IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 367 OF 2021

JONATHAN J MUMBA..... APPLICANT

VERSUS

MOKA AFRICA LIMITED..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Faraja: Mediator)

dated 22nd July, 2021

in

REF: CMA/DSM/KIN/283/2020/193

JUDGEMENT

26th July & 02nd September 2022

Rwizile, J

The applicant asked this Court to revise, quash and set aside the ruling of the Commission for Mediation and Arbitration (CMA) and to grant reliefs this Court may deem fit and just to grant.

Facts of the case albeit brief can be stated that, the applicant was employed by the respondent as a cook. He was in a fixed term contract that commenced on 15th February 2020 to end on 14th February 2021. Despite being a second contract in that capacity, it had a probation term. On 31st March 2020, he was terminated from his employment for

misconduct. He was however not satisfied by termination and filed a dispute with the CMA. He was not successful.

Not satisfied again, he has now filed this application. Presenting oral arguments, the applicant who was represented by Mr. Simkoko a personal represented submitted on the grounds as hereunder;

(i) *Whether it was proper for the trial arbitrator to consider the applicant as a probationary employee without considering that the applicant was on the 2nd contract with the same employer and same position.*

(ii) *Whether it was proper for the Honourable Commission to admit and rely on the employment contract tendered by the respondent of which was a copy without adhering to the law in tendering.*

(iii) *Whether the case law cited by the arbitrator upon deciding the matter was parallel to the facts of the case before this Honourable Court.*

(iv) *Whether it was proper for the trial Honourable Commission to reach decision basing on the contradictory evidence and testimony of the respondent's witness.*

(v) *Whether the documentary evidence tendered was properly scrutinized before reaching at the decision*

On the first ground, he said the CMA improperly treated the applicant as probationary employee. He said, he had finished the first contract and was in the second contract of one year. According to him, this treatment is contrary to rule 10(2) of GN 42 of 2007. According to him, the employee ought to be examined by the employer for that matter. Evidence shows, he added, the warning letter addressed to him as the cook and not a supervision. In his view, there was no evidence proving that he committed the alleged misconduct.

Arguing the second issue, he said, the CMA admitted copies of documents. It was his strong argument that despite protesting, still the CMA did not hear his objection and therefore wrongly admitted them. The copies tendered were not originals. It is contrary to section 67(1) of Evidence Act. It was his further submission that section 68, provides for means through which copies should be admitted. The contract tendered as a copy, he said, was differed from the applicant's. Therefore, there was a dispute on the same. To conclude this point, he argued that under section 15(5) of ELRA, the employer is to keep records of the employee.

The applicant argued, the last two grounds together that, there was a contradiction in terms of evidence, exhibit D5 and D6, letters of warning. According to him, the two letters were issued on same date and have some differences. It was Mr. Simkoko's view that the applicant forged the same letter to prove there were two warning letters.

He strongly made it clear that the procedure was not followed and because the evidence shows, even to the probationary employee, rule 10(8) GN 42 of 2007 has to be complied with. In support, he cited the case of **Fredy Ngodoki v Swisport Tanzania Plc**, Civil Appeal No. 232 of 2020 at 4-5, where the employer is to prove termination substantively and procedurally.

On the other side, Mr. Mushi submitted that the applicant was in the second contract at the time of termination. The second agreement had a clause of probation. Upon furnishing the first contract, it was argued, the applicant was paid all his dues as per exhibits D2 and D3. It was his argument that exhibit D4 is a contract, and it has probation clause, and that applicant was terminated during the probation.

Arguing the second ground, it was said, the law does not prevent tendering of photocopies, what it deals with is the weight of the same. According to him, the objection was not on admission but on the weight

attached to the documents. It was his view further that, the CMA is not bound by legal technically, it was flexible to decide as it did. According to him, section 68 Evidence Act, was not applicable because originals were not found.

Lastly, Mr. Mushi argued that the respondent, has never had an intension to mislead the CMA. He further argued that same documents even though were admitted, but they were not considered by the CMA to decide the matter. According to the learned counsel, the dispute was not about fairness of termination. The applicant was a probationary employee, a person in less than 6 months in a contract is not covered under the Act. The applicant was under 6 months of the second contract as held in **David Nzaligo vs National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016 at page 22. He therefore prayed, the application be dismissed.

After hearing both sides, it is important to determine *if the applicant was on probation when his employment was terminated.*

The evidence is clear before the CMA that the applicant was employed by the respondent as the chef. He diligently served and had his first contract finished. On 15th February 2020, he obtained another contract fixed for one year. It was admitted as D4. It is from clause 7 of the same that it

had three months for probation. The applicant commenced his employment immediately after signing the same.

It is according to evidence that on 26th February 2020, the applicant was warned by a letter exhibit D5 for failure to follow the regulations. It should be noted here that this was at least 10 days from the commencement of the contract.

On 31st March 2020, it is clear that the applicant was terminated. This is as per exhibit D7. Even though the applicant attacked these documents as being photo copies, but they are convincing that the applicant was a probationary employee. As well, the CMA is not bound by strict rules of admission of evidence.

According to the applicant, the respondent did not prove that the terms of rule 10(2) of the Code of Good Practice, GN No. 42 of 2007, were met. It is apparent that rule 10 of the Code of Good Practice provides that terms of an employee in probation shall be made known to him before the employee commences employment.

There is no dispute that the applicant did not sign this contract. It is categorical that if he indeed enjoyed terms of the same such as remuneration, it cannot be said, he did not know his employment had a

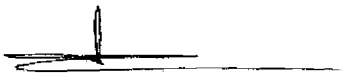
clause on probation. After all, this point was raised by the applicant in his submission through Mr. Simkoko. There is no cogent evidence that the same was complained of by the applicant at the CMA. It is clear to me that the applicant has no point to make in respect of this point.

Now having rule out that the applicant was a probationary employee, the next point to determine is if, termination followed the law. There is no naysaying here that termination of employment to a probationary employee, as it is to fixed term contracts, need to follow the procedure stipulated under section 37 of the Employment and Labour Relations Act. It is so because, such contracts are governed by the terms of the same. If breached, then the law provides for payment of compensation.

The applicant, there is no doubt, had terms of the probation clear to him before starting employment. It is stated under clause 13 of exhibit D4, that termination done in the first three months of commencement, a notice of 7 days has to be issued. Otherwise, it should be terminated by a notice of 30 days or a month's salary in lieu.

According to the termination letter, exhibit D7, the respondent terminated his employment on notice of 7 days and paid him the salary of one month. It is therefore clear to me that since there was a warning letter and the applicant was so terminated few days after commencement of the

contract, I have no doubt that this application has no merit. The law was followed. I dismiss the same with no order as to costs.



A.K. Rwizile

JUDGE

02.09.2022