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

REVISION NO. 40 OF 2022

(Arising from Labour Dispute No. CMA/DSM/KIN/275/2020/299)

BETWEEN

DAVID SEKWAO ..... APPLICANT

VERSUS

SPORTPESA LIMITED ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

This application is lodged under the provisions of Section 91(1)(a), 91(2)(b)(c), 91(4)(a), (b) and section 94(1)(b)(i) of the Employment and labour relation Act [Cap 366 R.E. 2019] ("ELRA") and Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f), Rule 24(3)(a), (b), (c), (d), Rule 28(1)(a), (b), (c), (d) of the Labour Court Rules, GN. No. 106 of 2007 ("LCR"). Briefly, the applicant was employed by the respondent on 01/06/2018 as a Telecom Account Manager. He was placed under a probation period of six months. The applicant alleges that he was confirmed in his employment, the allegation which was at issue during arbitration. On 17/03/2020, the applicant was served with the notice of non-confirmation of employment. Aggrieved by the non-confirmation, he referred the matter to the Commission for Mediation and Arbitration

("CMA") claiming for unfair termination. After considering the evidence of the parties the CMA dismissed the dispute on the ground that the applicant was a probationary employee therefore he was not entitled to remedies of unfair termination. Dissatisfied by the CMA's award, the applicant filed the present application on the following grounds:-

i. That the Arbitrator grossly erred in law and in fact by disregarding entirely the facts and evidence adduced by the applicant.

ii. That, the Arbitrator grossly erred in law by holding that the applicant was a probation employee beyond the time allowed by the law.

iii. That, the Arbitrator grossly erred in law and in fact to give an award in favour of the respondent where there was no evidence adduced by the respondent showing that the applicant's performance was assessed by the respondent at any time during the alleged probation extension period.

iv. That, the Arbitrator grossly erred in law and in fact to give an award in favour of the respondent where there was no evidence adduced by the respondent showing that the probation period was extended and the number of times it was extended.

v. That, the Arbitrator grossly erred in law and fact to give an award in favour of the respondent where there was no evidence adduced by the respondent showing the length of extension of the probation period.

vi. That, the Arbitrator grossly erred in law and in fact by holding that the applicant was terminated during probation period.

The application was argued by way of written submissions. Before this court the applicant was represented by Mr. Erick Kamala, Learned Counsel whereas Mr. Oscar M. Kizuguto 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.

From the grounds raised, I find the court is called upon to determine only one issue, whether, at the time of his termination; the applicant was a probationary employee. Looking at the employment contract entered between the parties herein (exhibit D1) the applicant was to undergo a probation period of six months. Clause 2 of the contract provided as follows:-

"2. ***PROBATION PERIOD***

2.1 This contract is subject to a probationary period of six months, starting from the date of commencement. The purpose of this probationary period is to asses whether you have the capacity or compatibility required for the job.

2.2 The probationary period can be extended to a further period of similar term should the company feel that you have not attained the standard required or may be stopped and your confirmation declined where the company is not persuaded with your performance or compatibility, as the case may be.

2.3 After the successful probation, you will be confirmed."

Before this court the applicant strongly argues that he was not a probationary employee, that he was not issued with any letter of extension of probation after the above agreed period expired as alleged by the respondent. Looking at the records, during arbitration, the respondent tendered the management minutes (exhibit D2) which shows that the management agreed to extend the applicant's probation period. Following such agreement, the applicant's probation period was extended through a letter dated 18/01/2019 (exhibit D3). The applicant strongly contended that he was not served with the relevant letter of extension of his probation period.

I have considered the applicant's allegation that he was orally confirmed. Unfortunately, his allegation is not supported by the evidence on record. As stated above, the respondent tendered sufficient evidence to prove that the respondent was not confirmed in the employment. Therefore, the Arbitrator's finding that the applicant was not confirmed is correct. Since the applicant was not confirmed in his employment, the question remains on the consequence of the application.

It has been decided in numerous decisions of this court and the Court of Appeal that a probationary employee will remain with such status until formal confirmation from the employer. This is also position 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.'*

After being satisfied that the applicant was a probationary employee the question to be addressed is whether she was entitled to sue under the principles of unfair termination. The principles of unfair termination are governed under Section 35 of Employment and Labour

Relations Act, [CAP 366 RE 2019] ('ELRA'), which I find it pertinent to reproduce: -

> *"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 the matter at hand, the applicant was not even confirmed in the employment. He was still under probation whereby his abilities were under assessment before he was formally confirmed in the employment. As per the above cited provision, he could not claim remedies under Sub-Part E of Part III of the ELRA. This is the Court of Appeal position 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."*

In the CMA F1 which initiates disputes at the CMA, the applicant sued for unfair termination of employment. On the basis of the above

findings, it is conclusive that under the provisions of Section 35 of the ELRA, the applicant had no cause of action against the respondent. I therefore see no justification to interfere with the findings of the CMA. Consequently, this application is hereby dismissed.

It is so ordered.

Dated at Dar es Salaam this 3rd day of November, 2022.

.....

S.M. MAGHIMBI
JUDGE