), (2) (c) of the ELRA and Rule 9 (1) of the GN. No. 42 of 2007 prohibits termination of the employment of an employee without following the fair procedures. She went on arguing that, the stated right is now a constitutional right and that right is also provided under Article 7 of the ILO Termination of Employment Convention 158 of 1982 which is similar to what is provided under section 37 (1) and (2) of the ELRA. He argued that, under section 39 of the ELRA and Rule 9 (3) of the GN. No. 42 of 2007, the employer is required to prove that the termination by an employer was fair and according to section 38 of the ELRA, fairness is on both validity of reason and procedure.

She submitted that, an employee on probation is entitled to a fair labour practice. She argued that, under Rule 10 (7), (8) and (9) of the GN. No. 42 of 2007 a probationer is entitled to be represented

in the process provided under sub rule (7) of Rule 10 of the GN. No. 42 of 2007 by a fellow employee or union representative but there is no evidence to show that right was accorded to her. She prays the application be granted as there was no valid reason for terminating her employment and fair procedures were not observed during termination of her employment.

In reply the counsel for the respondent prayed to adopt the counter affidavit sworn by Elly Reweta to form part of his submission. He prefaced his submission by referring the court to the case of **David Nzaligo V. National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016, CAT at DSM (unreported) where it was stated that, a probationer cannot claim for unfair termination. He argued that, as appearing in the referral form, CMA F1 the applicant was claiming for unfair termination. He went on arguing that, in terms of section 35 of the ELRA and as interpreted in the above cited case, a probationer like the applicant cannot sue for unfair termination.

He argued that, the employment of the applicant commenced on 5th June, 2017 subject to probationary period of six months which was extended on December, 2017 for further three months. He stated the extension was made to give the applicant more time to

improve her performance but after the expiration of the extended period the applicant did not improve. He stated that, a discussion meeting was held on 9th March, 2018 and followed by notice of non-confirmation issued on 12th March, 2018.

He submitted that, as the applicant had never been confirmed, her status remained a probationer who as held in the case **David Nzaligo** (supra) she cannot sue for unfair termination. He referred the court to the case of **Yusto Habiye V. Knight Support (T) Limited**, Revision No. 101 of 2019 where the holding made in the case of **David Nzaligo** (supra) was followed. He also referred the court to the case of **Commercial Bank of Africa (T) Ltd. V. Nicodemus Mussa Igogo**, Revision No. 40 of 2012 where the court made the similar finding that, a probationer is excluded from fair termination provisions of the ELRA.

In alternative, the counsel for the respondent argued in relation to the procedures which the Arbitrator hold was properly followed that, the finding of the Arbitrator was proper. He stated that, the applicant was required to undergo probationary period of six months as depicted in exhibit D1 whose purpose is well explained under Rule 10 (3) of the GN. No. 42 of 2007. It was stated that, after completion

of the probationary period the respondent evaluated the applicant's performance and found she had not performed to the required standard as shown in exhibit D3.

That caused the applicant probationary period to be extended for more three months as shown in exhibit D4. During that period, she was put under performance improvement plan (PIP) to assist her to improve as stated in exhibit D5. On expiration of the extended period, it was found the applicant had not improved her performance. A discussion meeting was held and the applicant was well informed she had not improved as stated under exhibit D6 and her employment was not confirmed as indicated in exhibit D7. It was submitted that, the above conduct shows the respondent dully adhered to Rule 10 (5), (6), (7), (8) and (9) of the GN. No. 42 of 2007.

It was argued further that, the applicant's allegation that there is no evidence adduced pursuant to Rule 13 (3) of the GN. No. 42 of 2007 and that the proper procedure provided under sections 36, 37 and 39 of the ELRA was not followed is misconceived as those provisions of the law are not applicable to the applicant. As for the application of Article 7 of ILO Termination of Employment

Convention, 158 of 1982 regarding valid reasons for termination of the employment the counsel for the respondent stated is also inapplicable in the matter.

To support his argument, he referred the court to the case of **Stella Temu V. Tanzania Revenue Authority**, [2005] TLR 178 whereby the Court of Appeal followed the position stated in the case of **Mtenga V. University of Dar es Salaam**, (1971) CHD 247 where it was held that, expiration of probationary period does not amount to confirmation and the confirmation is not automatic upon expiry of probation period. In fine he implored the court to find there is no reason to interfere with the CMA decision as the claim of the applicant was made on unfair termination which the applicant is not entitled and the procedure for non-confirmation of the employee on probation was dully adhered to.

After giving due consideration to the rival submissions from both sides the court has found the issues for determination in this matter is whether the applicant was entitled to sue for unfair termination, whether the laid down legal procedures and guidelines were adhered in the termination of the applicant's employment and what reliefs the parties are entitled.

Starting with the first issue the court has found that, as one of the claims of the applicant as stated at part 4 of the CMA F1 used to initiate the dispute before the CMA is a claim of 20 months' salary as a compensation for unfair termination it is to the view of this court pertinent to start to determine whether the applicant is entitled to claim for the reliefs based on unfair termination. The court has also framed the above question after seeing that, while the applicant is arguing she was not on probationary period when her employment was terminated the counsel for the respondent maintains the applicant was on probationary period when her employment was terminated.

That being the argument from both sides the court has found the law is very clear that, for an employee to initiate a claim of unfair termination he or she must be an employee who is not under probationary period and or has less than six months' employment with the same employer, whether under one or more contract. The above stated position of the law is provided under section 35 of the ELRA which states as follows:-

> *"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".*

The sub-part referred in the above provision of the law is Sub-Part E of Part III of the ELRA which governs unfair termination of employment. That being the position of the law the court has found the question to determine here is whether the applicant was within the web of employees referred in the above quoted provision of the law when her contract of employment was terminated. The court has found that, although the above provision of the law is not providing specifically for an employee under probationary period but this court stated in the case of **Agnes B. Buhere V. UTT Microfinance PLC**, Lab. Revision No. 459 of 2015 (unreported) that, employees who are under probation are precluded from the scope of relevant provisions concerning unfair termination. The Court of Appeal put that position of the law clear in the case of **David Nzaligo** (supra) when it stated that:-

> *"We find that the import of section 35 of ELRA though it addresses the period of employment and not the status of employment, the fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination. It suffices that when assessing this provision, it is a provision that envisages an employee fully recognized by an employer and not a probationer".*

That being the position of the law the court has found the record of the matter at hand shows that, it is no disputed that the applicant was employed by the respondent in a contract of two years period commencing from 5th June, 2007. The court has also found that, clause 5 of the contract of employment of the applicant admitted in the matter as exhibit A1 shows the applicant was supposed to undergo probationary period of six months. However, as stated by the respondent's witness and indicated in exhibit D4 the probationary period was extended for three months from 5th December, 2017 to 5th March, 2018.

The court has also found that, although the applicant had finished the probationary period of six months stated under clause 5 of her contract of employment and there is no any clause in the contract showing the probationary period would have been extended but the extension of three months period made to her probation is allowed by Rule 10 (5) of the GN. No. 42 of 2007. The cited provision of the law states as follows:-

> *"An employer may, after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not yet been able to properly*

assess whether the employee is competent to do the job or suitable for employment".

The court has found the wording of the above provision of the law shows the requirement to be complied with by an employer before making an extension of probationary period of an employee is to do consultation with the employee. The evidence in the record of the matter at hand shows the applicant stated in her testimony as recorded at page 18 of the proceedings of the CMA that, after completion of the six months period of probation she was not confirmed in her employment.

She said to have been informed the employer had not been satisfied with her performance of work and thereafter she was served with exhibit D4 which extended her probationary period for more three months from 5th December, 2017 to 5th March, 2018. To the view of this court that shows there was consultation between the respondent and the applicant before extension of her probationary period which is a requirement provided under Rule 10 (5) of the GN. No. 42 of 2007.

Since up to when the applicant was informed through exhibit D7 served to her on 12th March, 281 that, she would have not been

confirmed in her employment she had not been confirmed in her employment, it is crystal clear that her contract of employment was terminated while she was still a probationer and not a confirmed employee. The above finding is getting support from the case of **David Nzaligo** (supra) cited in the submission of the counsel for the respondent where the Court of Appeal followed the position of the law stated in the case of **Mtenga V. University of Dar es Salaam** (supra) and stated that:-

> *"We are therefore of the view that confirmation of an employee on probation is subject to fulfilment of established conditions and expiration of a set period of probation does not automatically lead to change of status from a probationer to a confirmed employee".*

The court has found Muruke, J. put clear the intention of subjecting an employee on probation and the stages which an employee is required to undergo before becoming a confirmed employee. She made that observation in the case of **WS Insight Ltd. (formally known as Warrior Security Limited) V. Denis Nguaro,** Revision No. 90 of 2019, HCLD at DSM (unreported) where she held that:-

> *"Under normal circumstances an employer should subject an employee to a probationary period. During the period on*

probation, the employee's skill, 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 probation period, and, if successfully completed, a confirmation is issued to an employee, culminating in the conclusion of a second employment contract".

From the above quoted excerpt, it is crystal clear that as there is no evidence adduced before the CMA to show the applicant had been confirmed in her employment when her employment was terminated, she cannot claim she was not on probationary period as argued in her submission. If she was on probationary period the answer to the firs issue can be found in the case of **David Nzaligo** (supra) where the Court of Appeal discussed at length the status and rights of a probationer and held that, a probationer cannot enjoy the rights and benefits enjoyed by a confirmed employee.

The similar holding was made by Aboud, J. in the case of **Anna M. Kitula V. Sleep In Hotel Limited**, Revision No. 773 of 2019, HCLD at DSM (unreported) where she stated that, a probationer

employee cannot sue for unfair termination because he/she is not in full employment protected under Part III sub-part E of the ELRA. Basing on the law and cases cited hereinabove the court has found the first issue is supposed to be answered in negative and as rightly found by the Arbitrator the applicant was not entitled to claim for anything basing on unfair termination of her contract of employment as she was not protected by the law governing unfair termination of employment.

Coming to the second issue which relates to the compliance or none compliance of the procedures for termination of employment of an employee who is on probation the court has found the applicant has cited several provisions of the law from the ELRA and GN. No. 42 of 2007 in her submission. As the court has already found the applicant was not protected by the provisions of the law provided under sub-part E of Part III of the ELRA as she was on probationary period when her contract of employment was terminated, the court will not delve into what is provided under the said part of the law because the applicant's employment was not been governed by that part of the law.

Therefore, the court will not deal with what is provided under sections 36, 37 and 39 of the ELRA together with Rules 9, 13 and 17 of the GN. No. 42 of 2007 as all of them are governing unfair termination of employment and as rightly submitted by the counsel for the respondent the applicant is not entitled to the protection provided under those provisions of the law. The only provision which is governing the applicant is Rule 10 of the GN. No. 42 of 2007 which deals with probationary employees. The court has found the applicant argued the procedures provided under sub rules (7), (8) and (9) of the cited Rule were not complied with at the time of termination of her employment. For clarity purposes the cited provision of the law states as follows:-

> *"10 (7) where at any stage during the probation period the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of the concern and give the employee an opportunity to respond or an opportunity to improve.*
>
> *(8) subject to sub-rule (1) the employment of a probationary employee shall be terminated if-*
>
> *(a) the employee has been informed of the employer's concerns;*

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

(c) the employee has been given a reasonable time to improve performance or correct behaviour and has failed to do so;

(9) A probationary employee shall be entitled to be represented in the process referred to in sub-rule (7) by a fellow employee or union representative."

The court has found the applicant argued there is no evidence adduced by the respondent to prove the procedures laid under the above quoted provisions of the law were complied with before terminating her contract of employment. After reading the above quoted provisions of the law and going through the evidence adduced before the CMA the court has found that, there are various evidence adduced before the CMA by the respondent to show the procedures quoted hereinabove were followed.

The court has found the evidence of DW1 shows the applicant was informed by the respondent that her performance was not satisfactory and the applicant admitted so at pages 11 and 12 of the typed proceedings of the CMA where she said there was one meeting which was held to discuss her performance and after being notified her performance was not satisfactory her probationary period was

extended for further three months. In addition to that, the applicant was also given an opportunity of getting training conducted by ATE to improve her work performance and that was supported by the certificate issued to her which was admitted in the matter as exhibit D2. That shows the requirement provided under Rule 10 (7) of the GN. No. 42 of 2007 was complied with.

The court has also found that, when the applicant was served with the letter of extending her probationary period, (exhibit D3) she stated thereon that she had also been served with improvement plan (exhibit D5) on 19th January, 2018 and wrote thereon that she would have discussed the same with her line manager but she didn't state in her evidence or submission whether she discussed the improvement plan with her line manager or not. In addition to that the court has found there is exhibit D6 which comprises of email written by the applicant committing herself to improve her work performance and meeting minutes showing the performance of the applicant was intensively discussed. That shows sub rule (8) of Rule 10 of the GN. No. 42 of 2007 was complied with and negate the argument by the applicant that there is no evidence to prove the requirement provided under the cited law was complied with.

There is another argument raised by the applicant that sub-rule (9) of Rule 10 of the GN. No. 42 of 2007 which gives right to a probationary employee to be represented in the process provided under sub-rule (7) of Rule 10 of the GN. No. 42 of 2007 by his/her fellow employee or representative from the Union was not complied with by the respondent. The court has found that, although the applicant insisted in her submission that the stated provision of the law was not complied with but the alleged none-compliance of the legal procedure was not raised before the CMA.

To the view of this court to raise the said allegation before this court at the revisionary stage of the matter is not proper as it was supposed to be raised and determined by the CMA before being taken to this court. In the strength of what I have stated hereinabove the court has found that, as rightly argued by the counsel for the respondent the Arbitrator was right in finding the procedures pertaining to termination of the employment of the applicant who was on probation was properly followed.

The court has also considered the further applicant's argument that Article 7 of the ILO Termination of Employment Convention which prohibits termination of employment of an employee for

reasons related to his/her conduct or performance without providing him or her with an opportunity to defend herself against the allegations but find that argument is devoid of merit. First of all, the court has found as stated hereinabove there is evidence (exhibit D6) in the record of the matter showing the applicant was given an opportunity to defend herself before termination of her employment.

Secondly the court has found that, as stated in the case of **Commercial Bank of Africa (T) Ltd.** (supra), probationer is one of the categories of employees who are excluded from coverage of fair termination procedures. The above finding moved the court to the settled conclusion that, the second issue is supposed to be answered in affirmative that the laid down procedures for termination of probationary employee was properly adhered in termination of the applicant's employment.

In totality of all what is stated hereinabove, the court has found there is no any error committed by the Arbitrator which can make the court to revise the award and order issued by the CMA. In the upshot

the application is dismissed in its entirety for being devoid of merit. It is so ordered.

Dated at Dar es Salaam this 10th day of September, 2021.

I. Arufani

JUDGE

10/09/2021

Court: Judgment delivered today 10th day of September, 2021 in the absence of the Applicant and in the presence of Mr. Anthony Meya, Advocate for the Respondent.

Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

10/09/2021