**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**LABOUR REVISION NO. 347 OF 2021**

*(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala* ***(Faraja: Arbitrator)*** *dated 29th October 2019 in Labour Dispute No. CMA/DSM/ILA/R 67/17)*

**JOHN ALFREDY SIMBA.....1st APPLICANT**

**RAPHAEL JOHN SEUTE.....2nd APPLICANT**

**DAVID ALLAN NDAMBO.....3rd APPLICANT**

**HANZURUNI YUSUPH JUMA.....4th APPLICANT**

**VERSUS**

**UDA MANAGEMENT AGENCY LIMITED..... RESPONDENT**

**JUDGEMENT**

**27th September 2022 & 29th September 2022**

**K. T. R. MTEULE, J.**

Dissatisfied with the award of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala [herein after to be referred to as CMA] the applicants have filed this application under the provisions of Sections 91 (l) (a) (b), (2) (a) (b) (c), (4) (a) (b) and 94 (l) (b) (i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019] as amended from time to time [herein to be referred to as ELRA] and Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (l) (c) (d) and (2) of the Labour Court Rules, GN. No. 106 of 2017 and any other enabling provision of the law. The applicant is praying for an order of

this Court to call for the records of the proceedings of the Commission for Mediation and Arbitration of Dar es salaam in Labour Dispute No. CMA/DSM/ILA/R 67/17, revise and set aside the whole award delivered by Hon. Faraja Johnson Lemurua, Arbitrator on 29th October 2019.

The brief background of the dispute as gathered from the CMA record and the parties' pleadings is explained hereunder. The applicants were employed by the respondent as Station attendants in the business of transporting services on yearly fixed term contract subject to a probation period of six months. Their relationship turned hostile on 21st Day of December 2016 when the notice of non-confirmation of their employment was issued by the respondent basing on unsatisfactory performance during the probation period.

Being not satisfied with employer's decision, the applicants lodged a complaint in the CMA. The arbitrator in the CMA found that there were unfair labour practices in ending the applicant's employment. According to the arbitrator, the applicants were terminated under probation period with no fair reason and procedure. The arbitrator awarded the applicants one month salary on the reason that they rendered services for three months. The applicants were resentful with the award, and filed this application for revision.

The affidavit in support of this application is sworn by Mr. Edward Simkoko who is the applicant's Personal Representative in which three legal issues challenging the decision of the arbitrator are raised. These issues are: -

a) Whether it was correct for the trial arbitrator to decide that the respondent was not bound to follow procedures before ending the applicants' employment contract.

b) Whether it was correct for the arbitrator to decide that the applicants were only entitled to the payment of one month salary as notice payment without considering that the applicants did not receive last month worked salary.

c) Whether the trial arbitrator properly evaluated the evidence adduced by both parties.

At the hearing the applicants were represented by Mr. Edward Simkoko, Personal Representatives while the respondent was represented by Ms. Sechelela Chitinka. The hearing of the application was by way of oral submissions.

In his submissions, while referring to page 4 paragraph 1 of the CMA award, Mr. Edward Simkoko submitted that the arbitrator admitted that the respondent did not have reasons to terminate the applicants and that she did not follow the fair procedure but yet held that the

respondent was not bound to follow the procedure because the applicants were under probation. In Mr. Simkoko,s view, the arbitrator misdirect himself because under **Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N No. 42 of 2007** the employer is guided how to terminate an employee who is under probation period. According to Mr. Simkoko one of the procedures to be followed is to involve the employee in the performance assessment process which must be clear with full disclosure. He submitted that the letter of assessment report **(exhibit D2)** was a confidential letter which contravenes the requirement of open assessment where the applicant could be told what were the targets and how much he performed out of those targets. He added that the applicants' termination was by surprise without the applicants being told what was wrong.

With regards to the **second** ground as to whether it was proper for the arbitrator to hold that the applicants were entitled to one-month salary Mr. Edward Simkoko submitted that one month salary was the payment worked for in the last month. He is of the view that the applicants were entitled to more than one month salary because the respondent committed breach to their contract. Therefore, in Mr. Simkoko's view,

they were entitled to be paid all the remaining months in their contract. Bolstering his position, he cited the case of **Agness B. Ruhere vs. UTT Microfinance PLC,** Labour Revision No. 459 of 2015. Referring to page 5 of the decision and pages 6-10, Mr. Simkoko submitted that in the cited case, the Court directed what is the entitlement of an employee who is unfairly terminated before the lapse of the probation period. According to the decision the applicants were entitled to be paid the remaining months prior to expiration of the contract. According to Simkoko, the arbitrator erred in not granting any payment to the applicants other than what they had already being paid.

On last issue as to whether the arbitrator properly evaluated the evidence adduced by both parties, Mr. Simkoko is of the view that if the arbitrator could consider the evidence, he could have reached into an appropriate decision because there was ample evidence showing that the applicant's employment was unfairly ended. He further submitted that since the applicants' employment was terminated unfairly while they had already served for 3 months in a fixed yearly contract, he thus prayed for the Court to grant 9 months as a remaining period of the contract to the tune of TZS 7,920,000/= for all the applicants.

In resisting the application on the first ground of the revision that the arbitrator erred in law to hold that the employer was not bound to follow

the procedure, Ms. Sechelela Chitinka submitted that this argument is baseless and false because the arbitrator never held that the employer is not bound by the good labour practices. According to Ms. Chintika, the arbitrator held that the respondent did not follow the procedure and the respondent was punished by being ordered to pay one month salary.

Ms. Sechelela Chitinka submitted that the applicants being probationary employees, they could not enjoy the same benefits as enjoyed by confirmed employees as highlighted in **Part III Sub Part E of the ELRA, Cap 366 R.E. 2019.** She referred to the case of **David Nzaligo vs. Natural Microfinance Bank Civil Appeal No. 61 of 2016(unreported).**

On the second issue regarding insufficiency of one month salary, Ms. Sechelela Chitinka submitted that the applicants failed to convince the CMA that there was a pending salary. She stated that the applicants worked for only 3 months; Therefore, it was fair for the arbitrator to compensate them with one month salary and she is in believe that the arbitrator properly exercised her jurisdiction as provided under **Section 40(1)(c) of Cap 366** which allows the arbitrator to award compensation of not less than 12 months remuneration. According to Ms. Sechelela, the Act bars the applicants from enjoying reliefs under

Section 40 (1) since they worked for only 3 months, and they were under probation period.

Lastly, she is of the view that the award issued by the arbitrator does not have any irregularity.

In rejoinder Mr. Simkoko emphasized that one month salary was not a punishment to the respondent, but it was a pending salary for the applicants. He refuted the assertion that they did not prove non-payment of the salary since they claimed to have unpaid one month salary. In his view, it was upon the employer to prove otherwise if he really paid them. He thus prayed for the application to be granted.

Having gone through the parties' submissions and their sworn statements, I am inclined to deal with two issues, as to **whether the applicant has adduced sufficient grounds for this Court to exercise its discretional power of revising the CMA award** and secondly to **what reliefs parties are entitled?**

In the CMA the arbitrator found that non confirmation of the applicants under probation period was tainted with unfair labour practices, for lacking reason and procedure in initiating the process of non-confirmation. In arbitrator's view, the procedure was not observed as they were neither consulted nor given time to improve contrary to **Rule 10(5), (6) (a) and (b) of the Employment and Labour Relations**

**(Code of Good Practices) G.N No.42 of 2007** (see page 9 of the impugned award). It is on this reason the arbitrator awarded one month salary as compensation contrary to what Mr. Simkoko claimed to be payment of unpaid salary and not compensation. The arbitrator's findings totally differ from the applicants' allegation that the arbitrator held that the respondent was not bound by the procedure in breaching applicant's employment and evidence evaluation lacks merits. The arbitrator correctly found unfair labour practice and ordered compensation.

The contention I note from the parties' submissions centers on two aspects, one being insufficiency of one month salary as a breach of contract and non-payment of unpaid one month salary. It is already confirmed that the one-month salary award was to compensate the applicants for the unfair labour practice by the respondent. What is to be answered now is whether such one-month salary is sufficient to redress what was unfair labour practice against the applicants and whether the applicants ought to have been paid one month salary.

Ms. Sechelela contended that the unpaid salary was not proved in the CMA, the assertion which Mr. Simkoko vehemently disputed. I have gone through the CMA Form No 1 and noted that as rightly stated by Mr. Simkoko, the claim of unpaid salaries was made by the applicants

therein. Since it was not a disputed issue in the CMA, it remains to be uncontested. The arbitrator ought to have granted it unless disputed otherwise by the respondent.

Coming to insufficiency of the award of one month salary for the unfair labour practice, it was contested by the applicant's representative Mr. Simkoko that the award of one month salary is insufficient as the applicants' termination was not fair. He added that since they worked for three months, the arbitrator ought to have awarded 9 months being the remaining period of contract. Ms. Sechelela maintained that what was awarded by the arbitrator was right after being found that there were unfair labour practices in terminating the applicants' employment of the applicants who were probationers not covered by Section 40 (1) of Cap 366.

It is not disputed that the applicants were probationers and that they are not covered by the remedies provided under **Section 40 (1) of Cap 366. (See Nzaligo's case)**. The arbitrator correctly found unfair labour practice in ending the applicant's probation period. I agree with Sechelela that it is vivid that being not a confirmed employee the applicants could not enjoy remedies including reliefs as if they were confirmed employees. Therefore, awarding the applicants the remained period of the contract as contended by the applicants in this application

while they were not confirmed would prejudice the whole notion and the purpose of having probation period under employment contract. In the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, where it was held: -

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

The applicants were under fixed term contract which commenced on 10th Day of September 2016, which was subjected to the probation period of six months as per Exhibit D-1(employment contract). Their contract ended on 21st Day of December 2016 which means they worked for three months and the remained period under probation was three months. In my view, it will be unwise for this Court to allow the award of 9 months remaining in the entire unconfirmed contract as claimed by the applicant. This will be treating the contract as confirmed which will be contravening the principle laid in **Section 35 of *Sub Part E* of the ELRA** which excludes employees under probation period from enjoying remedies of unfair termination. I stand to be guided by the case cited by

the respondent's Counsel, the Court of Appeal case of ***David Nzaligo's*** *(supra).*

From the above legal reasoning I am of the view that the award of 9 months as remained period of the contract will be acceptable applicants' employment would have been confirmed.

Having said the above, I remain with the question as to whether one month salary is sufficient to redress the applicants whose employment was improperly ended before the expiry of the probation which constitute unfair labour practice. I would point out that every employee is entitled to fair treatment and fair labour practice in whatever status he/she possesses in that employment, whether confirmed or probationary. Being under probation does not condone unfair labour practice to any employee. Whoever encounters mistreatment in employment needs to be fairly compensated. The arbitrator awarded one month salary. I agree with Mr. Simkoko that this is too minimal amount. But awarding the remaining period is as assuming the applicants as confirmed employees. In my view the foreseeable remedy can be the remaining period of probation which is 3 months. Therefore, in my view, an award of 3 months' salary for each applicant is sufficient to redress the applicants for the unfair labour practice. Since it is already

confirmed that the applicants are as well entitled to one-month unpaid salary, let the said salary be paid.

Finally, I conclude that the application is partly allowed to the extent discussed herein that is to say, each applicant shall be paid 4 months remuneration which constitute the 3 months compensation for unfair labour practice and one-month unpaid salary. Each party to the suit to take care of its own cost.

It is so ordered.

Dated at Dar es salaam this 29th Day of September 2022.

**KATARINA REVOCATI MTEULE**

**JUDGE**

**29/09/2022**