

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

REVISION NO. 238 OF 2021

BETWEEN

YOKTANI GERALD NYONDWI APPLICANT

VERSUS

ARAB CONTRACTORS -ELSWEDY ELECTRIC RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicant filed the present application challenging the award of the Commission for Mediation and Arbitration for Mkuranga (CMA) in Labour Dispute No. CMA/PWN/MKR/44/2021 dated 17th May, 2021 by Hon. Massawe, Y, Mediator ("the Dispute"). He has moved the court under the provisions of Section 91(1) (a),(2)(b) and (c), 94(1)(b)(i) of the employment and Labour Relation Act (CAP. 366 R.E. 2019, Rule 24(1), 24(2)(a),(b),(c),(e), and (f) 24(3)(a),(d),(c),(d), 28(1)(b),(c), and (e) of the Labour Court Rule, 2007 in his Chamber Summons; which was supported by an affidavit of the applicant dated 17/06/2021; the applicant has moved the court for the following orders:

1. That this Honorable Court be pleased to revise, correct and set aside the Mediation award of the Commission for Mediation and Arbitration at Pwani-Mkuranga in labour dispute No.

CMA/PWN/MKR/44/2021 dated on 17th May 2021 before Hon. MASSAWE Y, MEDIATITOR of Commission for Mediation and Arbitration for the same is full on illegalities and biasness of justice on the part of record of evidence.

2. Any other relief(s) this Honourable court may be deemed fit and justice to be granted.

The application arose out of the following context; the applicant was employed by the respondent on 23/09/2020 as a Civil Supervisor for one year contract which was to end on 23/09/2021. The relevant contract had a probation period of three months. On 06/01/2021, the applicant was terminated from employment after being charged and found guilty of assaulting a fellow employee. Aggrieved by the termination, the applicant referred the matter to the CMA. The matter proceeded ex parte and upon conclusion, the Mediator dismissed the applicant's claim for lacking merits. Still dissatisfied by the Mediator's decision, the applicant filed the present application urging the court to determine the following issues: -

- i. Whether the Mediator was right to deny the remedies by the applicant while there is a declaration of breach of contract within the award.

- ii. Whether the applicant was entitled to the claimed remedies of breach of contract.
- iii. Whether the Mediator bothered himself to rely upon the untendered evidence on record.

The matter was argued by way of written submission. Before this court, Mr. Majaliwa Musa, Personal Representative was for the applicant whereas Mr. Anwaar Katakweba, learned Counsel, appeared for the respondent.

Mr. Musa submitted jointly on the above-mentioned issues. He submitted that the Mediator failed to consider that the termination letter dated 06th January, 2021 was availed out of the expiry of the probation period which rendered the automatic confirmation of employment. He alluded that the applicant was employed for fixed term contract of one year which had probation of three months. He argued that the applicant being a probationary employee was supposed to be terminated in accordance with Rule 10 (8) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 ("the Code").

Mr. Musa submitted further that the records of the CMA and the Arbitral award does not show that the applicant was informed the employer's concern or was given opportunity and reasonable time to

correct his behaviour. That the Mediator failed to consider and interpret Rule 10 (8) of G.N. No. 42 of 2007. He argued that the applicant being a probationary employee, there was no need to conduct disciplinary hearing which is a requirement under fair termination provisions. To support his position, he cited the case of **Happiness Geff Vs. Wadhamini KKKT (Dayosisi ya Mashariki Ziwa Victoria), Revision No. 35 of 2013**, High Court of Tanzania, Labour Division at Mwanza. He continued to submit that the applicant's termination was under unfair labour practice. In the upshot, he urged the court to order the applicant to be paid 9 month's salaries as compensation for unfair labour practice.

Responding to the application Mr. Katakweba eluded that throughout the submission, the applicant's representative referred to Mediator and not Arbitrator as it was supposed to be referred. He argued that for the purposes of setting the record correct they will refer to Arbitrator and not Mediator as Mr. Musa did.

As to the first issue Mr. Katakweba submitted that referring to page 5 of paragraph 1 of the impugned award, the Arbitrator did not declare that there was breach of contract but rather he declared that the applicant's employment contract was terminated. He argued that the

applicant is confusing the terms termination and breach. In his interpretation termination means '***mkataba ulivunjwa***' while breach implies that '***mkataba ulivunjwa isivyo halali***'.

As to the second issue, Mr. Katakweba argued that probationary status of an employee is only applicable to issues of work performance (competence) but it has no relevance to misconduct perpetrated by the employee during probation. He added that all issues other than work performance (competence) such as misconduct, must be dealt with in the same way as with any permanent employee. He further submitted that claims arising from probationary employee such as the applicant's case at hand can neither be instituted under unfair termination as it is prohibited under Section 35 of the Employment and Labour Relations Act [CAP 366 RE 2019] ('ELRA'). To buttress his submission, he cited the cases of **Agnes B. Buhere v. UTT Microfinance Plc, Revision No. 459 of 2015**, High Court Labour Division at Dar es salaam, **Imran Abdallah Yahaya Ruhumba v. Mini Bakeries (T)- Ltd, Labour Revision No. 217 of 2020**, High Court Labour Division at Dar es salaam, to name a few.

Mr. Katakweba continued to submit that the applicant's probation exceeded three months agreed in the employment contract due to

disciplinary procedures. He strongly submitted that since the applicant was not confirmed in the employment, he was still a probationary employee who cannot enjoy the rights of a permanent employee. He argued that there is no automatic confirmation of employment, supporting his submissions by citing the case of **Ngeleki Malimi Ngeleki Vs. Dimension Data Tanzania Ltd, Revision No. 890 of 2019, David Nzaligo Vs National Microfinance Bank PLC (Civil Appeal 61 of 2016) [2019] TZCA 287 (09 September 2019)** and the case of **Mtenga Vs. University of Dar es Salaam (1971) HCD 247** where the same position was held.

Turning to the last issue Mr. Katakweba submitted that the Arbitrator was right not to award the applicant the relief claimed. He stated that the case of **Happiness Geff** (supra) is irrelevant to the case at hand and the reliefs of breach of contract are addressed in the case of **Cfao Motors Tanzania Ltd v. Attu J. Myna, Revision No. 204 of 2019**. He strongly argued that the applicant is not entitled to any reliefs because he was paid his terminal benefits upon termination as they are stipulated in his termination letter. He therefore prayed that the court dismiss the application and sustain the Arbitrator's decision.

In rejoinder Mr. Musa reiterated his submission in chief.

After considering the submissions for and against the application, and the Court records as well as applicable labour laws, I will correct Mr. Katakweba's correction to Mr. Musa's submission referring the decision maker as mediator. It was Mr. Katakweba's submission that Mr. Musa was wrong to refer the CMA's decision maker as the mediator and that the correct one was arbitrator. In fact it was Mr. Katakweba who got it wrong as Mr. Musa was right to refer to mediator and not arbitrator. This is because at the CMA, the matter proceeded ex-parte hence it did not reach the stage of arbitration. It was the mediator who proceeded ex-parte and issued the award therefore Mr. Musa was right on track in referring her as the mediator and not the arbitrator as argued by Mr. Katakweba. On that note, the records will be set right and at every place that Mr. Katakweba referred to the award issuer as arbitrator, it shall be deemed to read "mediator".

Having so set the records proper, it is not to decide the issues raised which be determined jointly since the applicant has jointly submitted them. Generally, the applicant wants this court to determine if the Mediator was right to deny him the reliefs claimed after the finding that there was breach of contract. The applicant is strongly alleging that there was a breach of contract for being unfairly terminated from

employment in disregard of Rule 10 (8) of the Code which stipulates the procedures for terminating a probationary employee.

It is undisputed that the applicant herein was employed on a one-year fixed term which commenced on 23/09/2020 and was to end on 23/09/2021 as reflected in the employment contract (exhibit P1). The said contract had a probation period of three months. The applicant was terminated on 06/01/2021 (exhibit P6), fourteen days after the expiry of the probation period. It was Mr. Musa's argument that since his probation period expired, he was automatically confirmed in the employment. In this aspect I join hands with Mr. Katakweba's submission. As per the cited cases of **David Nzaligo Vs National Microfinance Bank PLC (Civil Appeal 61 of 2016) [2019] TZCA 287 (09 September 2019)** and the case of **Mtenga Vs. University of Dar es Salaam (1971) HCD 247**; a probationary employee will remain with that status until confirmation to employment. In other words, there is no automatic confirmation of a probationary employee after expiry of the probation period. In the case of **Ngeleki Malimi Ngeleki** (supra) it was held that: -

"Undoubtedly, the applicant was employed in a one-year fixed term contract, commencing with a three months' probation

period. The applicant continued to work for the respondent even after the lapse of a probation period. It is crystal clear that the applicant was not issued with a confirmation letter hence he was still a probationary employee. As stated by the respondent's counsel, it is a principle of law that there is no automatic confirmation of employment."

This is also the position in the case of **David Nzaligo** (supra) where the Court of Appeal held 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 a change of status from a probationer to a confirmed employee."

In line with the above court positions, it is crystal clear that at the time of his termination, the applicant herein was still on probation. The question to be addressed is whether the applicant was supposed to be terminated in accordance with Rule 10 (8) of the Code. The relevant provision provides as follows: -

"Rule 10 (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"*

In this application, the applicant was terminated for misconduct namely assaulting a fellow employee. Looking at the evidence on record, it is revealed that the applicant was informed of the misconduct in question and was summoned to disciplinary hearing (exhibit P2) where he was found guilty of the misconduct charged. Even in his evidence the applicant admitted that he had a confrontation with his fellow employee and pulled his shirt for the purpose of getting him to the office to discuss their misunderstanding. In my view, such an action amounts to assault and the disciplinary committee properly found him guilty of the misconduct charged. Therefore, the above stipulated procedures were followed in this case hence the respondent properly terminated the applicant from employment after he was found guilty of the mentioned misconduct.

On the argument that an employee has to be given an opportunity to improve, this is not applicable in all cases. The procedure is mainly applicable on issues of performance of an employee and his behaviour during probationary period and upon under performance and a general bad behaviour, he may be given a chance to improve. But the issue in question is an assault to a fellow employee. Rule 12(2)&(3)(e) of the Code provides:

"(2) First offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.

(3) The acts which may justify termination agree:-

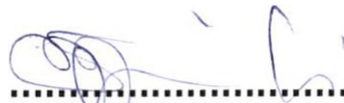
*(e) **assault on a co-employee**, supplier, customer or a member of the family of, and any person associated with, the employer; "*

Therefore under Rule 12(3)(e) of the Code, such conduct calls for a prompt termination from employment. On the basis of the above findings, it is conclusive that the applicant was under probation and the respondent followed the required procedures in terminating him. The

mediator was therefore right to dismiss the applicants claim. As for this revision, it is lacking merits hence it is dismissed.

Dated at Dar es Salaam this 25th day of April, 2022.




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S.M. MAGHIMBI
JUDGE