

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

**REVISION NO. 105 OF 2021**

**BETWEEN**

**LUCKY GAMES LIMITED ..... APPLICANT**

**VERSUS**

**SALIM MADATI ..... RESPONDENT**

**JUDGEMENT**

**S. M. MAGHIMBI, J**

On 30<sup>th</sup> December, 2017 the respondent was employed by the applicant as a System and Process Manager, the contract was for a fixed term contract of ten (10) years as reflected in the employment contract (exhibit D1). As per the contract, the respondent was to be on probation for four months. Following an alleged unsatisfactory performance, on 27<sup>th</sup> April, 2018 the respondent's probation was extended for two more months (exhibit D2) and following a continued unsatisfactory performance, on 24<sup>th</sup> May, 2018 the respondent was terminated from employment (exhibit D4). Aggrieved by the termination the respondent referred the matter to the Commission for Mediation and Arbitration for Ilala (CMA) on ground of unfair termination both substantively and procedurally as well as breach of contract. The CMA decided in favour of

the respondent, subsequently awarding him a total of USD 84,500/= being twelve (12) months' salary as compensation and a salary for June, 2018. Dissatisfied by the award, the applicant filed the present application on the following grounds:

- i. That, the respondent's complaints were based on substantive and procedural fairness of termination. That being the case section 35 of the Employment and Labour Relations Act, [CAP 366 RE 2019] (ELRA) was not applicable and therefore, the Arbitrator erred by awarding reliefs to the complainant that were not available to probationers.
- ii. That, the Arbitrator failed and/or refused to apply properly the principles established by the Court of Appeal of Tanzania in the case of **David Nzaligo v. National Microfinance Bank Plc**, (Civil Appeal 61 of 2016) [2019] TZCA 540 (09 September 2019) which is against the rules of precedent.
- iii. That, the Honourable Arbitrator failed to rule that since Form No. 1 was not signed by the complainant now the respondent, the proceedings were nullity since form No. 1 is an equivalent of a plaint if not signed, the proceedings become a nullity.

- iv. That, the Arbitrator erred by holding that the respondent was not given job description while in fact there is evidence on record that he was the one who prepared job description for the applicant.
- v. That, the Arbitrator erred by holding that the procedure for termination was not followed while in fact the respondent was served with a notice of termination as per the contract of employment.
- vi. That, there was no justification for awarding the respondent USD 84,000 as the respondent testified that he secured a new employment immediately after his termination.
- vii. That, the Arbitrator failed to issue the award within time prescribed by law without assigning reasons.
- viii. That, generally the findings by the Arbitrator were based on assumptions and the respondent's facts which were not substantiated that in effect led to material irregularity that affected the merits of the complaint No. CMA/DSM/ILA/R.662/18/466 and caused injustice to the applicant.

The application was argued by way of written submissions. Before this court, the applicant was represented by Mr. Makarious Tairo,

Learned Counsel whereas Mr. Said Nassor, 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. I will jointly determine the first and second grounds of revision and, if need be, I will determine the remaining grounds.

On the first and second grounds, Mr. Tairo submitted that procedure for termination of employment is provided for under Sub-Part E – of the ELRA. That Section 35 of ELRA provides that:

*"The provisions of this subpart shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contract."*

He then submitted that the Court of Appeal of Tanzania in David Nzaligo v. National Microfinance Bank PLC; Civil Appeal No 61 of 2016: Court of Appeal of Tanzania at Dar es Salaam (Unreported),(copy attached) had the following to say regarding section 35 of the ELRA:

*"Section 35 of ELRA provides that provision of Part III Sub – Part E shall not apply to an employee with less than 6 months employment with the same employer, whether under one or more contract, means that a worker with less than 6 months of*

*employment may not bring an unfair termination claim against the employee”*

He continued to submit that the court further held that probationer cannot enjoy the rights and benefits enjoyed by a confirmed employee under Part III of ERLA. He then pointed out that in this case, the Respondent was still a probationer when he was terminated as he had worked for the Applicant for less than 6 months. That the Arbitrator was bound to apply the provisions of Section 35 of ELRA and the principles established by the Court of Appeal of Tanzania in the cited case. However, argued Mr. Tairo, the Arbitrator ignored a binding authority and held that the termination of the Respondent’s employment was both substantively and procedurally unfair.

Mr. Tairo submitted further that the Arbitrator failed and/or refused to properly apply the principles established by the Court of Appeal of Tanzania in the case of **David Nzaligo V. National Microfinance Bank PLC** (supra) which is against the rules of precedent. That according to the doctrine of stare *decisis*, inferior courts are bound by the decisions of superior courts in the judicial hierarchy in cases where material facts are the same. That the purpose of the doctrine is to create certainty, uniformity and ascertainability in the law

while allowing some flexibility. He then emphasized that in the case of David Nzaligo v. NMB PLC (supra), the Court of Appeal of Tanzania held that one; a worker with less than 6 months of employment may not bring an unfair termination claim against the Employer and two; that a probationer cannot enjoy the rights and benefits enjoyed by a confirmed employee under Part III of the ELRA. That in our case, the Exh. D1 shows that the Respondent worked for less than six months (from 1<sup>st</sup> January, 2017 to 24<sup>th</sup> May, 2018) and at the time when his employment was terminated, he was still a probationer and that the Arbitrator was bound to follow the holding of the Court of Appeal of Tanzania and hold that since the Respondent worked for less than 6 months he could not bring unfair termination claim against the Applicant or being entitled to benefits and rights enjoyed by confirmed employees under Part III of the ERLA.

On his part, Mr. Nassor hesitated to state the applicability of the referred provision to the respondent. His only argument was that the CMA determined the complaint based on the evidence on record. On the cited case of David Nzaligo Vs. National Microfinance Bank (supra) Mr. Nassor submitted that the Arbitrator did not disregard the same but rather she applied the case to distinguish the argument that a

probationary employee worked for less than six months cannot file a dispute on the basis of unfair termination.

Having gone through the records of the CMA, I am in agreement with Mr. Tairo's ground that having still been on probation period and having worked for less than six months, the respondent was not entitled to claim reliefs under Section 35 of the ELRA. As narrated above in the dispute background, the applicant's employment contract had a probation clause of four months and due to unsatisfactory performance, his probation was extended for two more months as indicated in exhibit D2. The record reveals further that the respondent was terminated following unsatisfactory performance on the extended two months' probation. To be more precise, according to the EXD1, the contract was executed on the 30/12/2017 and ended on the on 24<sup>th</sup> May, 2018 (EXD4). Therefore even if we are to count from time the contract was executed to the time of termination, six months' period had not yet lapsed to have entitled the applicant to lodge the dispute u/s 35 of the ELRA. Further to that, there is no letter in record indicating that the respondent was confirmed in his employment hence he remained with such status until formal confirmation from the employer. This is the



Court of Appeal position in the cited case of **David Nzaligo v. National Microfinance Bank** (supra) 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.'*

Having been satisfied that the respondent was a probationary employee and had worked under the period of six months, the next question to be addressed is whether he was entitled to sue under the principles of unfair termination. The principles of unfair termination are governed under Section 35 of ELRA, which I find pertinent to reproduce the same: *"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.'*

The wording of the above provision which governs the claim of unfair termination clearly draws a line of the minimum employment period within which a party can sue for unfair termination. The time should be more than six months hence the provisions are not applicable to an employee with less than six months' employment contract. In his CMA F1 which initiates disputes at the CMA, the respondent sued for termination of employment as well as breach of contract. Therefore, the



dispute being initiated under the claim of unfair termination and on the basis of the above finding that the respondent was a probationary employee who had worked for less than six months, it my finding that u/s 35 of the ELRA, the CMA had no jurisdiction to entertain the matter. Having so found that the CMA had no jurisdiction, I see no reason to dwell on the remaining grounds of revision. Consequently, the CMA's proceedings and subsequent award are hereby nullified.

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



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