

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 602 OF 2019  
DIGITAL GRID SOLUTION.....APPLICANT**

**VERSUS**

**OMARY MANYWELE.....RESPONDENT**

**JUDGMENT**

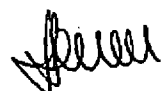
*Date of Last Order:16/03/2021*

*Date of judgment: 19/03/2021*

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

Omari Manywele was employed by applicant for one year under probation period of six months. He did not report to work for more than five days without permission. He was charged, and convicted on Disciplinary hearing. He filed dispute at CMA in which decision was in his favour. Applicant was dissatisfied, thus filed present revision. On the date set for hearing Herman Lupogo represented applicant while Yusuph Mathias represented respondent.

In support of revision applicant counsel submitted that. According to employment contract between the parties herein, exhibit D1, it is clear that, there was six month probation period. Applicant was employed on 21<sup>st</sup> November, 2016. Respondent termination was on 27<sup>th</sup> March, 2017 being after 4 months i.e. before expiry of probation period. Provision of Section 35 ELRA, Act No. 6 /2004, read as follows:-



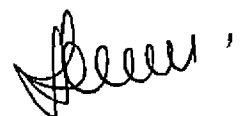
"The provisions of this sub part shall not apply to an employee with less than 6 months employment with the same employer whether under one or more contract."

Respondent at CMA claimed for unfair termination which in terms of the provision above was not right. The award at page 7 last paragraph, arbitrator admitted that respondent was in probation period and that he only worked for 4 month out 6 probation period. Respondent does not quality to get relief for unfair termination provided under Section 40 of Employment and Labour Relation Act, that provides for relief of unfair termination.

Position of probationer employee was laid down in the case of **David Nzaligo Vs. NBC** Civil Appeal No. 61/2016. Karosso, JA at page 21 held that, "Probations is a such a situation that, cannot enjoy the right enjoyed by confirmed employee."

Since respondent was under probation, the law bars him from enjoying the benefit of permanent employee. There is no dispute that respondent was not confirmed.

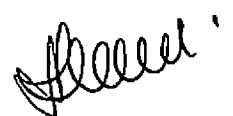
On the relief of the parties, respondent, is only entitled to the payment of salary on days he has worked before termination of employment. He traveled on 8<sup>th</sup> March, 2017 and return was supposed to be on 13<sup>rd</sup> March, 2017. He did not report on 13<sup>rd</sup> March, 2017. Respondent was entitled for the salary for 12 days only. On the issue of transport allowance was suppose to be given only for 12 days he has worked. Not the whole amount of 250,000 Tshs. Other relief as granted by arbitrator are strongly disputed as not entitled. The award was erenius, granted, ought to be set aside.



On the other hand respondent counsel submitted that according to CMA form number one, respondent claimed breach of contract. The said breach of contract was to contravene one of principle of nature justice. Respondent was assigned the tusk by applicant, he became sick, but applicant terminated respondent. He was communicating with applicant on his sickness. Paragraph 3.4 of affidavit in support of the application, proves communication between the applicant and respondent. Only after 7 days from the last communication on 17<sup>th</sup> March, 2017, respondent was terminated. All the procedures were done within 7 days. How may days then, respondent was given to recover from sickness before termination.

From the facts, of the case respondent was sent to perform duty, after communications, sickness was reported. No any previous record that respondent misconducted. It was first offence. There was no room for right to be heard. In the eyes of law, the said termination was contrary to principal of natural justice. So, respondent is entitled for payment for the months remained before expiry of probation, and general damages for breach of contract.

In rejoinder respondent counsel submitted that, applicant was aware of respondent sickness as shown in paragraph 3.4 of affidavit in support of the application. It is applicant who attempted to communicate by respondent by asking his whereabouts, being after 5 days from the date was suppose to report to work. It is on record that applicant requested for sick sheet or ED (Excuse Duty) upon several reminders same was not furnished by respondent. This shows negligence on respondent part, who was supposed to know his responsibility. Reason of sickness is not automatic relief from absenteeism from work without permission. Absence



from work is one the offence which may constitute termination in terms of GN 42/2007 in the schedule, item 9.

Having heard both parties submission, It is clear that, respondent travelled but did not report to work as scheduled. He was absent for more than 5 days thus applicant inquired his where about as avared at paragraph 3.4 of affidavit in support of application that

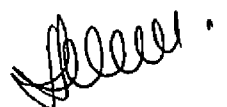
That on 17<sup>th</sup> March, 2017, the applicant contacted the respondent wanting to know his whereabouts in which the respondent claimed to have abdominal malaria, and he promised to submit the sick sheet to the Human resources department on the next day but the promise was not honored.

Furthermore, applicant reminded respondent to comply as reflected at paragraph 3.5 of affidavit in support of the application that:-

That the applicant severally reminded the respondent via emails, phone calls and messages to firstly submit the sick sheet or excuse duty form (ED). After several reminders from the applicant the respondent admitted that he was feeling better and promised to go to the office thus the applicant intended to serve the respondent with a notice of intention to conduct a Disciplinary hearing to dispose off the matter of absenteeism but the respondent never honored the promise, and was nowhere to be found and avoided the applicant.

Despite applicant effort to assist the respondent to put his records right yet, he failed as averred at paragraph 3.6 of affidavit in support of application that:-


That the applicant could not serve the notice of intention to conduct a disciplinary hearing to the respondent hence the applicant had to



conduct the disciplinary hearing on the 24<sup>th</sup> March, 2017 in absence of the respondent and thus termination of his employment prior to expiration of the probation period.

Under normal practice an employer who 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. The job of a probationary employee is potentially more secure than that of a temporary employee. This is because, right at the outset, the probationary employee has the expectation of permanent employment. However, the probationary employee does not initially have the same degree of security as that of a permanent employee. An employee may start as probationary employee and become a permanent employee at the end of probationary period if the probationary conditions have been met.

It is my clear observation that the respondent's offer of employment was not confirmed, this clearly show that the respondent was still recognized as a probationer employee who cannot claim on unfair termination. It is a principle of law that once employee is in probation there is no automatic confirmation of employment. In the case of Commercial Bank of Africa (T) LTD Vs. Nicodemus Musa Igogo , Lab Rev.NO.40/2012, (unreported) 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"

The same position was reasoned in a recent decision of the Court of Appeal in the case of David Nzaligo Vs National Microfinance Bank PLC, Civil Appeal No. 61 of 2016 CAT, Korosso, J.A, (unreported) held that:-

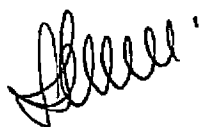
**"At the time the appellant was still in probation , we are of the view that , a probationer in such a situation , cannot enjoy the right and benefit enjoyed by a confirmed employee. Since The respondent was still a probationer at the time he resigned, and he cannot benefit from remedies under Part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

Moreover, this court in the case of 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 a kin to **'engagement before marriage'**. As the saying goes **'The job interview is not over until employee has gone through the probation'**.

Also in the case of Stella Temu Vs Tanzania Railways Authority, Civil Appeal No.72 of 2002, CAT, while answering the issue of whether the probation employee had a right to be heard for termination, Court held that;

**"In the present case, however we are of the opinion that there was no right of a hearing because there was no termination but it was merely a non-confirmation"** it further stated that probation is a practical interview.



With the above observation, I find the arbitrator incorrect for holding that, the respondent is covered under S.37 (2) of the Employment and Labour Relations Act, No.6/2004 while he was a probationary employee.

As far as reliefs are concerned, since the respondent was a probationary employee, not covered by the law as observed and he himself misconducted by not reporting to work from 13 March until terminated on 24<sup>th</sup> March, 2017, he cannot benefit from the work he has not done. Absent from work without permission is one of the offences that can lead to termination as serious misconduct. Absent from work constitutes serious misconduct, thus termination is an appropriate remedy. Revision application allowed. Thus applicant is only entitled to a salary on days that he had worked for month of March and fuel allowance being 12 days only. The award of 4,125,000Tshs is quashed and set aside. Revision allowed to the extent shown.

  
Z.G. Muruke

**JUDGE**

19/03/2021

Judgment delivered in the presence of Herman Lupogo for applicant and Yusuph Mathias for the respondent.

  
Z.G. Muruke

**JUDGE**

19/03/2021