IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 154 OF 2021

(Arising from the award of the Commission for Mediation & Arbitration of DSM at Kinondoni)
(H, Msina: Arbitrator) Dated 19th February, 2019 in Labour Dispute No. CMA/DSM/KIN/R.830/16/142)

UDA MANAGEMENT AGENCY.....APPLICANT

VERSUS

HIPOLITI JANUARY MALYA .....RESPONDENT

JUDGEMENT

K. T. R. Mteule, J.

26th August 2022 & 14th September 2022

Aggrieved with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant has filed this application for revision under Sections 91(l)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]; Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007 and any other enabling provisions of the law. The Applicant is praying for the Court to call and revise the proceedings, quash and set aside the award of the CMA in Labour Dispute No. CMA/DSM/ILA/KIN/R.830/16/142 (Hon. Msina H. H) for being tainted with illegalities.

The facts leading to this Application are derived from the CMA record, affidavit filed by the applicant and the Respondent's counter affidavit as follows:- The respondent was employed by the applicant as a Driver since 11th June 2016 on a monthly salary of TZS 400,000.00. The employment was subjected to 6 months' probation period. On 27th July 2016 while under probation period the respondent's service was terminated on reason of alleged misconduct (false information) where the applicant decided to issue non confirmation letter. It was alleged that the applicant provided false information that he held a meeting with drivers and provided false signatures of the said drivers purporting to show that they signed the minutes of their meeting.

Aggrieved by the termination decision, the respondent filed the impugned labour dispute in the CMA. The arbitrator found that the employer did not comply with the required procedure in ending the employment and found unfair termination and awarded the Respondent 11 months remuneration to the tune of TZS 4,400,000/= as a compensation. The applicant herein being aggrieved with the compensation of 11 months lodged this application.

Along with the Chamber summons, the applicant filed an affidavit sworn by Mr. Jonas Maheto, applicant's Counsel, in which after expounding the chronological events leading to this application, the

applicant challenged the decision of the arbitrator on the ground that the respondent's termination was fair in both aspects including reason and procedure.

The applicant's affidavit at paragraph 19 contains three legal issues as follows; -

i) Whether it was proper for arbitrator to hold that the applicant had no reason to terminate the contract of employment.

ii) Whether it was proper for arbitrator to hold that the applicant had not followed the procedure in terminating the respondent.

iii) Whether it was proper and just for the trial arbitrator to award eleven (11) months salaries for the remained months of the contract to the tune of TZS 4,400,000/= to an employee who was not confirmed.

In this Application, the above issues will be treated as grounds of the Revision.

The application was disposed of by a way of written submissions. The Applicant was represented by Ms. Sechelela Chitinka, Advocate, whereas the Respondent was represented by Mr. Edward Simkoko, Personal Representatives.

Supporting the application on **1st** ground questioning whether it was proper for arbitrator to hold that the applicant had no reason to terminate the contract of employment, Ms. Sechelela submitted that the arbitrator erred in law to hold that the applicant had no valid reasons to terminate the respondent employment. She stated that the respondent was employed on 11th June, 2016 by the Applicant in the position of Driver to provide services to UDA Rapid Transit Plc under a specific contract of one year, subjected to a probational period of six months for a salary of TZS. 400,000/= per month. She stated that while in the course of his employment during his probational period, the respondent conducted an act which amounted to misconduct by giving false information about the attendance of drivers meeting held on 10th July, 2016, an act which amounted to gross dishonest contrary to Rule 12 (3) (a) of the Employment and Labour relations (Code of Good Practice) GN. No. 42 of 2007, which justified termination of employment.

On the **2nd** ground concerning procedure, Ms. Sechelela submitted that arbitrator erred in holding that the Applicant did not follow proper procedure in terminating the Respondent's employment. She explained the procedure followed by the Applicant prior to terminating the Respondent thus, on 16th July 2016 the applicant issued the Respondent with a letter demanding explanation on his

misconduct. According to Ms. Sechelela, the Respondent replied to that letter where 20th July 2016 another letter was issued to invite the Respondent to attend disciplinary hearing on 22nd July 2016. She stated further that the disciplinary hearing was conducted and both parties were heard and the disciplinary committee decided that the respondent should be terminated, due to the nature of his offence and the impact it has in his position as BRT driver hence the termination on 27th July 2016. According to Ms. Sechelela the termination was done following the procedures and guidelines provided under the **Employment and Labour Relations Act**.

On the **third** ground, Ms. Sechelela submitted that the arbitrator erred in law by awarding 11 months as a compensation for unfair termination in accordance with Section 40 (1)(c) of the Employment and Labour Relation Act, Cap 366 R.E 2019 while the respondent was under probation period of 6 months. Supporting her stand she cited the case of **David Nzaligo v. National Microfinance Bank PLC,** Civil Appeal No.61, Court of Appeal of Tanzania, at Dar es salaam, (unreported).

They thus prayed for the CMA award to be quashed as it is tainted with illegalities.

On the other hand, Mr. Simkoko submitted that the Applicant failed to fulfil the requirements of Section 37 (2) of the Employment and Labour Relation Act, for failure to prove reason for breach of employment contract. He challenged the validity of the reason of alleged misconduct by giving false information about attendance of Drivers' meeting held on 10th July 2016. In his view, this allegation was not proved during hearing at the CMA since key witnesses were not called including respondent's follow employees to prove if the respondent forged their signatures. Therefore, Mr. Simkoko is of the view that the evidence adduced by the Applicant was hearsay evidence.

He reminded about the employer's liability to prove reason for termination as was held in the case of **Fredy Ngodoki v. Swissport Tanzania PLC,** Civil Appeal No.232 of 2019, Court of Appel of Tanzania, at Dar e salaam, (unreported). According to him, the Applicant failed to prove before the Commission whether there was a valid reason for termination.

On the second ground, Mr. Simkoko submitted that the Applicant failed to prove that she has followed proper procedures by failing to tender the minutes of the alleged disciplinary meeting. On such weakness he is of the view that it is difficult to prove if the Applicant

have conducted fair disciplinary meeting which contravenes **Section 39 of Employment and Labour Relations Act, Cap 366 R.E 2019** which imposes on the Employer the liability to prove the fairness of termination.

Regarding the reliefs Mr. Simkoko submitted that the Applicant established new ground which has never been adduced during hearing at CMA, but he stated that the Applicant wrongly interpreted the words of breach of contract indicated in referral form CMA F1 as it is the same as unfair termination. In his view, the Arbitrator's award was based on breach of contract and not unfair termination. Simkoko thus, prayed for the application to be dismissed.

Guided by the submissions made by both parties, the applicant's affidavit, and CMA record, I draw two issues for determination. The first one is **whether the applicant have provided sufficient ground for this Court to revise the CMA award** and the second one is **to what reliefs are parties entitled.**

In approaching the above issues, all 3 grounds of revision identified in the affidavit will be considered all together.

It is not in dispute that the applicant worked for less than six months, and he was still under probation during his termination. The applicant is disputing on the fairness of the reason for his termination before

the lapse of his probation. In the CMA, the arbitrator found that there was no fair reason in terminating the Respondent's employment prior to the end of probation. In the arbitrator's view, the applicant failed to prove the alleged false information given by the applicant. I have gone through the evidence adduced in the CMA. DW1 testified that the disciplinary meetings found the respondent guilty of misconduct but neither the minutes of the meeting were tendered in the CMA nor the report of the disciplinary committee. As well the drivers alleged to have signed an attendance sheet of a meeting alleged to have been called by the Respondent were not called to testify. The sole evidence of DW1 left a number of questions unanswered. These documentary pieces of evidence were necessary in the CMA to enable the arbitrator to assess the fairness of reason.

The failure to produce the evidence from the drivers indicated to have signed the attendance and the investigation report which in my view were necessary evidence for the purposes of this case in both the disciplinary committee meeting and in the commission, rendered the offence not sufficiently proved. I agree with the arbitrator, these were hearsay facts from DW1 which needed more prove. In this regard, I agree with the arbitrator that there was no fair reason

proved by the employer in arriving at a decision of terminating the applicant prior to end of probation period.

Regarding procedure, there are mandatory procedures to be adhered to when an employer terminates any employee regardless of the status. Good labour practices must be adhered to even when an employer opts not to continue working with a probationary employee. The procedure of ending the employment of a probationary employee is guided by Rule 10 (8) of the Employment and Labour Relations (Code of Good Practices) G.N. No. 42 of 2007 which reads as follows;

> *"10 (8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-*
>
> *(a) the employee has been informed of the employer's concerns;*
>
> *(b) the employee has been given an opportunity to respond to those concerns;*
>
> *(c) the employee has been given a reasonable time to improve performance or correct behavior and has failed to do so.*

From the above cited provision, the employer is directed to observe the procedures mentioned therein. In the present matter, the circumstances are different. The employee was terminated prior to the end of the probation period on grounds other than poor performance. There is evidence like Exhibit DA2 (letter of giving explanation) which justifies employer's concern to her employee

about the alleged misconduct. Also the applicant was called to attend the Disciplinary hearing as per the notice of attending disciplinary hearing (Exhibit DA4). This means that the applicant was afforded an opportunity of being heard and disclosure of the employer's concerns is apparent in these exchanged correspondences. Basing on nature of the dispute I am of the view that there was a fair procedure in terminating applicant's employment although the fairness of reasons was not proved. Therefore, the respondent's argument concerning procedural compliance is well founded.

From the above analysis, it appears that the procedure to terminate the applicant seems to have been complied with but there was no sufficient prove regarding to the fairness of the reasons. This leaves the court to hold that there was no fairness in the reason.

What was supposed to be the relief of the applicant? Regarding ground 3 concerning the amount awarded, It is already found that there was no sufficient prove of fairness in terms of reasons in terminating the Respondent's employment before the completion of the probation period. In CMA form No. 1, the applicant claimed breach of contract and prayed for reinstatement. The arbitrator awarded 11 months remuneration which was the remaining period of contract.

Ms. Sechelela challenged the Application of Section 40 (1) (c) of the Cap 366 in awarding remedies. In her opinion, Section 35 of Cap 366 excludes probationers from enjoying the benefits under section 40 (1). I agree with her. Not only this, but also **Section 37 and 39 of the Employment and Labour Relations Act, Cap 366 R.E 2019** and the whole *SUB PART E* do not apply to probationary employees. (See **David Nzaligo v. National Microfinance Bank, Civil Appeal No. 61 of 2016, CAT at Dar es salaam (unreported).** That means the one who fall under such category cannot enjoy remedies available under *SUB PART E* of the Act. Therefore, respondent's Counsel Submission regarding Section 37 and 39 of the Cap 366 R.E 2019 lacks relevance to this application.

However, inapplicability of sub part E of Cap 366 does not condone any unfair labour practice. Even though the applicant was a probationer who served for only one month, he still have right to enjoy good labour practice. Termination without fair reason cannot be left without any sanction only because the employee is a probationer. The applicant deserves a certain compensation.

The arbitrator paid all the salaries which remained in the entire contract of the Applicant's fixed term contract. In my view this is not reasonable for an employee who worked for only one month. The

amount awarded is excessive for an employee who worked for just one month. To be reasonable I reduce the award. I award only two months salaries as compensation to the applicant.

Dated at Dar es Salaam this 14th day of September 2022.

KATARINA REVOCATI MTEULE

JUDGE

14/09/2022