

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

REVISION NO. 500 OF 2020

BETWEEN

TOTAL TANZANIA LIMITED..... APPLICANT

VERSUS

SEET PENG SWEE RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand was lodged under Section 91(1)(a), 91(2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, CAP 366 R.E. 2019 ("the Act") read together with Rule 24 (1), 24 (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 28(1)(c)(d)(e) of the Labour Court Rules GN. No. 106 of 2007 ("the Rules"). She is moving the court for the following:

1. That this Honourable Court be pleased to Revise and set aside the Commission for Mediation Award and proceedings in Labour Dispute No. CMA/DSM/KIN/R.478//15/1054.

2. Any other relief this Honourable Court may deem fit and just to grant.

The application was supported by an affidavit of Marsha Msuya Kileo, the Director of Legal of the Applicant Company dated 30th November, 2020. The respondent strongly opposed the application by filing a notice of opposition under Rule 24(1)(2)(a)-(f), (4)(a)&(b) of Rules. Before this court, the applicant was represented by Mr. Ramadhani Karume, learned advocate while the respondent was represented by Mr. Nuhu Mkumbukwa learned advocate. The application was disposed by way of written submissions.

From the gathered fact, the brief background of the matter dates back to the 02nd March, 2015 when the applicant and the respondent duly executed a contract of employment for the respondent to be employed in the capacity of Chief Sales Manager, the commencement date being 13th April, 2015. Under paragraph 1 (vii) of the said contract, the respondent was subjected to probationary period of six months which commenced on the 13th April 2015 and was to come to an end on the 13th October 2015 on the condition that the Respondent's employment will be confirmed on expiry of probation period upon satisfaction by the Applicant.

During probation period, the Applicant initiated discussions with Respondent to review some terms in the contract of employment before confirming Respondent's employment, unfortunately the discussion did not succeed after the parties failed to reach consensus hence termination of the Respondent's engagement on 15th October 2015. Subsequent to the termination, the Respondent filed her complaint No. CMA/DSM/KIN/R.478/15/1054 ("the Dispute") before the Commission for Mediation and Arbitration ("the CMA") at Dar es Salaam alleging to have been unfairly terminated by the Applicant. The CMA decided in favor of the respondent and in the award, the applicant was ordered to pay the respondent 14 month's salary compensation, pending arrears of incentive, prorated, amount for accrued annual leave and nominal damage totaling at USD 88,403/-. Aggrieved by the said award, the applicant has lodged this application raising the following legal issues:

1. Whether the respondent's employment had been confirmed after the expiry of the probation period.
2. Whether the CMA had jurisdiction to entertain the Labor Dispute between the applicant and the respondent.

3. Whether the Arbitrator's award of compensation of 14 months' salaries to the respondent was justified and legal.

Having considered and find that the three issues by the applicant in this revision can be summarized as whether the respondent's employment had been confirmed after the expiry of the probation period, two is whether the Commission for Mediation and Arbitration had jurisdiction to entertain labor dispute between the applicant and the respondent and the last one is on the reliefs whereby the applicant is challenging whether the arbitrator fell into error in awarding the respondent a compensation of a total of 14 months' salary.

My determination of this revision will address the first two issues together. The rationale behind is that the two issues challenge the jurisdiction of the CMA both directly and indirectly. While the second issue is conspicuous that the applicant is challenging the jurisdiction of the CMA, the first issue revolves on the same parameters because the applicant is still attempting to argue whether the respondent had been confirmed to employment so as to have entitled her to the claims lodged at the CMA. The applicant moved the court to see whether the applicant was confirmed in employment so that it can be ascertained whether the termination was

within probation period which fact shall strip of the jurisdiction of the CMA under Section 35 of the Act, or whether she was already confirmed in her employment to have crossed over to the provisions of Part III sub-part E of the Act.

In his submissions to support the issue as to whether, the Respondent's employment had been confirmed after expiry of Probation period, Mr. Karume submitted that pursuant to the Act, and the employment contract between the Applicant and the Respondent, it is clear that respondent was subjected to probation period of Six months before confirming her in the Appointment (position). Further that the contract unveiled that confirmation of the same would be upon satisfactory completion of probation period as envisaged under clause 1 (vii) of the contract of Employment issued to the Respondent. He then argued that there is no any point in time where the Applicant confirmed the Respondent's employment hence the Respondent retained a position of probationer. That she was not entitled to any reliefs provided under Part III Sub Part-E of the Act because she was just a mere probationer and not an employee. He supported his argument by referring this to the decision of the Court of Appeal in the case of **D.P Mtenga Vs. University of Dar**

Es Salaam, File No. 53 of 1971 (CAEA, Feb. 08, 1972) where it was held at page 4 of the judgment by Hon. Law, J:

'As to the continued employment of the appellant after the expiry of his probationary period, it is clear from paragraph (iv) of the terms and conditions endorsed on the appellants letter of appointment, to which I have already made reference, that such expiry only renders the employee eligible for confirmation and does not involve automatic confirmation. The appellant in this case has established that he was eligible for conformation, but has failed to establish that he was in fact confirmed in his appointment''

He further cited the case of **David Nzaligo Vs. National Microfinance Bank PLC (Civil Appeal 61 of 2016) [2019] TZCA 287 (09 September 2019)** where the Court of Appeal of Tanzania (Hon. Korosso J.A) at page 19 was of the observation that:

"we are therefore of the view that confirmation of an employee on probation is subject to fulfillment of established conditions and expiration of set period of probation does not automatically lead to change of status from a probationer to confirmed employee".

Mr. Karume submitted further that having had a glance through to the CMA award, it is with no doubt that the honorable Arbitrator did not appreciate the fact that an employment contract between the Applicant and the Respondent was not automatic rather subject to confirmation on expiry of probation period of six months. Further that at the time the Respondent referred the matter to the CMA; she was a mere probationer thus not eligible to claim for unfair termination. His conclusion was that the award is tainted with material irregularities and illegalities for being given to a probationer contrary to the requirement of the Law, praying that this court revise the same and set it aside.

In reply, Mr. Mkumbukwa raised an objection that the issue of confirmation of the respondent was never raised at the CMA. His argument was that the issues which specifically cropped marking the termination of the respondent were not confirmation or unsatisfactory performance of the respondent, rather the issue was unacceptable unilateral change of contractual terms initiated by the Applicant after unsuccessful discussion on the respondent's incentives which ultimately led to her termination. That there is no single page leave alone a paragraph in the typed proceedings showing the confirmation or not of the respondent's

employment after probation period to be an issue. The reason for termination as can be gleaned at the last paragraph of page 4 of the CMA Award was the need by the applicant (employer) to introduce new and unfavourable terms to the respondent's contract and not issues of confirmation.

In rejoinder Mr. Karume argued that that a question of Jurisdiction can be brought anytime even at the Appellate stage. He then reiterated his submission in chief that; if an employee has not been confirmed to the position upon expiry of probation period, then the said employee shall remain in the status of probationer and will not be entitled to benefit with clauses in the Employment laws which benefit the employees.

Relating the second issue to the first issue, Mr. Karume submitted that the issue relates closely to the first issue. That at the outset, the CMA had no jurisdiction to entertain matter on the ground that at the Respondent (Complainant at the CMA) was unqualified to refer the matter as she was not an employee rather a probationer. He supported his submission by referring the Court to Section 35 of the Act which requires the employment period to exceed six months. He then argued that the

Respondent was not eligible to refer the dispute of unfair termination before the CMA hence the matter was erroneously lodged and determined by the CMA without Jurisdiction.

In reply, Mr. Mkumbukwa submitted that the Applicant had a chance to raise the issue at the CMA in terms of Rule 15 and 20 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. That she never raised the issue knowing that the same required evidence to prove whether the CMA had the requisite jurisdiction. He pointed out that it is worth noting that under the Rule 15 cited above, parties are allowed to adduce evidence to establish whether or not the CMA has jurisdiction over a particular matter. He prayed that the Applicant be barred from raising it at the revisional stage in line with the case of **Kisanga Tumainiel v. Frank Pieper and Another, Civil Case No. 139 of 2008** where it was held:

"We have shown that the High Court took up a new claim which was not pleaded at all. That was not proper as a party cannot take up new plea or new contention on appeal, unless it is pleaded in the plaint or written statement of appeal"

Admitting that the issue of jurisdiction can be raised at any time, Mr. Mkumbukwa submitted that the position is not applicable in the CMA or in a case when the issue of jurisdiction requires material evidence to prove whether or not the lower court had the requisite jurisdiction. He argued that in the instant application, the issue of jurisdiction revolves around the issue of confirmation after probation. That since the issue on whether or not the respondent was confirmed is contentious, the court will require evidence to first prove whether the respondent was confirmed and that such evidence cannot be adduced at this revisional stage.

In the alternative, Mr. Mkumbukwa submitted that the CMA had the requisite jurisdiction to entertain the dispute between the parties herein and that the applicability of section 35 of the Act, does not come into play where the employee has completed more than six months and confirmed in her employment. That the respondent in the present dispute completed six months of her probation as required by the law and was accordingly confirmed (refer page 19 of the CMA proceedings) and this is the reason why she was terminated on other grounds not even connected to her performance and or confirmation issues.

He then argued that Mr. Karume has misconstrued the provision of section 35 of the Act because the provision says that part of the statute will not apply to the employee with less than six month's employment and that the probationary status is irrelevant in this regard. That the only applicable criteria here is duration of stay in employment and as alluded above the Respondent herein, she had more than six months in employment. Further that the word "less than six months" requires no arithmetical expertise to glean that it literally means six or below six months. He prayed that this Court find that the CMA had the requisite jurisdiction to determine the dispute between the parties herein and proceed to dismiss this ground for want of merit.

I will first answer the issue raised by Mr. Mkumbukwa; that the issue of jurisdiction cannot be raised at this stage because it requires evidence. With respect I do not find this to be the case here. The parties' evidence is during arbitration is sufficient to establish jurisdiction of the CMA, and that is what will guide in determining that issue. After all, the issue of jurisdiction goes to the root of the legality of the proceedings and the award thus if the CMA did not have jurisdiction, then everything including

the award becomes a nullity. Therefore it is crucial that the issue of jurisdiction is determined at this point.

Having said that, on my part, as I had indicated from the beginning, the two issues shall be combined because the jurisdiction of the CMA would depend on whether the respondent was an employee with regard to confirmation of employment, or just an employee under probation. As it is undisputed between the parties, there was no confirmation of the respondent post probation. Although Mr. Mwinuka argued that the issue at dispute then (which allegedly led to the termination of the respondent) was the need by the applicant (employer) to introduce new and unfavourable terms to the respondent's contract. Whichever way that the words may be looked upon, they all narrow down to one fact, the respondent was never confirmed in her employment and that is why, I would think, Mr. Karume introduced the cited cases of **D.P Mtenga** and **David Nzaligo** (*Supra*). As per the cited cases, we cannot determine the matter without coming into admission that the respondent was never confirmed in her employment. On that note, let me now see if the CMA had jurisdiction to entertain the matter.

I will start with the evidence adduced by DW1, the Human Resource Manager of the Applicant who testified that the respondent's contract commenced on the 13/04/2015, a fact that is not in dispute in this revision. Going to the exhibit T-3, the termination letter, the same was written on 15/10/2015 but with effect from 12/10/2015, a period which is less than six months in line with Mr. Mkumbukwa's argument on the term "less than six months" stipulated under Section 35 of the Act. I must make it clear that the issue of jurisdiction can be raised at any stage and it is for the court to determine whether or not jurisdiction did exist, whether or not the same was in issue at the trial court. The rationale behind is that jurisdiction is a creature of statute hence it cannot automatically exist merely because the other party failed to object at the earliest opportunity.

That being the case, my work is to look at the statute concerning jurisdiction and see whether within the parameters of the facts and evidence that I am seized with, the jurisdiction of the trial court (in this case the CMA) was conferred under the statute. Here my work is simple, is to see whether there was an employment relationship between the applicant and the respondent that existed beyond the prescribed time of probation under the statute, and in this case the statute is the Act and the

section which confers jurisdiction under the Act is Section 35 which 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 contract".

Going to the exhibit T-3, the termination letter, the same was written on 15/10/2015 but with effect from 12/10/2015, it means that the applicant was terminated within the probation period and the period of six months had not lapsed. Therefore much as the respondent argued that the issue was not raised at the CMA, the records show that by the time the same respondent was terminated, the period of six months had not lapsed to have qualified her to lodge a dispute at the CMA under Part III-sub part E of the Act. The Section 35 is clear that the part shall not apply, meaning a party cannot lodge a dispute in any one or more contracts as long as the employment with the same employer is less than 6 months, which is the case in this revision.


In conclusion therefore, the second issue is answered in the affirmative, that the CMA lacked jurisdiction to entertain the dispute as the

respondent was still a probationary employee and had not worked for more than six months with the same employer.

In consequence to the above findings, all the proceedings and the subsequent award of the CMA are hereby nullified.

Dated at Dar es Salaam this 09th day of March, 2022.




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S.M. MAGHIMBI
JUDGE