IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 670 OF 2018

BETWEEN

OMARY HAMISI CHAGO AND 2 OTHERS.....APPLICANT

AND

GASHPARTS LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 01/10/2021

Date of Judgment: 08/10/2021

B. E. K. Mganga, J.

On 14th June 2017 applicants filed to the Mediation and Arbitration henceforth CMA Labour dispute No. CMA/DSM ILA/R.625/17 against the respondent who was their employer. In CMA Form No. 1 applicants indicated that they were employed by the respondent as drivers and that they were unfairly terminated on 16th May 2017. They were therefore claiming for terminal benefits and special damages against the respondent. Respondent did not enter appearance at CMA as a result, applicants were ordered to proceed ex-parte. In order to prove that they were unfairly terminated, they only paraded Omary Hamis Chago who testified as PW1. On 6th September 2018, Mkenda S, Arbitrator, issued an award dismissing the complaint by the applicant on ground that respondent had valid reasons for termination and further that applicants had no locus to lodge

termination claim against the respondent as they worked less than six months with the respondent.

Applicants were aggrieved with that decision hence this application. In paragraph 6 of the joint affidavit of Omary Hamisi Chago, Mwombeki Revelian and Mbaraka Ally, the respondents, in support of the notice of their application, raised three grounds namely:-

> *(a) That arbitrator erred in holding that we were not entitled any payment from the respondent on ground that we served our contract less than six months while our claims was not for unfair termination but was for terminal benefits.*
>
> *(b) That arbitrator erred in regarding our claim of special damages to be the same as claim for 12 months salaries for unfair termination.*
>
> *(c) That the arbitrator erred in law and facts by ignoring our claims.*

When the application was called for hearing, applicants enjoyed the service of Edward Simkoko, from TASIU, a trade union while the respondent enjoyed the service of Benson Kisamarwa, advocate.

Arguing on behalf of the applicant, Mr. Simkoko submitted that applicants got their employment with the respondent on 9th February 2017 as drivers and that they were terminated on 16th May 2017. At CMA, they were claiming for terminal benefits and general damages as they were terminated without payment of salaries for the months they work for the respondent. He argued that this is what they claimed in CMA Form 1. He

cited the case of **Joachim Mwamkwa v. Golden Tulip Hotel, Revision No. 268 of 2013** to bolster his argument that arbitrators are not allowed to depart from what parties pleaded in CMA Form 1. He argued further that applicants were entitled to be paid one month salary as notice as per section 41(1)(b)(ii) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and one month salary they worked for. He however conceded that in his evidence, Pw1 said nothing in relation to claim of general damages and payment of one month salary in lieu of notice. He was quick to argue that the issue of notice is statutory as per section 41(5) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] as such, the arbitrator was supposed to award. He concluded by praying that application be allowed.

Arguing for and on behalf of the respondent, Mr. Kisamarwa, advocate submitted that in CMA Form 1, applicants were claiming terminal benefits and special damages but in evidence they claimed to be paid ten months salaries and general damages. He argued that applicants were under probation and that in terms of section 35 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] they cannot claim for unfair termination. He concluded that applicants did not prove their claims at CMA. He therefore prayed the application be dismissed.

I have gone through the evidence of Omary Hamis Chago (PW1) who is the only witness in the CMA file and find that he testified that on 3rd December 2016 all applicants were employed by the respondent and that their monthly salary was TZS 350,000/=. He tendered employment contracts (exhibits P1 collectively) and went on that their employment was under permanent terms. In his evidence, Pw1 testified:-

> *"Sisi tulikuwa waajiriwa wa Gashparts Ltd ambapo tuliajiriwa mnano* ***tarehe 03/12/2016...tulikuwa tukilipwa mshahara wa Tsh 350,000/=*** *kwa mwezi. Ili kuthibitisha kuwa sisi tulikuwa waajiriwa wa M/kiwa, tunaomba tume ipokee vielelezo hivi ili vitumike kama sehemu ya Ushahidi wetu(vielelezo vimepokelewa kwa Pamoja kama P1"). Tulikuwa waajiriwa wa kudumu.*
>
> *Mnamo tarehe 16/05/2017 mwajiri alituachisha kazi, pasipo kutupa sababu yoyote. Siku hiyo mwajiri alituita saa nane mchana na kutufahamisha kuwa anatuachisha kazi.* ***Mwajiri hakufuata utaratibu wowote wa kutuachisha kazi zaidi ya kutupatia barua za kutuachisha kazi na kutulipa malipo yetu.***
>
> *Tunaomba Tume imwamuru mwajiri wetu atulipe stahiki zetu ambazo ni overtime, mishahara ya miezi 10 kama fidia ya kutuachisha kazi kionevu".*

When asked by the arbitrator to clarify payment received, Pw1 stated:-

> ***"Alitulipa tu mshahara wa mwezi wa 5 tu, ambao ndio mwezi tulioufanyia kazi."***

It is clear from the evidence of PW1 that he departed from pleadings filed at CMA through CMA Form 1 in which applicants indicated that their

employment started on 9th February 2017. In fact, employment contract of Omary Hamis Chago and Mwombeki Fihilimon Tibanga (exh p1 collectively) show that their contract started **on 9th February 2017 with three months' probation period and not 3rd December 2016 as PW1** testified. In the case of ***Barclays Bank (T) Ltd v. Jacob Muro, Civil Appeal No.357 of 2019*** (Unreported), the Court of Appeal found that in his evidence, respondent mentioned a different date from the one he indicated in CMA Form 1 and declined to allow him to abandon the one in CMA Form 1 and maintain the one he mentioned in his evidence. In declining that departure, the Court of Appeal held:-

> *"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded fats or is at variance with the pleaded facts must be ignored..."*

Having so held, the Court of Appeal quoted with approval a passage in an article by sir jack I.H. Jacob titled "the Present Importance of Pleading" first published in Current Legal Problems (1960) at page 174 that:-

> *As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any*

inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

The said contracts shows that they are not fixed terms. I have noted that Pw1 told lies or for reasons best known to him but to the prejudice of the respondent, departed from pleadings filed at CMA through CMA F.1 when he testified that their contracts started on **3rd December 2016.** He cannot be allowed to depart from that pleadings. I therefore hold that applicants' employment with the respondent started on 9th February 2017 with three months' probation period and not 3rd December 2016.

It is clear also that applicants were terminated while on probation and that at time of termination, they had worked less than 6 months with the respondent. In terms of section 35 of the Employment and Labour Relation Act [Cap.366 R.E. 2019], they are not covered by the provisions of part III sub-part E that relates to unfair termination and reliefs thereof. Reasons for exclusion of probationer in unfair termination was given by the court of Appeal in the case of ***David Nzaligo v. National Microfinance Bank PLC,Civil Appeal No. 61 of 2016*** (unreported) where it was held :

"...We are aware that for the employee, probationary period is there to allow one to see if one enjoys working with the employer and whether the employee

matches the skills and abilities for the job recruited... probationer in such a situation, cannot enjoy the rights and benefits enjoyed by a confirmed employee.."

The court of appeal in so hold, was in one way or another, though not expressly, reciting its earlier decision in the case of ***Stella Temu v. Tanzania Revenue Authority [2005] TLR 178*** where it held that probation period is a period of practical interview.

In his evidence, Omary Hamis Chago (PW1) testified that they were unfairly terminated and that they are claiming to be paid 10 months salaries as compensation and overtime pay. These, in no doubt, are only payable to confirmed employees and not probationers.

For the foregoing, I find that the application is devoid of merit and hereby uphold the decision of CMA and dismiss it.

It is so ordered.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA KAZI

B.E.K. Mganga
JUDGE
08/10/2021