IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION APPLICATION NO. 202 & 214 OF 2021

BETWEEN

ENERGY AND WATER UTILITY REGULATORY AUTHORITY (EWURA)..... APPLICANT

VERSUS

NAINGISHU SOIKAN MOLLEL ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The Respondent, (Naingishu Mollel) ("the employee"), was employed by the applicant, the Energy and Water Utilities Regulatory Authority (EWURA) ("the employer") in a capacity of Director of Corporate Affairs (EXD11). The employment contract was for a fixed period of five (5) years effective from 18th November, 2013 and was subject to confirmation upon satisfactory performance. According to the employer, vetting clearance was also a pre-condition for confirmation of the employee. As per the records, the vetting was conducted by the relevant authorities and the Employee was not cleared to continue her employment with the employer. The vetting results were communicated to the Employer on 17th July, 2015 (exhibit D-15). Subsequent to vetting

results, 30th October, 2015, the Employer informed the Employee that her employment will not be confirmed. (Exhibit D-16).

The Employee was aggrieved by the termination and initially on the 27th November, 2015, she referred the dispute to the Commission for Mediation and Arbitration for Ilala ("CMA") vide Labor Dispute No. CMA/DSM/ILA/609/15/16/02 alleging un-fair termination. On the 04th day of May, 2019 the CMA issued its award in favour of the Employer. Aggrieved by the award, the employee lodged in this court a Revision Application No. 712/2019 and in her judgment dated 30th November, 2020, this court (Hon. Z. Muruke, J), quashed and set aside the award of the CMA for reason that the CMA determined an issue which was raised by the Arbitrator suo moto without affording the parties an opportunity to be heard. The Hon. Judge subsequently ordered the matter to be remitted back to the CMA where the parties could be heard on the issue of unfair termination.

Upon conclusion of the subsequent arbitration, the CMA issued an award in favor of the employee declaring that there was a breach of contract. The employer was ordered to compensate the employee a sum of Tshs 660,630,913/- being salaries for the remaining period of the contract. The prayer for damages of Tshs. 100,000,000/- and employer's

NSSF contribution for the remaining three years period, annual leaves and gross gratuity allowances were rejected.

Both parties were aggrieved by the award; the Employer was the first to approach this Court vide Revision No. 202/2021 praying for the whole award to be set aside. On her part, the Employee eventually lodged a Revision No. 214/2021 claiming for her employer's NSSF contributions for three years as well as damages. On the 16th day of August, 2021, I ordered the two revision applications to be consolidated hence this consolidated judgment. The following were the consolidated grounds/issues of revision raised:-

a) Whether the Hon. Arbitrator was right to hold that the dispute was of unfair termination and not non-confirmation of the employment.
b) Whether the Hon. Arbitrator was right to hold that the Applicant has failed to substantiate the reason for terminating the Respondent's employment.
c) Whether the Hon. Arbitrator was right to hold that the Respondent had a right to know the reason as to why she was not cleared by the vetting results.
d) Whether the Hon. Arbitrator was right to hold that the Applicant after receiving the vetting result was required to afford the

Respondent with an opportunity to be heard while the vetting was not conducted by the Applicant.

e) Whether the Hon. Arbitrator was right to hold that the Respondent was entitled to payment of TZS 660,630,913.00 as salary for the remaining period of the contract of three years while her monthly salary was TZS 11,396,559.00.

f) Whether the Hon Arbitrator was right to hold that the Respondent was vetted before being employed and the vetting resulting to her termination was a new vetting.

g) Whether it was proper for the Applicant to keep the Respondent in employment while she was not cleared by the vetting Authorities.

h) Whether it was proper for the Applicant to launch disciplinary proceedings against the Respondent based on the vetting results done by another Authority.

i) Whether it was proper for the Applicant to undertake confirmation process of the Respondent before receiving vetting results.

j) Whether the Hon. Arbitrator properly considered the evidence adduced by the Applicant during the trial before the Commission for Mediation and Arbitration.

k) Whether the Hon. Arbitrator was right to hold that the Respondent was unfairly terminated while her contract was of fixed period of time.

l) Whether the Hon. Arbitrator was right for refusing to award and order payment of NSSF employer's 15% contribution for the remained three years contractual period, gross gratuity allowances at the rate of 15% of her basic salary for the remained three (3) years and annual leaves also for the remained three (3) years.

The application was disposed by way of written submissions. Ms. Selina Kapanga, learned Senior State Attorney and Mr. John Mhangati, learned State Attorney represented the employer and Mr. Laiza, learned advocate represented the employee. Both parties filed their submissions accordingly.

Having considered the grounds of revisions and issues raised therein, the matter in controversy before me can be categorized into three issues. In the first issue the parties are challenging the substantive reason of termination of the employee where they have raised several grounds including Whether the Hon. Arbitrator was right to hold that; **one,** the dispute was of unfair termination and not non confirmation of the employment, **two;** the employer has failed to substantiate the

reason for terminating the employee's employment, **three;** the employee was vetted before being employed and the vetting resulting to her termination was a new vetting.

The employer also questioned the propriety of keeping the employee in employment while she was not cleared by the vetting Authorities; whether it was proper for the Applicant to undertake confirmation process of the Respondent before receiving vetting results and whether the CMA was right to hold that the Respondent was unfairly terminated while her contract was for a fixed period of time. Second issue is on the procedural fairness, the grounds and issues raised included whether the Hon. Arbitrator was right to hold that the employee had a right to know the reason as to why she was not cleared by the vetting results; whether it was proper for the employer to launch disciplinary proceedings against the Respondent based on the vetting results done by another Authority; and whether the Hon. Arbitrator was right to hold that after receiving the vetting result, the employer was required to afford the employee with an opportunity to be heard while the vetting was not conducted by the employer.

The last issue is on the relief(s) that each party is entitled to, on this issue, the employer challenged the award on the ground that the

employee is not entitled to any compensation because the termination was fair while the employee, although she was awarded compensation for the remaining period of the contract, she is also not satisfied as she alleges to also be entitled to payment of 15% (being employer's social security fund contribution) for the remained three years contractual period. She is also praying for payment of gross gratuity allowances at the rate of 15% of her basic salary for the remained three (3) years as well as her annual leave payments for the remaining period.

Starting with the fairness of the reason for termination, it is undisputed by both parties that the employee was terminated after the employer received vetting result from relevant authority which did not clear her for confirmation. According to Ms. Kapanga, at the time of her termination, the Employee was not yet confirmed in her employment. Further that she was under a fixed term contract of five years to be confirmed upon fulfilling necessary requisites hence she was still a probationer. She then submitted that the provisions relating to un-fair termination are envisaged under Part III E of the ELRA and they do not apply to an employee under probation who does not enjoy the same right as a confirmed employee. She supported her argument by citing the case of **David Nzaligo Vs. National Microfinance Bank PLC**

(Civil Appeal 61 of 2016) [2019] TZCA 287 (09 September 2019); whereby at page 21, the court had this to say:

"We are of the view that a probationer in such a situation, cannot enjoy the rights and benefits enjoyed by a confirmed employee".

The Justice of Appeal went on holding that:

".....the appellant was a probationer at the time he resigned and cannot benefit from the remedies under Part III E of the ELRA".

Ms. Kapanga then submitted that although the right to be heard and given the reason for decisions is fundamental, the same is not absolute. That one exception to this requirement is curtailment of such right to probationary employees where the provisions of the fair termination under the law requiring right to be heard does not apply. She supported this submission by referring to a decision of the Court of Appeal (Ramadhan J.A (as he then was)) in the case of **Stella Temu Vs TRA, Civil Appeal No. 72/2002** (unreported) where page 12 he had this to say:

".....we are of the opinion that there was no right of a hearing because there was no termination but it was merely a non-confirmation..... It is our decided opinion that probation is a practical interview. ***We do not think the right to be heard***

and to be given reasons extends even where a person is told that he/she has failed interview".

Ms. Kapanga went on submitting that since non confirmation of the Employee was due to vetting results conducted by another Government institution, the employee had no room to be accorded rights emanating from unfair termination as held by the CMA because she was still under probation and not yet confirmed to the position of DCA. That even the letter that ended her contract (admitted as Exhibit D-16) clearly stated that the reason for ending her employment was non confirmation and not termination.

In reply, Mr. Laiza submitted that under Order D.31 of the Standing Orders for Public Service of 2009, vetting is required to be done before a job opportunity is offered to a person. He then argued that in the event, a failed vetting will not in any way lead to circumstances of termination and therefore the ground advanced by the Employer of failed vetting being the reason for non-confirmation of the Employee, cannot stand and do not constitute fair and valid reason for termination. That when the Employer had demanded for release of the results/reasons for the alleged failed vetting, the Ministry of Water responded by a letter dated 21st September, 2015 (also marked as Exhibit D-17 to the CMA proceedings), by refusing to

release the results on pretext of being classified information as per Order C 15 of Standing Orders for the Public Service, 2009. He argued that the decision to refuse the allege vetting results to the Employer who requested for such vetting to be done, raises many questions which are important for this court to ask itself such as why and whether the said Order C.15 of the Standing Orders for the Public Service, 2009 relied by the ministry to deny the Employer the vetting results does apply to the circumstances of this matter. He then cited the provisions of Order C.15 of Standing Orders for the PublicService, 2009 which reads as follows;

"C.15 Restriction Regarding Disclosure of Information:

1. *No correspondence which has been passed between Ministries/ Independent Departments, Regions, Local Government authorities or between the public and Ministries/ Executive Agencies/ Regions /Local Government Authorities may be communicated to the Press or any member of the public without the approval of the Chief Executive Officer concerned; but information of a general nature which may be of material assistance in discussing local questions need not be withheld, provided that such information is not of a confidential nature or*

*likely to infringe the privacy of others (*underlining is supplied for emphasis*)"*

Mr. Laiza then submitted that it is crystal clear from the above cited provision, that indeed the Employee's vetting results (if any) were not communicated to the Employer to enable the Employer's board of Directors to make a decision which substantiates the Employee's termination. That it is also clear from the above that the Employer being neither a Press nor a member of the public, was not restricted under the above Order from accessing the said vetting results (if any) which they requested to be conducted. That the vetting results of EWURA's employees (be they positive or negative) have never been a secret or confidential and as such, they have always been sent to the Employer's board of directors. He then provided an example of the results of other employees of EWURA who were vetted by pointing to the letters dated 14th March, 2012, from the President's office with ref. No.CCA.273/342/01/D/21 to the Ministry of Water (Exhibit A1 to the CMA proceedings) forwarding vetting results of one Fred Msemwa and Mohamed Nyasama whose vetting results had passed and one Paskali Massawe whose vetting results had failed for being in possession of wealth which did not match his income. Further that on 21st March, 2012, the

Ministry of Water wrote a letter with ref. No.CAB 533/544/01/136 to EWURA (also Exhibit A1 to the CMA proceedings) to forward the said vetting results with instructions to proceed with appointment in accordance to the directive in the letter from the President's office and that on 10th April, 2012, EWURA wrote a response letter with ref. No.EWURA/14/29/VOL.III/6 (also Exhibit A1 to the CMA proceedings) to the Ministry of Water to inform the ministry that Mr. Paskali Massawe who had failed vetting results was given an opportunity to be heard and submitted in writing his explanation on his wealth. He therefore argued that the reasons advanced by the Employer to justify the Employee's termination of employment for non-confirmation, was alleged failed vetting results (Exhibit D-16) which were never made available neither to the Employer nor to the Employee. Mr. Laizer then submitted that the termination of the Employee on grounds non-confirmation due to alleged failed vetting whose results were not made available to EWURA, did not substantiate termination of the Employee. He concluded that the arbitrator's decision to this effect was right.

Having heard the parties, I will start with the issue of whether the dispute was unfair termination or non-confirmation of employment. It is on record that the original dispute was initially lodged at the CMA in November 2015 before the CMA Form No. 1 had an option to fill where

the issue of non-confirmation is concerned. Therefore I am in agreement with the employee that the previous CMA Form No. 1 did not have an option for non-confirmation let alone breach of contract and the relevant option in the said CMA Form No.1 was that of unfair termination of employment, the option is what was opted by the Employee as type of dispute. This answers the issue above to the effect that the dispute as filed at the CMA is one of unfair termination of employment. The option for breach of contract was brought about by amendments through the Employment and Labour Relations (General) Regulations, Government Notice No.47 of 2017 by placing in CMA Form No.1 an option for breach of contract to be filed by employees who are under fixed term contracts. Therefore at the time of initiating the dispute, the employee had no other option but to file a dispute of termination.

Coming to whether it was termination of employment or non-confirmation, the issue was also tackled by this court in Revision Application No. 712/2019 whereby in her judgment dated 30th November, 2020, this court (Hon. Z. Muruke, J), quashed and set aside the award of the CMA for reason that the CMA determined that issue raised by the Arbitrator suo moto without affording the parties an opportunity to be heard. She subsequently ordered the matter to be remitted back to the CMA where the parties could be heard on the

particular issue of non-confirmation of employment. The order was complied with, a subsequent award which is a subject of this revision.

Given the complexity of the prevailing situation at the time of institution of the dispute at the CMA, the issue of non-confirmation and termination of the employee have to be determined together to see whether the non-confirmation of the employee amounted to the substantive and procedural unfairness in ending the employee's contract. This will also determine whether the ending of the employment contract by the employer resulted to a breach of contract or unfair termination of the employee to entitle her with the reliefs as granted by the CMA.

Starting with the exhibit A6-A15 which was tendered by the employee, the exhibits have established how the other employees hired under the same terms with the employee herein were confirmed appointment. I find this evidence relevant to establish whether the employer conformed with Rule 12(1)(b)(iv) of the Employment and Labor Relations (Code of Good Practice) Rules, G.N. No. 42/2007 ("the Code"). I am aware that the alleged termination herein does not fall under the grounds provided for under Rule 12(3) of the Code, however, I am referring to the Rule because it provides for equal treatment of employees under the same circumstances which may lead to an end of

their contract. The Rule 12(1)(b)(iv) of the Code requires the arbitrator or judge to see whether the reason for terminating one employer was consistently applied by the employer to the other employees. In this case, the reason that ended the employee's contract was non-clearance during vetting of the employee.

As stated earlier, the exhibits A6-A14 were all letters for confirmation of other employees with the same employer, EWURA. The employees therein were vetted through letters dated 14th March, 2012, from the President's office with Ref. No.CCA.273/342/01/D/21 addressed to the Ministry of Water (Exhibit A1 to the CMA proceedings) forwarding vetting results of one Fred Msemwa and Mohamed Nyasama whose vetting results had cleared them. There was also a letter for one Paskali Massawe whose vetting results were not positive. That means at this point, the Rule 12(2)(b)(iv) of the Code was complied with as the same procedures were applied for employees under the same category and rank with the employee herein.

On the other hand, for the employee herein, there is EXD13, 14 and 15 which are letters from the employer to the responsible Ministry seeking for vetting of the employee (EXD13 and 14) and the subsequent letter EXD15 which is the reply from the Ministry that the employee was not cleared in vetting. The letter also directed the employer herein to

submit other three names of employees with qualification for the post so that vetting should proceed to fill the post. There was even D17 which shows the employer's efforts to have an explanation on what went wrong on the employees vetting exercise. Therefore the argument that there was malice by the employer cannot be established. I think the most important question to be determined here is whether after having received the EXD15 on non-clearance of the employee in vetting, the employer had any other powers to continue employment of the same employee.

The question above can be answered by looking at the wording of the EXD15, the non-clearance letter from the responsible Ministry. The wording of EXD15 is quoted:

> *"Kama unavyofahamu Bi Naingishu Mollel ambae ni Kaimu Mkurugenzi wa Fedha na Utawala alikuwa anafanyiwa upekuzi kwa ajili ya kushika nafasi ya Mkurugenzi wa Fedha na Utawala hapo EWURA. Kwa barua hii, nasikitika kukufahamisha kuwa, katika zoezi hilo la upekuzi, Bi. Mollel ameonekana ana kasoro na hivyo kutokuwa na sifa ya kushika wadhifa huo.*
>
> ***Hivyo unaombwa uandae na kuwasilisha majina mengine matatu (3) ya watumishi wenye sifa ya kuweza kujaza nafasi hiyo**, ili waweze kufanyiwa upekuzi wa kumwezesha*

mmoja wao kujaza nafasi ya Mkurugenzi wa Fedha na Utawala."(Emphasis is mine).

From the emphasized words, having the vetting results not cleared the employee, the employer was directed to submit three other names of the employees who qualified to fill that position. So what is the meaning of those words? The words are clear that the employment of the employee with that employer could not continue. It ended where the clearance was denied. On her part, the duty of the employer in confirming the employee starts after the results of the vetting comes out and not before that. This is also supported by the EXD5, 6, 7, 8,9,10 which shows that the other directors were vetted and confirmed only after vetting clearance. Even in these other exhibits tendered, there was a time lapse between their appointment and confirmation after the vetting results came clean.

Maybe the other question to ask at this point is whether the employer had powers to confirm the employee whose vetting results did not clear her for confirmation. This was evidenced by the Waraka wa Utumishi wa Umma tendered as exhibit D2 which was a directive to all public institutions not to confirm or promote employees before vetting. Therefore the employers powers to confirm before vetting were none, so is the power to confirm employees even after the vetting results came in

negative. It is therefore conclusive as alleged by Ms. Kapanga, the employee was never confirmed her appointment before she received the non-confirmation letter (EXD16).

That said, I am inclined to agree with the employer that as per the cited case of **David Nzaligo** (Supra), since there was no evidence of confirmation of the employee's appointment, she was still a probationary employee who could not enjoy the remedies under Section sub Part E of Part of the ELRA. Furthermore, as so correctly argued by the employer, the employee was not terminated from employment, she was rather not confirmed in that position after the vetting authority did not clear her.

This finding will also address ground (d), whether the CMA was right to hold that the Applicant, after receiving the vetting result, was required to afford the Respondent with an opportunity to be heard while the vetting was not conducted by the Applicant.

I agree with the submissions of the employer that the cited of **Stanbic Bank (T) Ltd v. Iddi Halfan, Revision. No. 858/2019** and the case of **KBC (T) Ltd v. Dickson Mwikuka (2013) LCCD 132** which required right to be heard on a bank employee whose termination was based on BOT vetting is distinguishable in our case. As determined

above, the employee was never confirmed in her employment and as per the cited case of **David Nzaligo**, she was still a probationary employee while in the cited cases, the employees were already confirmed. Being a probationer, the Employee cannot enjoy the same rights enjoyed by the employees who have already been confirmed their employment. The EXD15 was clear that after the vetting results failed, the employer was to table other names for vetting to fill in her post. The issue of right to be heard cannot therefore be relevant in this case.

On those findings, I see no reason to dwell on the remaining grounds (b)(c)(e)-(k) of revision because since her non-confirmation came from the fact that the vetting authority did not clear her, the employer had no other choice but not to confirm the employee, hence no procedures were to be followed apart from notifying her of the results. Therefore the issue of procedural fairness does not come because again, she was still a probationary employee.

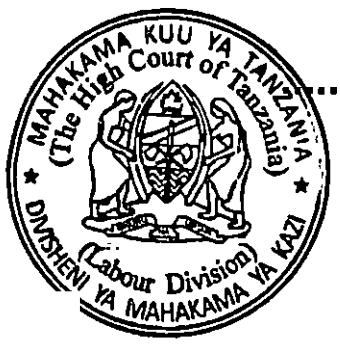
The last ground (l) will be addressed on the relief(s) that each party is entitled to. The employer challenged the award on the ground that the employee is not entitled to any compensation because the termination was fair while the employee, although she was awarded compensation for the remaining period of the contract, she is also not

satisfied as she alleges to also be entitled to payment of 15% (being employer's social security fund contribution) for the remained three years contractual period. She also prays for payment of gross gratuity allowances at the rate of 15% of her basic salary for the remained three (3) years as well as her annual leave payments for the remaining period.

In her Affidavit, the employee raised the issue of gratuity and NSSF payment, but those issues were only to be discussed if this court upheld the award of the CMA, that the termination was substantively and procedurally unfair. Since I have held that the employee was on probation and that the employer could not proceed with confirmation of the employee after the vetting did not clear her, then the non-confirmation of the employment cannot be termed as unfair termination and the employer is not under any obligation to compensate the employee.

In conclusion and on the findings above, the Revision No. 214 is dismissed in its entirety. As for the Revision No. 202, it is hereby allowed by revising and setting aside the award of the CMA.

Dated at Dar es Salaam this 09th May, 2022.



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S.M. MAGHIMBI
JUDGE