

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

LABOUR REVISION NO. 300 OF 2021

BETWEEN

WATER MISSION TANZANIA.....APPLICANT

VERSUS

DEUSDEDITH MKUNGURU.....RESPONDENT

(From the decision of the Commission for Mediation and Arbitration
of DSM at Kinondoni)
(Belinda: Arbitrator)
dated 25th day of June 2019

in

Labour Dispute No. CMA/DSM/KIN/R.505/2018

JUDGEMENT

01st June 2022 & 07th June 2022

K. T. R. MTEULE, J.

This Revision application emanates from the award of the Commission for Mediation and Arbitration. This court has been asked to call for records, revise and set aside the award of the CMA. The Applicant herein is praying for the orders:-

1. That the Honorable Court be pleased to call for and examine the records of the proceedings in Labour Dispute No. CMA/DSM/KIN/R.505/18 Hon. Belinda Salehe and the resultant Award therein delivered on the 25th June 2019 and served to the applicant on 3rd July 2019 and revise and set aside the award.

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

At this stage I find it wise, to give brief facts leading to this matter as grasped from CMA record, applicant's affidavit and counter affidavit by the Respondent. The Respondent was employed by the applicant as an Engineer under yearly fixed contract from 05th March 2018 to 28th February 2019. On May 2018 while under probation the Respondent's service was terminated after being charged with an offence of being late to work. Aggrieved by the said termination, the respondent filed the matter at the CMA where it was decided in his favor. The Respondent was aggrieved by the CMA decision hence this application for revision.

Along with the Chamber summons, the applicant filed the affidavit sworn by David Gerlach applicant's Country Director, in which after elucidating the chronological events leading to this application as already stated in the above, the applicant alleged that; the respondent was lawfully terminated after committing an offence of being late at work.

The application was not challenged by the respondent who opted not file counter affidavit. In the result the application was heard ex-parte

by a way of written submissions as per the order issued by this Court on 09th May 2022 due to respondent's non-appearance. In the written submissions, the Applicant was represented by Ms. Madeline Kimej, Advocate. In her affidavit, the applicant advanced six legal issues of revision as stated at paragraph 13 as follows:-

- i) Whether the Commission for Mediation and Arbitration erred in law and fact by awarding the respondent 21 days salary as notice to be added to the issued 7 days' notice in view that the respondent, was an employee under probation.
- ii) Whether the Commission for Mediation and Arbitration erred in law and fact by failing to consider the applicant's evidence.
- iii) Whether the Commission for Mediation and Arbitration erred in law and fact by failing to consider that the respondent had not worked for six months and awarding him remedies under Section 40 (1) of the Employment and Labour Relation Act, Cap 366 R.E 2019 contrary to Section 35 of the same Act.
- iv) Whether the award is improper by the Arbitrator's use unproven assumptions as part of her reasoning for granting the award in favour of the respondent.

- v) Whether the Commission for Mediation and Arbitration erred in law and fact by concluding that the respondent was not given the right to be heard as per **Rule 7 of the Employment and Labour Relation Act, Cap. 366 R.E 2019.**
- vi) Whether the award was improperly procured as it was issued out of time after the expire of the 30 days period within which as to such an award was to be issued.

In the submissions, the applicant abandoned issue No. VI and submitted on all-other issues seriatim. I will also address the said five issues to answer the following main issues in dealing with this application. The first main issue is **whether the CMA award was properly procured by the arbitrator in determining fairness of labour practices relating to the respondent's termination** and the second one **is to what relief parties are entitled to?**

The **first** argument of the applicant is based on the validity of the decision of the arbitrator to award a probationary employee 21 days' notice while disregarding the 7 days' notice requirement as per the terms of the employment contract and which was duly issued to the Respondent during the termination. According to the Applicant, the

terms of the employment contract ought to have guided the arbitrator and 7 days' notice is what is stipulated in the said contract. He supported this argument by the cases of **Osteria Ice Cream Limited versus Junction Limited (TJL) Civil Case No. 898 of 2010 KLR and Azama Rajabu Mbilanga versus Shield Security Services Ltd. Revision No. 113 of 2019 (unreported) Wambura, J. and Benda Kasanda Ndassi versus Makafuli Motors Limited, Rev. No. 25 of 2011 HC Labour Division DSM (Unreported).**

With regards to failure to consider the employer's evidence the applicant complained of the arbitrator's failure to take into consideration the evidence which was admitted to confirm the applicant's lateness in reporting to work despite of some warnings, the fact which was the reason of non-confirmation of the employment on probation.

In further submission, the Applicant's counsel submitted that the under section 35 of the ELRA, exclude the application of the Part covering section 40 (1) (c) from being applicable to employees having less than 6 months in work. Citing the case of **Patrick Tyni Kihenzie versus Stanbic Bank (T) Limited, Revision No. 47 of**

2011 (Rweyemamu, J.). Ms. Kimei is of the view that the CMA did not have jurisdiction to entertain a dispute preferred by an employee having less than six months employment period. Ms. Kimei further cited the case of **Mwaitenda Ahobokile Michael versus Interchick Co. Limited, Labour Dispute No. 30 of 2010 Dar es Salaam Registry (Mipawa, J.).**

Ms. Kimei challenged the arbitrator's imposition of personal assumption by considering the lateness behavior as a normal practice and take into account unproved assumption of the Applicant's good performance.

With regards to arbitrator's conclusion that the Respondent was not given a right to be heard, Ms. Kimei submitted that such right does not apply to a probationary employee. She cited the case of **Stella Temu versus Tanzania Revenue Authority, Civil Appeal No. 72 of 2002, Court of Appeal of Tanzania, (unreported).** Relying on this case, Ms. Madeline justified the non-confirmation notice served to the Respondent dated 23 April 2018 as a sufficient measure to end the employment of the respondent who was under probation.

In addressing the issue of fair labour practices two aspect must be considered including fairness of reason and procedure for

termination. I have taken note that the respondent was terminated during the probation period. At Commission the arbitrator found that the termination was unfair on the reason that, the respondent's late attendance at work does not attract termination as a proper sanction. I will start with the first point regarding reason for termination or non-confirmation. In supporting it the applicant's counsel averred that respondent was lawfully terminated after committing an offence of misconduct by having a tendency of coming late to work contrary to employer's policy. In addressing the question posed before this Court I find it wise to direct myself to the CMA record including respondent's employment contract (Exhibit D1), which reveals that the applicant was employed on 5th March 2018 till 23rd May 2018 when her employment ended. It is not disputed that she was informed to have been not confirmed to her employment while under probation as per clause 1 of the employment contract (Exhibit D5). The arbitrator considered this ending of employment as a termination, but the applicant takes it as a non-confirmation of the applicant's employment and not termination. This debate needs to be resolved. I have gone through the letter by the applicant but I could not find the word termination. The words used in the letter state: "... we have decided not to continue your employment beyond your

probationary period.” In my interpretation, these words do not necessarily mean termination although they mean an ending to the employment. This means, the applicant opted not to confirm the employment of the applicant.

In this matter it is undisputed that the applicant had a tendency of delaying at work. The record reveals that the applicant was employed on 5th March 2018 soon after being employed, on 13th March 2018 the first warning was issued to him regarding accusation of being late at work as per Exhibit D-2 (warning). Apart from this warning, the applicant delayed further for three times, whereby on 23rd March 2018 he received an email accusing him of the same offence before expiration of the 1st warning as per Exhibit D-3 (accusation email). This is contrary **Rule 9 (2) of Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007** which direct any written warning to remain operative for six months. This was the reason which prompted the Applicant’s decision of 23rd May 2018 not to confirm the employment contract. It is a normal expectation that the Respondent had a duty to report on time in his working station, failure of which goes to fundamental roots of the contract. The several warnings were a

signal of intolerable employment relationship which the applicant had right not to bear.

There are some case laws which guide the ending of employment by opting not to confirm it after probation. In **Mwaitenda Ahobokile Michael v. Interchick Co. Ltd.**, Labour Revision No. 30 of 2010, High Court of Tanzania, at Dar es Salaam (unreported) it was held that:-

"This Court has firm view that the purpose of probationary period is to provide the parties with an opportunity to test one another and to find whether they can continue working with each other for a long period in healthy employment relationship."

From the above authority since the respondent was under probation, he had a duty to act honestly so as to attract the confirmation of employment contract. It is undisputed that the probation period was of three months. It is further not disputed that before the expiration of the three months of probation warnings were already issued by the applicant to the Respondent from the foregoing, it is my considered view that there was a fair reason for ending of the Respondent's employment. In such circumstance I differ with arbitrator's findings

that termination was not a proper sanction to be imposed to the respondent.

Regarding procedure, the respondent's dispute fall under fair labour practices. It is already found that the Respondent employment ended by the Applicant's refusal to confirm the employment after the lapse of the probation period. The law directs some conditions to be observed in exercising termination, including informing employee the employer's concern, giving him/her an opportunity to respond to those concerns and giving him/her a reasonable time to improve performance or correct behaviors and has failed to do so. In this application the record shows that the respondent was given first warning on 13th March 2018 the second accusation was on 23rd March 2018 and decision not to confirm was issued on 23rd May 2018 as per Exhibit D-5 (termination letter), basing on the nature of the contract as he was under probation period of three months. I am of the view that the Respondent was afforded with a time of correcting his behavior so as to attract confirmation in accordance with **Rule 10 (8) of GN. No. 42 of 2007** and not termination.

The issue as to **whether the CMA award was properly procured by the arbitrator in determining fairness of labour practices**

relating to the respondent's termination is answered in the negative.

Regarding reliefs, the respondent in this application is barred to enjoy remedies for unfair termination as claimed in CMA Form No. 1 on the ground that the decision not to confirm respondent's contract was exercised with fair labour practices in terms of reasons and procedure and therefore, I find nothing to award.

From the above circumstances, I depart from the decision and award of the Commission for Mediation and Arbitration. I therefore hold that this application has merit, and the only remedy is to allow it and revise the decision of the CMA. The Application is allowed, and the decision of the CMA is quashed and set aside. Each party to take care of its own cost.

It is so ordered.

Dated at Dar es Salaam this 07th June, 2022.



KATARINA REVOCATI MTEULE

JUDGE

07/06/2022