

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

**REVISION NO. 45 OF 2021**

**BETWEEN**

**TANPACK TISSUES LIMITED ..... APPLICANT**

**VERSUS**

**BATULI JUMA SHABANI ..... RESPONDENT**

**JUDGEMENT**

**S. M. MAGHIMBI, J**

The applicant filed the present application was aggrieved by the award of the Commission for Mediation and Arbitration ("CMA") which was delivered on 21<sup>st</sup> December, 2021 by Hon. Mwabeza, N.L, Arbitrator. She has lodged this application under the provisions of Rule 24(1), 2(a),(b),(c),(d),(e),(f), 3(a), (b), (c) and (d) and Rule 28(1)(b),(c),(d) and (e) of the Labour Court Rules, 2007 GN. No. 106 of 2007, Read together with Section 91(1)(a), (2)(b) and (c) 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 as amended) She was moving the court for the following:

1. That this Honorable Court be pleased to call for the records of the Commission for Mediation and Arbitration in the proceedings of the original Labour dispute No. CMA/DSM/KIN/203/203/2020/141, between BATULI JUMA

SHABAN and TANPACK TISSUES LIMITED which its award was delivered before Hon. MWAMBEZA Arb. On the 21<sup>st</sup> December 2020, revise the proceedings and the award thereof in respect of the Applicant herein and make an order to quash and set it aside thereof the findings and award issued therein.

2. That this Honourable Court be pleased to grant such other reliefs or orders in favour of the applicant as it may deem fit and just to grant.

The application proceeded by way of written submissions. The applicant was represented by Mr. Levi Ng'weli, Learned Counsel whereas Mr. Gabriel Kunju, Learned Counsel appeared for the respondent.

Briefly; the respondent was employed by the applicant as a Human Resource Assistant on a fixed term contract of one year which commenced on 27<sup>th</sup> January, 2020 and agreed to end on 31<sup>st</sup> December, 2020. The contract had a probation period of six months. After one month of the contract, the applicant terminated the respondent on the ground of poor performance. Aggrieved by the termination the respondent referred the matter to the CMA claiming for unfair labour practices where she was awarded eight months as compensation. Being

dissatisfied by the CMA's award the applicant filed the present application on the following grounds:-

- i. Whether it was just and fair for the Arbitrator to order the respondent to be paid compensation of eight months as compensation on unfairly labour practice on a probationary employment contract that is fixed for a six months period.
- ii. Whether it was proper for the trial arbitrator to construe issues based on whether the procedures for termination and reasons were followed while the respondent did not dispute on the same through her form No. 1 while instituting the labour complaint.
- iii. Whether the respondent was entitled to award despite of all gross misconducts that she committed.

In his written submission Mr. Ng'weli raised an objection that the application is unopposed because the respondent's counter affidavit admits some of the facts while putting the applicant into strict proof of other facts. He stated that the respondent was supposed to counter the alleged facts by advancing evidence other than that the fact remaining undisputed. To support his submissions, the Counsel cited the case of **Janeth William Kimaro and Two Others vs Joan Auye Mrema**

**and Another (Misc. Commercial Cause 59 of 2020) [2021] TZHCComD 3299** (15 July 2021).

Arguing in support of the first ground Mr. Ng'weli submitted that the Arbitrator ought to have awarded the respondent only three months being the period remained in the probation period. He stated that the respondent was on probation period which was for assessment before being endorsed into a fixed employment therefore the Arbitrator wrongly awarded her eight months.

Regarding the second ground Mr. Ng'weli argued that the parties are bound by their pleadings. He stated that in the CMA F1 which initiates disputes at the CMA, the respondent did not complain about the procedural and substantive issues of termination thus the Arbitrator wrongly determined the same. To support his submission the counsel cited numerous decisions including the Court of Appeal decision in the case of **Tanzania Tobacco Processors Limited v. The Commissioner General (TRA), Civil Appeal No. 174 of 2019** (unreported). He added that the cited cases cement the importance of parties to be confined and be bound by their pleadings.

As to the reliefs awarded to the respondent, Mr. Ng'weli submitted that the respondent committed misconducts in her probation period

which she admitted; therefore she is not entitled to the reliefs awarded. He submitted that the respondent was terminated basing on gross misconduct namely insubordination as well as lack of skills as she expressly or impliedly claimed to possess. He further argued that it has been the position of the law when an employee commits offence of insubordination by refusing to obey an order of the employer such conduct leads to serious misconduct hence termination. That since the respondent committed misconducts she was rightly terminated and it was not necessary for the applicant to follow termination procedures.

In reply, Mr. Kunju started with the first ground where he submitted that there is no dispute that the respondent was employed by the applicant for the contract of one year commencing from 27<sup>th</sup> January, 2020 and agreed to end on 31<sup>st</sup> December, 2020. That the respondent's employment contract was terminated on 27<sup>th</sup> February, 2020 without legal reasons and failure to follow required procedures. He firmly submitted that in the matter at hand, the Arbitrator awarded the respondent compensation for unfair labour practice by applying the law and the reasonability of the finding was explained. He stated that the applicant is alleging illegality in the award but he failed to prove the same as per the requirement of section 110 of the Law of Evidence Act, [CAP 6 RE 2019] (TEA).

As to the second ground, Mr. Kunju submitted that it was proper for the Arbitrator to rule on issues of procedures for termination and reason thereof. He argued that the law is very clear on the status of an employee who is on probation period and the procedures for his/her termination. He insisted that the applicant is not excluded to comply with procedures stipulated under Rule 10 of GN 42/2007. That the applicant failed to comply with the relevant provision because he failed to notify the respondent of the performance concern and gave her an opportunity to respond and improve.

Mr. Kunju continued to submit that the arbitrator was correct to rule on issue of procedure and reason for termination of a probationary employee. To support his submissions, he cited the case of **Ester Itule Masala v. African Assay Laboratories (T) Ltd, Labour Revision No. 220 of 2016**, High Court Labour Division Dar es salaam (unreported). As to the allegation that parties are bound by their pleadings Mr. Kunju submitted that the Arbitrator has powers to grant remedies even when they are not prayed for by the applicant in the CMA F1 thus, the cases cited by the applicant's counsel are irrelevant.

Turning to the last ground of remedies entitled to the parties, Mr. Kunju submitted that the arbitrator stated genuine reasons for his

decision. He stated that the applicant failed to prove the alleged misconduct levelled against the respondent and added that there is no prove that there was any act done by the respondent for wrong intention which contravened rules of standard relating to misconduct as in accordance with Rule 11 (1) to (6) of GN 42/2007. To booster his submission, the counsel cited the case of **Tanzania International Container v. Felix Ndikumwami, Revision No. 262 of 2013**, Labour Division at Dar es salaam (unreported).

As to the contention on counter affidavit Mr. Kunju briefly submitted that the applicant's allegation is baseless and the case cited is irrelevant. In conclusion Mr. Kunju persuade the court to upheld the CMA's award and dismiss the application for lack of merit.

In rejoinder Mr. Ng'weli challenged Mr. Kunju's submission and stated that the same is from the bar because the counter affidavit is defective. As to other grounds he reiterated his submission in chief.

I have noted the applicant's allegation that the counter affidavit is defective, and Mr. Ngw'eli's argument that the application is unopposed. The objection should not detain me much because it is not a pure point of law, it is an arguable issue because if the counter affidavit did not have evidence, that is not a sufficient reason to strike it off the records



because denial of the fact is also a reply to the facts. Further to that, I have gone through the contested counter affidavit and it does not have the alleged defects contested by the applicant. I find the counter affidavit in question to be properly deponed before this court. It is the duty of the applicant to prove the facts alleged in his affidavit thus, by demanding the respondent to do so the applicant is trying to shift such burden. The objection is therefore overruled.

Having considered the parties rival submissions, court records as well as relevant labour laws, the court has reconstructed the applicant's grounds for revision and come up with only one issue of whether the Arbitrator properly awarded the respondent. It is an undisputed fact that the respondent was on probation period of six months, it is also undisputed fact that the respondent was terminated during her probation period. The relevance of probation period is well stated in the case of **WS Insight Ltd (Formerly Known as Warrior Security Ltd) vs Dennis Nguaro** (Revision 90 of 2019) [2020] TZHCLD 1 (13 March 2020); where Muruke J, held that: -

*'Under normal practice an employer should subject an employee to a probationary period. During the period on probation, the employees, skills, abilities and compatibility are*



*assessed and tested. The probation provides for an opportunity to test one another and to find out whether they can continue working with each other for a long period of time in a healthy employment relationship. At this point it is important to understand that, there are two employment contracts. The first is during probationary period, and, if successfully completed, a confirmation is issued to the employee, culminating in the conclusion of a second employment contract.'*

In the matter at hand, the termination letter indicates that the respondent was terminated from employment for unsatisfactory performance. As per the record available, there is no doubt that the respondent failed to perform to the required standards because she also admitted the same in her testimony at the CMA. The Arbitrator analysed the reason of termination in line with section 37 of ELRA and in my view, the Arbitrator was wrong to rely on the relevant provision which only governs confirmed employees and not employees who are on probation period as the respondent was.

Following the respondent's failure to perform as required, the applicant was supposed to terminate the respondent in accordance with

Rule 10 (6) (7) (8) of GN 42/2007 which provides the following procedures:-

*"Rule 10 (6) During the period of probation the employer shall-*

*(a) Monitor and evaluate the employee's performance and suitability from time to time;*

*(b) Meet with the employee with regular interval in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counselling to the employee during probation.*

*(7) where at any stage during the probation period the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.*

*(8) subject to sub-rule (1) the employment of a probationary employee shall be terminated if-*

*(a) the probationary employee has been informed of the employer's concerns;*

*(b) the employee has been given an opportunity to respond those concerns;*

*(c) the employee has been given a reasonable time to improve performance or correct behaviour and has fails to do so."*

Looking at the matter at hand, it is crystal clear that the procedures quoted above were not followed by the applicant in terminating the respondent. The respondent was not informed of the employer's performance concern and she was not afforded an opportunity to respond and improve, all these omissions are against the mandatory requirement of the cited provision. The respondent was terminated after completion of only one month of the probation period without being formally informed of her performance and given a chance to improve.

The applicant alleges that the Arbitrator wrongly analysed the termination procedures because the respondent did not claim for the same. In my view although the respondent did not challenge the procedures for termination in his CMA F1, the fact that she claimed for

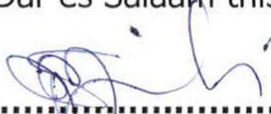
unfair labour practice suffice the Arbitrator to analyse the reason and procedures leading to the respondent's termination of employment.

The next question is on the reliefs that the parties are entitled to. Following the finding that the respondent was terminated without following the above cited provision, the Arbitrator awarded her eight months compensation for unfair labour practice. In my view such an award is too excessive because the respondent was still in probation and not confirmed in employment. Secondly there is no doubt that the respondent underperformed and it is on that basis of those findings that I revise the award of the CMA and reduce the amount of compensation that was awarded to the respondent. Instead the respondent is awarded compensation equivalent to the salaries for a period of three months, therefore the applicant is ordered to pay the respondent three months' salaries as compensation for unfair labour practice. The employment contract (exhibit D1) indicates the respondent's salary was Tshs. 757,800 therefore she is entitled to a total of Tshs. 2,273,400/=.

It is so ordered.

Dated at Dar es Salaam this 28<sup>th</sup> March, 2022.



  
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**S.M. MAGHIMBI**  
**JUDGE**