

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

**REVISION APPLICATION NO. 106 OF 2022**

(Arising from an Award issued on 13<sup>th</sup> April 2022 by Hon. Mbeni M.S, Arbitrator in Labour dispute No.  
CMA/DSM/KIN/889/20/27/21 at Kinondoni)

**BETWEEN**

**FALCON ANIMAL FEEDS LIMITED ..... APPLICANT**

**AND**

**LUSAJO SEMU ALLAN ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 05/07/2022  
Date of Judgment: 25/07/2022*

**B. E. K. Mganga, J**

On 01<sup>st</sup> September 2020, the respondent entered a one-year fixed term contract of employment as a Driver of the applicant. The said one-year fixed term contract was expiring on 31<sup>st</sup> August 2021. The said contract had a probation clause of six months. On the third month of probation, applicant terminated the contract of employment of the respondent on ground of poor performance. Aggrieved with termination,

respondent referred a dispute to the Commission of Mediation and Mediation (CMA), complaining that applicant breached the contract. After determination of a dispute, arbitrator found that applicant breached the contract and awarded the respondent to be paid TZS 2,070,000/= being nine (9) months' salaries compensation for the remaining period of the contract.

Dissatisfied with the CMA's award, applicant filed this application praying for the same to be revised and set aside. In the affidavit of Adelaide Ezekiel Sisya, the principal officer of the applicant in support of the application raised four issues namely: -

- 1. Whether breach of contract was proved by the respondent.*
- 2. Whether it was proper for the Arbitrator to hold that applicant had no justifiable reason to terminate the contract and did not follow proper procedure in terminating the contract.*
- 3. Whether failure to follow procedure for terminating a probationary employee amount to breach of employment contract.*
- 4. Whether it was proper for the arbitrator to award compensation of the remaining period of the contract of employment, that is nine months' salary TZS. 2,070,000/=.*

When the matter was scheduled for hearing, applicant was represented by Gladys Tesha, Advocate while Mr. Muhindi Said, the Personal Representative, appeared for the respondent.

Arguing in support of the first ground, Ms. Tesha submitted that in CMA F1, respondent indicated that there was breach of contract. She submitted that to prove breach of contract, respondent was supposed to show (i) that he has a contract with applicant, (ii) conditions of the contract, (iii) that conditions of the contract were breached by the applicant and (iv) Breach resulted into loss. Counsel for the applicant submitted further that, in his evidence, respondent did not prove item (ii) to (iv) instead, his evidence related to unfair labour practice which is not a complaint that was filed at CMA in CMA F1. Counsel for the applicant submitted that, parties are bound by their own pleadings and their evidence should be confined to the pleadings. She cited the case of ***Penna Pura Oil Tanzania Ltd v. Ekta V. Karsanji***, Revision No. 317 of 2020, HC (unreported) to support her submissions.

Ms. Tesha submitted further that, respondent was on six (6) months' probation and that he was terminated during probation period. She cited the case of ***WS Insight Ltd v. Dennis Nguaro***, Revision No.

90 of 2019, HC (unreported) to support her submission that if probation is successfully completed, an employee enters in the other stage of contract by being confirmed and that probation is an extended interview. She argued that the contract of the respondent was yet to commence, and that respondent was supposed to file a complaint relating to unfair labour practice and not breach of contract.

On the 2<sup>nd</sup> ground, counsel for the applicant submitted that Rule 8(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides that termination can be valid if there was material breach and whether respondent agreed with early termination. She went on that Arbitrator erred to base her decision on Rule 10 of GN. No. 42 of 2007(supra) because in CMA F1, respondent did not indicate that the complaint related to unfair labour practice rather, it was on t breach of contract.

On the 3<sup>rd</sup> ground, counsel for the applicant submitted that respondent did not prove how the contract was breached and loss incurred by the respondent. On the 4<sup>th</sup> ground, she submitted that arbitrator erred to award 9 months of the remaining period because



respondent was terminated while on probation. She therefore prayed that the application be allowed.

Opposing the application, Mr. Said, the persona representative of the respondent submitted on the 1<sup>st</sup> ground, that respondent had a one-year fixed term contract (Exhibit FL1). That, the contract commenced on 01<sup>st</sup> September 2020 expiring on 31<sup>st</sup> August 2021 or upon termination and had 6 months' probation period. He conceded that respondent was terminated on 13<sup>th</sup> November 2020 while under probation. He was quick to submit that Rule 10(6) of GN. No. 42 of 2007 provides that employer is required to make follow up of performance of the employee and guide an employee in relation to performance of employment. He submitted that Applicant did not comply with this Rule and that in termination letter, the reason assigned is that respondent did not meet the requirements of employment. Mr. Said submitted further that Respondent was not afforded right to respond whether he has failed to meet employment requirement or not. He was neither called in any meeting nor a Trade Union was involved contrary to Rule 10(1) of GN. No. 42 of 2007. Mr. Said strongly submitted that the procedure for termination was not followed. He cited the case of ***Jamaa Fast Food***

***Ltd V. Boniphace Njalali***, Revision No. 789 of 2019, HC (unreported) to support his submissions and prayed that the application be dismissed.

In rejoinder, Ms. Tesha, learned counsel for the applicant maintained that submissions made on behalf of the respondent relates to unfair labour practice. She argued that respondent was supposed to indicate in the CMA F1 that there was unfair practice and not breach of contract. She distinguished **Jamaa's case** arguing that in the said case the contract was breached.

I have examined the CMA record and considered the rival submission of the parties, affidavits, records of the application and relevant laws. In disposing this application, I will determine the first, second and third issues together. It is undisputed that the parties had a one-year fixed term contract of employment with effect from 1<sup>st</sup> September 2020 and was expected to expire on 31<sup>st</sup> August 2021. In the said fixed term contract (exh. P1) the parties agreed that respondent will be on probation for six (6) months. It is also undisputed that on 24<sup>th</sup> November 2020, the applicant terminated the contract of employment of the respondent on ground that respondent did not meet expectation of the applicant. Aggrieved with termination, respondent filed the dispute

before the Commission for Mediation and Arbitration (CMA) claiming to be paid nine (9) months of the remaining period of the contract, leave, severance pay and compensation for unfair termination. It is further undisputed that in the referral Form (CMA F1), respondent indicated that the dispute relates to breach of contract.

In his evidence, brief as he was, respondent (PW1) simply explained what transpired a day before termination of his employment but did not testify on how the applicant breached the contract. In his evidence, apart from his prayer to be paid nine months' salary compensation for the remaining period of the said fixed term contract and one month salary in lieu of notice, respondent (PW1) said nothing relating to breach of contract or unfair labour practice relating to probation. His evidence was based on termination and not breach of contract. It has been constantly held several times by the Court of Appeal that parties are bound by their own pleadings. See the case of **George Shambwe v. AG and Another** [1996] TLR 334, **The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)**, Civil Appeal No. 2 of 2020, CAT (unreported) and **Astepro Investment Co. Ltd v. Jawinga Company Limited**, Civil Appeal No. 8 of 2015, CAT

(unreported) to mention but a few. It is my view that respondent did not abide to his pleading in the CMA F1 wherein he indicated that applicant breached the contract but during hearing he testified that his employment was terminated. It is my view that submissions by Mr. Said relating none-compliance of the aforementioned provisions of the law relating to unfair labour practice relating to probation are submissions from the bar and not evidence hence cannot be entertained.

The respondent alleged that the applicant breached the contract because he was terminated before expiry of the agreed period. As pointed out hereinabove, one-year fixed term contract of employment (exhibit D1), commenced on 01<sup>st</sup> September 2020 and agreed to end on 31<sup>st</sup> August 2021. The record shows that on 23<sup>rd</sup> November 2020 the respondent was terminated from employment for failure to meet the required standards (exhibit P2). It is also undisputed fact that the employment contract had a probation clause of six months. The respondent was terminated after three months of probation thus, he was still a probationary employee at the time of his termination. Respondent was terminated after having worked for three months' only. He was awarded to be paid nine (9) months' salary for the remaining period of the contract. In other words, respondent was granted a relief



to be paid the remaining period of the contract based on unfair term. This, in my view, was not proper because he has worked less than six (6) months provided for under section 35 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. As pointed out hereinabove, respondent went contrary to his pleadings.

It is undisputed that respondent was terminated while on probation. I have examined evidence of Lusajo Semu Allan (PW1) the respondent and find that he testified while in chief that he was terminated because he did not meet the standard of work. While under cross examination he admitted that he did not call the applicant's customer after being delayed delivering the luggage he was supposed to deliver. On the other hand, Adelaide Sisya (DW1) testified on behalf of the applicant everyday employees were reminded procedures of doing work. While under cross examination, DW1 testified that respondent was terminated because he failed to follow procedure of working at applicant's office. Evidence that employees were reminded daily procedures was not shaken. From the evidence of the parties, it is clear in my mind that respondent who was under probation, failed to follow procedures and did not meet standard of his work. In other words, respondent was under practical interview and failed that interview. See

the case of **David Nzaligo v. National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016, CAT (unreported) and **Stella Temu vs Tanzania Revenue Authority**, [2005] TLR 178. In **Nzaligo's case** (supra) 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 ..."*

It is my view that respondent failed a practical interview and that he failed to prove that applicant breached the contract. For the foregoing, I therefore allow the application and quash and set aside the CMA award.

Dated at Dar es Salaam this 25<sup>th</sup> July 2022.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 25<sup>th</sup> July 2022 in the presence of Daniel Shao, advocate holding brief of Gladys Tesha, Advocate for the applicant and Muhindi Said, Personal Representative of the respondent.



B. E. K. Mganga  
**JUDGE**