

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION NO. 396 OF 2020**

**BETWEEN**

**AMARACHI INVESTMENT LTD ..... APPLICANT**

**VERSUS**

**ABOUBAKAR PAUL MSIGWA ..... RESPONDENT**

**JUDGEMENT**

**S. M. MAGHIMBI, J:**

The applicant filed the present application under the provisions of section 91 (1) (a), 91 (2) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 06 of 2004, Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 (LCR) seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) delivered on 31/08/2020 by Hon. Lucia C. Chacha, Arbitrator in Labor Dispute No. CMA/DSM/KIN/153/2020/117/20. The application is supported by an affidavit of Ms. Lulu Siame, applicant's Administrator and Human Resources Officer dated 30/09/2020. The respondent vehemently challenged the application by filing his counter affidavit dated 18<sup>th</sup> November, 2020.

The facts giving rise to the application at hand are that the respondent was employed by the applicant as a Driver on a fixed term contract of one year, subject to successful probation of three months. The contract commenced on 01/11/2019. On 24/12/2019 the respondent was caught by the Manager of Yapi Merkezi, the applicant's client, stealing fuel from the applicant's vehicle with registration No. T

283 DRU. On the same date the incident was reported to the police station and the respondent was remanded in custody. After sometime the applicant decided to withdraw the case at the police station and eventually terminated the respondent from service with effect from 24/12/2019.

Aggrieved by the termination, the respondent referred the complaint to the CMA. The CMA decided the matter in the respondent's favour by ordering the applicant to pay him a total of Tshs. 5,040,000/= being one (1) month salary in lieu of notice, one (1) month salary as leave allowance and ten (10) months as compensation for the remaining period of the contract. Dissatisfied by the CMA's award, the applicant filed the present application on the following grounds: -

- i. That the Arbitrator erred in law and fact for failure to hold that the respondent was a probationary employee and having been afforded an opportunity to defend himself before being terminated cannot benefit under claim of unfair termination as he was not confirmed as an employee.
- ii. That the Arbitrator erred in law and fact for failure to hold that the respondent stealing from the applicant was a valid reason to terminate the respondent as it amounted to gross dishonesty.
- iii. The Arbitrator erred in law and fact for holding that the respondent was unfairly terminated without following procedures while the applicant gave him a chance to defend himself before termination.
- iv. That the Arbitrator erred in law and fact for failure to hold that the respondent being a probationary employee for only two months

was not subject to termination procedures of employees as he was not yet an employee of the applicant.

- v. That the arbitrator erred in law and fact for awarding a 12 month's salary to the respondent whose employment contract was not yet confirmed at the time of termination.

The matter was argued by way of written submissions, the applicant's submissions were drawn and filed by Ms. Subira Mushi, Learned Counsel whereas Mr. Cosmas Kumalija, Personal Representative drew and filed the respondent's reply submission. I have read the submissions with appreciation on the efforts put by the parties to come up with such comprehensive submissions. I will however not reproduce the submissions but instead, I will consider the submissions in due course of determination of this matter.

To begin with, I have noted that in his submissions in reply, the respondent raised an objection that the applicant pointed out by Mr. Kumalija, the applicant cited the Employment and Labour Relations Act as Act No. 06 of 2004 instead of Cap. 366 R.E 2019. That being the case it is true that the applicant did a wrong citation of the law, however, in my view the pointed error/irregularity can be cured by the overriding objective which emphasize courts to focus much on the substantive part of the matter rather than procedural irregularities. I don't see how the respondent was prejudiced in his substantive right by the erroneous citation of the law; hence I will proceed to determine the merits of this application.

Having heard the parties' submissions for and against this application, and having perused the records of the CMA, I find that there are three main issues to be determined by this court. The first one is

whether the respondent was a probationary employee, the second one is whether the applicant fairly terminated by the respondent both substantively and procedurally and three is on the reliefs that the parties are entitled to.

On the first issue as to whether the respondent was a probationary employee, Ms. Mushi strongly submitted that the respondent was a probationary employee who is not supposed to sue on unfair termination. This necessitated me to go and have a glance at the respondent's employment contract (exhibit D2). Clause 10 of the contract reads: -

***'10. Sheria na kanuni za kampuni utatakiwa kuwa kwenye uangalizi kwa miezi mitatu mpaka pale tutakaporidhishwa na utendaji wa kazi yako na pia tusiporidhishwa na utendaji wa kazi iyo tutakuongezea miezi miwili ili uweze kujirekebisha na kufanya kazi kwa ufanisi, endapo utaongezewa hiyo miezi nakushindwa kufanya kazi zako utasimamishwa kazi. Kanuni na uendeshaji wa kampuni na matarajio ya mwajiri kwa mwajiriwa yanapatikana kwene vipeperushi vya (CODE OF GOOD CONDUCT) pamoja na (HR POLICY) ambazo zinapatikana kwa kiongozi wako wa kazi muda wowote, unatakiwa ujifahamishe na hizi documenti mbili muhimu kuweza kufahamu sharia za kazi na haki za mfanyakazi.'***

[Emphasis is mine]

The language of the quotation above is plain and clear with no ambiguity. The respondent's contract was subject to probationary period of three (3) months and if his performance was unsatisfactory the

probation period would have been extended to two more months. As per the contract, it commenced on 01/11/2019 and agreed to end on 31/01/2020. The record shows that the respondent was terminated on 24/12/2019 therefore, it is crystal clear at the time of his termination, he was still on probation.

The procedures of terminating a probationary employee are provided for under Rule 10 of GN 42/2007. For easy of reference, I hereunder quote some of the relevant procedures: -

*'Rule 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 that 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 question to be asked at this point is whether the termination of the respondent was due to none performance to standard or he was found not to be suitable for the position. Going through the records of this case, there is no doubt that the above stipulated procedures were not applicable to the respondent because the issue that led to his termination was not that of underperformance, rather it was an issue of theft which was reported to the police, hence the provisions above cannot be said to be applicable to the respondent.

Furthermore the dispute that was lodged at the CMA was breach of contract praying for relief of compensation for the said breach. The CMA proceeded to determine whether the termination of the respondent was fair. However, the wording of the Section 35 of the Act which deals with unfair termination are very clear and I quote:

*"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."*

Since it is undisputed that the employee had only worked for a period of less than six months, then the provisions regarding unfair termination are not applicable to him. The CMA was wrong to entertain a dispute of unfair termination while the respondent had not qualified to claim any compensation under the Act. On those findings, this revision is hereby granted. The award of the CMA is revised and set aside.

It is so ordered.



Dated at Dar es Salaam this 20<sup>th</sup> October, 2021.

**S.M. MAGHIMBI**  
**JUDGE**