

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

REVISION NO. 446 OF 2020

BACKBONE CO. LTD APPLICANT

VERSUS

SADIKI KITWANA SAAD 1st RESPONDENT

JUMA KANIKI 2nd RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Kibaha)

(Joyce, L: Arbitrator)

Dated 17th September, 2020

in

REF: CMA/PWN/KBH/119/2020

JUDGEMENT

04th & 16th March 2022

Rwizile J

In this application, the court has been called by the applicant to determine the following issues;

- i. Whether the Commission for Mediation and Arbitration was properly moved by the respondents who had fixed term of employment contract and sued for unfair termination instead of breach of contract.*
- ii. Whether the Commission for Mediation and Arbitration properly analysed the evidence of the applicant in reaching its decision.*

Historically, the respondents were hired and terminated by the applicant. Termination of the 1st respondent was on 03 July 2019, as per the termination letter. The 2nd respondent was terminated on 20th June 2019 also according to the termination letter. They referred a labour dispute to the Commission for Mediation and Arbitration for unfair and unlawful termination. After a hearing, the award was in favour of the respondents. Being aggrieved, the applicant filed this application for revision. The ground was for entertaining a dispute of breach of contract as if it was a dispute of unfair termination. The applicant prayed for the following reliefs against the respondent:

- a) That, the Honourable Court be pleased to call for the record of the Commission for Mediation and Arbitration in complaint with reference number CMA/PWN/KBH/119/2020 dated 17th September 2020 delivered by Hon. Joyce Lyimo (Arbitrator) and examine the legality, correctness and or appropriateness thereof.*
- b) That, having examined the same, this Honourable Court to be pleased to revise and set aside the arbitration award entered by the Commission for Mediation and Arbitration in the said complaint in favour of the respondent.*

The application is supported by the affidavit of Wang Yanhegh, the Principal Officer of the applicant. Opposing the application, the counter affidavit was filed by the respondents.

When the application came for hearing, Mr. Magnus Mdope, learned advocate appeared for the applicant while Richard Mbuli, learned advocate appeared for the respondent.

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- b) That, having examined the same, this Honourable Court to be pleased to revise and set aside the arbitration award entered by the Commission for Mediation and Arbitration in the said complaint in favour of the respondent.*

The application is supported by the affidavit of Wang Yanhegh, the Principal Officer of the applicant. Opposing the application, the counter affidavit was filed by the respondents.

When the application came for hearing, Mr. Magnus Mdope, learned advocate appeared for the applicant while Richard Mbuli, learned advocate appeared for the respondent.

Mr. Mdope submitted on the first issue that, the arbitrator adjudicated a labour matter under unfair termination instead of breach contract and awarded the remedies under sections 40(1)(c) and 44(1)(b)(d)(2) of the Employment and Labour Relations Act,2019[ELRA].

The learned counsel further argued through his written submission that the respondents were under probationary contracts and not fixed contracts. For that matter their dispute ought to be on unfair labour practice and not for unfair termination. The learned advocate argued that, the respondents should have advanced claims for breach of contract and not unfair termination.

Mr. Mdope further submitted that, since there were two different issues that is an allegation that there was a fixed term contract, and that of probationary contract, the commission had to deal with a contractual issue first. In his view, a fair and just decision would have been arrived at. He finally prayed for orders sought to be granted.

In opposing the application, Mr. Mbuli submitted that the matter was adjudicated as breach of contract. The arbitrator based on the evidence adduced and found breach of contract, which is unfair. In his view, the applicant failed to conceived the meaning of the unfair termination and breach of contract. That, the words termination and breach are considered to be synonymous. He said, for the trial arbitrator to rule out the reason was unfair, it is automatic that the employer breached the contract.

Mr. Mbuli went on submitting that, the contracts of the respondents were of one year. Thus, by the act of the applicant to terminate the respondents

for the allegation of theft made the arbitrator to order for the payment of 12 months salaries as required by the law.

After going through the submissions, CMA proceedings and exhibits, the court had been called to determine *whether respondents were under probation* and to *whether they were properly awarded terminal benefits*.

Having gone through proceedings of the CMA, before discussing issues raised, this court did not find any evidence in respect of the 2nd respondent's case. It only found the testimony of the 1st respondent. It is to my conclusion that he did not prosecute his case. Nor did the court find any evidence that is attached proving that the 1st respondent was prosecuting the case on behalf of the 2nd respondent as provided by the law. Rule 18(1) and (2) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007 provides: -

"(1) Arbitration is a process in which a person appointed as an arbitrator for resolving a dispute determines the dispute for the parties' process

(2) The process involves a hearing where parties present evidence and argument."

Also, Rule 25(1) of G.N. No. 67 of 2007, provides: -

"The parties shall attempt to prove their respective cases through evidence and witness shall testify under oath through the following process-

a) Examination in chief: -

- i. *the party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the persons;*

Based on the position stated by the law, the 2nd respondent did not prosecute his case, since there is no evidence in that respect. His case is therefore dismissed.

Dealing with the first issue raised, on the side of the applicant, it was stated that the respondents were under probationary period while the 1st respondent, on his side stated that he was under fixed term contract. Having gone through exhibits tendered, there is probationary employment agreement between the applicant and the 1st respondent. Clause one, at the second paragraph states: -

"The contract shall be fixed for a period for six months with the possibility to be confirmed when he/she passes the probationary period"

For that matter, it has been proved that the 1st respondent was under probationary period and not a fixed term contract as alleged. The court went further to see the rights he was entitled when under probation. Rule 10(1)-(4) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 it is provided that: -

"(1) all employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines.

(2) Terms of probation shall be made known to the employee before the employee commences employment.

(3) The purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.

(4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standard required, the custom and practice in the sector.”

In the present application, it is evident that the 1st respondent was terminated before being confirmed. As was employed on 01st June 2019 and terminated on 03rd July 2019. This proves that he was a probationary employee. In the effect, there is no automatic confirmation of the contrary on expiry of the probationary period. This position was reach also in the case of **Mtenga v University of Dar es Salaam** (1971) HCD 247, that expiry of probation period does not amount to confirmation and that confirmation is not automatic upon expiry of the probation period. I therefore hold that the respondent was a probationary employee not subject of section 37 (2) of the ELRA.

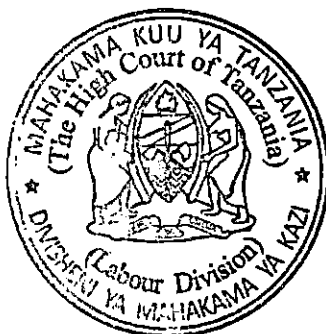
Dealing with the second issue, the applicant stated that the reliefs provided to the respondents were under sections 40(1)(c) and 44(1)(b)(d)(2) of the ELRA under unfair termination while was supposed to be under breach of contract. The respondent argued that reliefs given of 12 months' salary was lawful. Section 35 of the Employment and Labour Relations Act [CAP 366 R.E 2019] provides: -

"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 contracts."

Also, in the case of **David Nzaligo v National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016 in the Court of Appeal had this to say that: -

"This being the case under Part III Sub Part E of ELRA being a part addressing unfair termination of employment, it goes without saying that, taking all the circumstances pertaining in this appeal as alluded to herein above, it would have been prudent if the applicant would have waited for the assessment to be finalized for him to proceed accordingly and enjoy the benefits of the provision under dispute, that is being recognized as an employee of above six months...Particular circumstances of this case lead to the only conclusion that the appellant was still a probationer at the time he resigned and cannot benefit from remedies under Part III of ELRA."

From the foregoing, since it has been found that the respondent was probationary employee, it was not fair for him to enjoy terms of section 37 of ELRA. He is not entitled to the reliefs awarded under section 40(1)(c) and Section 44(1)(b)(d)(2) of ELRA. Therefore, the application is allowed. The award is set aside. No order as to costs.




A.K. Rwizile

JUDGE

16.03.2022