IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 104 OF 2021

BETWEEN

MBEYA CEMENT COMPANY LIMITED ..... APPLICANT

VERSUS

STELLA STEWART KASAMBALA ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The parties herein intended to create a permanent and pensionable employment way back on the 01st September, 2014 when the respondent was employed by the applicant as an Organizational and Human Resource Service Director. The contract had a six months' probation period. The respondent worked for the applicant for the six months of probation and upon expiry of the said period, the applicant was not satisfied with her performance and extended the period for another three more months' probation. Despite the extended period, the applicant alleged that the performance was unsatisfactory and upon frictions, the respondent's employment contract was terminated on 05th June, 2015.

Aggrieved by the termination, the respondent successfully referred a dispute which was registered as Labor Dispute No.

CMA/DSM/ILA/R.341/15/698 ("the Dispute"); to the Commission for Mediation and Arbitration for Ilala ("CMA") claiming for compensation owing to what she termed as an unfair termination. At the conclusion of Arbitration, the CMA awarded the applicant a compensation of Tshs. 156,000,000/= being twelve (12) month's salaries for what the arbitrator found to be unfair termination. The applicant was aggrieved by the award of the CMA, issued by Hon. William G.M, Arbitrator, on 28th January, 2021. She has filed this application under the provisions of Section 91(1)(a) and (b) and 91(2) of the Employment and Labour Relations Act, Cap 366, R.E. 2019 ("ELRA") read together with Rule 24(1), 24(2)(a) to (f), (3)(a) to (d) and 28(1)(c) to (e) of the Labour Court Rules, 2007 ("the Rules"). She is seeking for the following orders:

(a) The Court be pleased to call for records of the Commission pertaining to this matter and revise, quash and set aside the arbitral award which awarded the Respondent the compensation for unfair termination in total disregard of the fact that the Respondent was a probationary employee;

(b) The Court be pleased to quash and set aside the order requiring the applicant to pay the respondent compensation equivalent to twelve months' salary for unfair termination;

(c)The Court be pleased to grant the Applicant any relief the Court deems just and fair.

The orders sought were based on the following grounds: -

i. That the Arbitrator misdirected herself to award compensation for unfair termination to the respondent who was still a probationer.

ii. That the Arbitrator erred to find that the respondent was not afforded the right to be heard before her termination despite ample evidence on record that the respondent travelled to attend the meeting in Dar es Salaam, at the expense of the applicant but refused to attend the meeting on the pretext that she was sick at Aga Khan Hospital.

iii. That the Arbitrator erred in fact and law to find that the respondent, at the time of termination, her position had been confirmed by the CEO in total disregard of the letter dated 25th February, 2015 which extended the respondent's probationary period for further three months.'

iv. That the Arbitrator erred in fact and law to award 12 months salary compensation to the respondent despite her clear admission that she started working for a new employer (Uniliver) and was

earning Tshs. 10,000,000/= per month just three months after her termination by the applicant in total disregard of the principle which bars double payment of salaries.

v. That the Arbitrator erred in law and fact to decide that applicant didn't disclose to the respondent the key performance indicators (KPIs) on which the applicant was supposed to appraise the respondent despite ample evidence that the respondent was a member of the Executive Committee (Excom) thus reasonably expected to have been aware of the required performance standards.

vi. That in exercising her power to compose an award the Arbitrator acted with material irregularity by not considering the written submission filed by counsel.

The application was supported by an affidavit of Mr. Emmanuel Salla, Legal Manager of the applicant, an affidavit dated 26th day of February, 2021. In the affidavit, the applicant has raised the following legal issues to be determined by the Court:

i. Whether or not the Respondent was still a probationary employee.

ii. If the first issue is determined in negative, whether the Arbitrator was right to award 12 month's salary to the Respondent who, during 10 months out of 12, was employed and earning a salary of TZS 10m per month from a new employer.

iii. Whether an employee is legally entitled to excuse her/himself from attending a performance appraisal meeting on the pretext of illness without a proper medical report supporting that allegation. A report form Diagnostic Centre admitted as Exhibit S1 during hearing is attached and marked FB-7 to form part of this affidavit.

iv. Whether the Applicant followed a fair procedure in the process of terminating the Respondent's employment.

v. Whether or not disregarding the party's final written submissions is an act denying that party her/his right of being fairly heard.

vi. To what reliefs are, the parties entitled.

The application was argued by way of written submission. Before this court the applicant was represented by Mr. Rwekamwa Rweikiza, learned Counsel whereas Mr. Evold Mushi, learned Counsel appeared for the respondent. I appreciate the comprehensive submissions of both Counsels which shall be taken on board in due course of constructing this judgement.

Starting with the first ground Mr. Rweikiza submitted that the Arbitrator wrongly held that the respondent was orally confirmed. That on 18th February, 2015 the Chief Executive Officer ('CEO') and the respondent had a formal performance review meeting and that on 25th February, 2015 the respondent was informed in writing that her performance during the six months was unsatisfactory as evidenced by Exhibit M1. Mr. Rweikiza submitted further that the respondent was informed that her probation was extended for further three months starting from 06th March, 2015 to 05th June, 2015.

Mr. Rweikiza went on submitting that the Arbitrator erred in deciding that the respondent was orally confirmed by the CEO without specifying the date of the alleged oral confirmation. The counsel distinguished the circumstances of this court with those of the Court of Appeal case of **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472/2017 (unreported) cited by the Arbitrator to confirm oral confirmation. He hence urged the court to declare that the respondent was still under probation when her employment was terminated.

In reply, Mr. Mushi submitted that according to the evidence on record, the respondent was confirmed in employment. He statedhe pointed to the evidence of DW1 who testified under oath that the

respondent was orally confirmed in employment. He argued that the law does not mandatorily require confirmation to be in writing.

Having heard the parties' submissions and after considering the evidence on record, the following are my findings. The employment contract between the parties (exhibit M1) clearly provided the probation clause of six months which undisputedly commenced on 01st September, 2014 to 01st March, 2015. The record further shows that after expiry of the six months the probation period was extended to three more months which commenced on 06th March, 2015 to 06th June, 2015. All these contracts and extension were in writing. The records further show that following a further unsatisfactory performance, the respondent was summoned to attend a performance review meeting to discuss her performance. The undisputed evidence is that the respondent failed to attend the meeting and it was following her non-appearance that on 05th June, 2015 her employment contract was terminated (Exhibit M2) due to unsatisfactory work performance during her probation period.

It has been decided in several decisions of this Court and the Court of Appeal that a probationary employee will remain with such status until formal confirmation from the employer. The position was well elaborated in the decision of the Court of Appeal in the case of

David Nzaligo v. National Microfinance Bank Plc, (Civil Appeal 61 of 2016) [2019] TZCA 540 (09 September 2019) where it was held that: -

> *'...being on probation after expiry of probation period does not amount to confirmation and that confirmation is not automatic upon expiry of the probation period.'*

I have considered the respondent's allegation that she was orally confirmed her employment. Unfortunately, her allegation is not supported by the evidence on record. As stated above, the applicant tendered sufficient evidence to prove that the respondent was not confirmed in the employment. To begin with, the employment contract was in writing (EXM1) and so was the termination contract (EXM2). It is undisputed that the probation period under EXM1 was extended for another three months. Since the hiring and termination contract were in writing, we cannot make an assumption that the most crucial part of the contract, confirmation of employment after probation was orally done by the applicant. It does not come to mind at all. If the respondent needed the records to be clear that she was confirmed on employment, then she should have brought an exhibit to prove the same because mere assertions could not do away with a need to prove the conformation. I

am therefore in agreement with Mr. Rweikiza that upon termination, the respondent was still a probationary employee. Therefore, the Arbitrator's finding that the respondent was orally confirmed and the case cited thereto was erroneous and is hereby revised and set aside.

Having made a finding that at the time of her termination the respondent was still a probationary employee; the question to be determined is whether the respondent was entitled to lodge a dispute at the CMA on grounds of unfair termination. Issues of unfair termination are provided for under sub-part E of Part III of the ELRA. However, Section 35 of ELRA defines employees who can bring a dispute of unfair termination under the Act. The Section provides:

> *"The provisions of this Sub-part **shall not apply** to an employee with less than six months employment with the same employer, whether under one or more contracts."*

In this application, although the respondent had worked for the applicant for me than six months, she is still bound by the Section 35 cited above because she was yet to be confirmed employment. The gist of the Section was to cover for those who are also yet to be confirmed in employment and not necessarily that once six months have lapsed, then the employee is entitled to claim compensation on grounds of

unfair termination even if the probation period had lapsed. This is the position in the decision of the Court of Appeal in the cited case of **David Nzaligo v. National Microfinance Bank** (supra) where it was held that:-

> *'We find that the import of section 35 of ELRA though it addresses the period of employment and not the status of employment, a fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination.'*

As for the case at hand, the respondent was not yet confirmed in the employment. She was just a probationary employee whose abilities were under assessment in due of being formally confirmed. Therefore, the above quoted provision does not apply to the respondent. Since in her CMA Form No. 1 which initiates disputes at the CMA the respondent lodged a dispute of unfair termination of employment, it my finding that the CMA did not have jurisdiction to entertain the matter. On the basis above, the arbitrator fell into error in proceeding with the matter.

In conclusion of the first issue, it is the finding of this court that at the time of her termination, the applicant was still a probationary employee hence the CMA did not have jurisdiction to entertain the

dispute. Since the finding is on lack of jurisdiction of the CMA, this issue alone is sufficient to dispose this application. I therefore see no reason to labour on the remaining grounds for revision. Consequently, the CMA's proceedings and subsequent award are hereby revised, quashed and set aside for lack of jurisdiction.

Dated at Dar es Salaam this 20th day of April, 2022.

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S.M. MAGHIMBI
JUDGE