IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 97 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration at Temeke in Labour Dispute No. CMA/DSM/TEM/151/2020)

RAJABU SEFU .....1ST APPLICANT

ABUU BAKARI SAIDI .....2ND APPLICANT

VERSUS

AL – HASEEB JEWERY LIMITED ..... RESPONDENT

JUDGEMENT

S.M. MAGHIMBI, J;

The application beforehand was lodged under the provisions of Section 91(1)(a) 91(2)(a),(c) 91(4)(a) and S.94(1)(b)(i) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] ("the ELRA"), Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f) and 24(3)(a), (b), (c) (d), 24(11) Rule 28(1)(a), (b), (c), (d) and (e) of The Labour Court Rules GN. No. 106 of 2007 ("the LCR"). The application was lodged by a Notice of Application along with a Chamber Summons supported by a joint affidavit of the applicants. In both their Chamber Summons and the Notice of Application, the applicants are moving the court for the following orders:

(1) This honorable Court be pleased to call for the records of the proceedings and an Award of the Commission for Mediation of Dar es Salaam in Labour Dispute No. CMA/DSM/TEM/151/2020 and set the whole an Award of the Commission for Mediation and Arbitration delivered by Hon. Doris A. Wandiba, Arbitrator on 20th November, 2020.

(2) That after revise and set aside that an Award this Honorable Court to order Respondent to pay Applicants sum of Tsh. 4,200,000/- as compensation for unfair termination.

(3) Any other orders that this Honourable Court may deem fit and just to grant.

On the other hand, the respondent challenged the application through the counter affidavit sworn by Ms. Devora Kihyambe Nyoni, the respondent's Assistant Accountant, on the 09th May, 2022.

Before this court, the applicants were represented by Mr. Edward Simkoko from TASIU Trade Union. On the other hand, Mr. Jacob Mwambasi, an officer from the respondent, represented the respondent.

Brief background of the matter is that the applicants were employed by the respondent on 24th August, 2019 as Machine Operators on an unspecified period of contract. They allege that on 29th February, 2020 they were terminated from employment on unfounded reasons. Aggrieved by the termination, they referred the matter to the CMA claiming for unfair termination both substantively and procedurally. After

considering the evidence of both parties, the CMA dismissed the applicants' claims on the ground that they were probationary employees not covered under Section 35 of the ELRA. Dissatisfied by the CMA's award the applicants filed the present application on the following grounds:-

i. That the Honourable court erred in law and facts to decide the applicants worked under six (6) months while referral form (CMA F1) and evidence of both parties provided that they worked to the respondent more than six (6) months.

ii. That the Arbitrator erred in law and facts to decide that applicant worked under six (6) months while respondent failed to prove on that.

Starting with the first ground, Mr. Simkoko submitted that the Arbitrator misdirected herself to involve irrelevant facts which led to irregularity by deciding that the applicants were not entitled to remedies of unfair termination. He submittedargued that counting from the date of employment to the date of termination it is crystal clear that the applicants worked for more than six months.

As to the second ground, Mr. Simkoko submitted that according to section 14(2) and 15(6) of the ELRA the respondent was liable to prove

terms of the applicants' employment however, he failed to prove such requirement. The representative challenged the evidence of the respondent's witness that he only worked with the applicants for three days hence he was not quite conversant with their record. That the respondent failed to bring proper witnesses. However, Mr. Simkoko raised an argument that was not backed by any law when he argued that as per the law oral evidence is not to be considered, urging the court to disregard the evidence of SU. In the upshot prayed that this court grant the applicants reliefs as prayed in CMA F1.

Responding to the first ground, Mr. Mwambasi argued that the applicants were under probation of six months hence they can not claim unfair termination in terms of Section 35 of the ELRA. To support his position, he cited a range of cases including the Court of Appeal decision in the case of **David Nzaligo vs National Microfinance Bank Plc (Civil Appeal 61 of 2016) [2019] TZCA 540 (09 September 2019).** The counsel further submitted that a probationery employee will remain with such status until confirmation pointing out that the applicants were not confirmed in the employment.

Mr. Mwambasi went on submitting that the trial Arbitrator did not misdirect herself on the number of months worked by the applicants.

That the applicants commenced their employment on 02/09/2020 and the notice of termination was issued on 29/02/2020 thus when counting from the date of employment to the date of termination, it is six months which would have been completed on 02/03/2020.

Regarding the second ground, Mr. Mwambasi argued that according to section 14(2) of the ELRA it is not compulsory for the employment contract to be in writing unless the employee works outside the United Republic of Tanzania. He stated that the applicants worked in Tanzania; therefore, the referred provision does not apply. Making reference to Section 15(6) of the ELRA, Mr. Mwambasi submitted that the respondent proved the applicants' terms of employment contract while the applicants failed to challenge the respondent's witness when adducing evidence of their probation. He argued that failure to cross examine a witness in an issue means the relevant issue is accepted as evidence. To support his submission, he cited the case of **Tegemeo Madindo vs Zacharia Chaula (PC Civil Appeal 13 of 2021) [2021] TZHC 9084 (16 November 2021)**. He further reiterated his submission in the first ground and added that the decision of the Arbitrator was correct and there was no any alleged irregularity or

illegalities. In conclusion, he urged the court to dismiss the application. In rejoinder Mr. Simkoko reiterated his submission in chief.

Having considered the rival submissions the parties, Court's records and the evidence adduced during trial, I find that the main issues in controversy are whether, at the time of their termination, the applicants were under probation, whether the termination of the applicants was fair and what reliefs are the parties entitled to.

To begin with the first issue, whether at the time of their termination the applicants were under probation, it is the respondent's submission that upon termination the applicants were probationary employees hence not entitled to sue under on principles of unfair termination in terms of Section 35 of the ELRA. The respondent's assertion was also confirmed by the Arbitrator who found that the applicants were under probation hence, not protected under Section 35 of the ELRA. In this application it is undisputed that the employment contract between the applicants and the respondent was oral. Mr. Mwambasi argued that it is not mandatory to provide an employee with a written contract unless he/she is working outside of the United Republic of Tanzania. He supported his argument by referring the Court to the provisions of Section 14(2) of the ELRAwhich provides:-

"A contract with an employee shall be in writing if the contract provides that the employee is to work within or outside of the United Republic of Tanzania".

Going by the wording of the above quoted provision, it is clear that all contracts whether within or outside of the United Republic of Tanzania should be in writing therefore, Mr. Mwambasi's submission in that aspect is contrary to the provision of the law. The law further imposes liability to the employer to prove terms of the contract where he did not provide an employee with the written contract. This is pursuant to the provision of section 15(6) of the ELRA which provides as:-

"If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."

In the matter at hand, the respondent alleges that the applicants were under probation but there is no evidence to prove the same. He only submitted that the applicants were employed on 02/09/2019. Now if the issue is that the applicants were not confirmed after employment,

then the burden to prove that the probation period was of six months shifted to the employer that could have been proved by a written contract but there was none. It is important to analyse what probation is, how it is done and it is thereafter when we shall see whether the period of probation should be strictly six months. Para 2 of Article 2 of the ILO Termination of Employment Convention, 1982 (No. 158) provides:

> *"A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:*
>
> *(a) workers engaged under a contract of employment for a specified period of time or a specified task;*
>
> *(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;*
>
> *(c) workers engaged on a casual basis for a short period."*

However, what is "reasonable duration" has not been defined in relation to employees serving a period of probation. The only requirement is that the period should be determined in advance or in other words, at the time of engagement, so that the employee should be made aware of the period within which he shall be under probation and any extensions if any, so that the period cannot be unduly prolonged. As for the period,

the convention has left it for each country to determine the periods which the relevant country would consider to be reasonable as a period of probation, only that the determination should be made in good faith. As per our law, Section 35 of the ELRA is clear that the provisions of Sub-Part E of Part of the Act shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts. However, for the case at hand, there is no any formal written contract of employment to show the terms therein, therefore the duration within which the applicants were employed by the respondent is only a matter of oral evidence. Looking at the evidence adduced at the CMA, SU1 testified that the applicants started working for the respondent on 02/09/2019 and terminated on 29/02/2020. However, the evidence shows that the witness had only known the applicant for 3 days and since there was no written contract to prove their employment, then the evidence of SU1 remains hearsay evidence not worth of value.

On their part the 2nd applicant testified to have started working on 24/08/2019 on permanent basis through oral contract. The terminated was undisputed on 29/02/2020 hence the six months period had lapsed. It is pertinent to note that according to the Convention No. 58 and

principles of labour laws, the period of probation should not exceed six months and since the contract was oral, any day beyond the six months period that the applicant has worked is presumed to be a confirmation of employment hence the applicants were no longer probationary employees. It follows therefore, if failure to succeed on probation period was the reason for termination the same should have been indicated in the record by a written document. Failure of that the respondent's allegation stands as mere words without proof.

In conclusion, since the respondent failed to prove the terms of employment of the applicants, neither prove the date of commencement of their employment, it suffice to conclude that they were under unspecified period of contract as provided under Section 14(1)(a) of the ELRA. The Arbitrator's finding that the applicants were under probation is hereby revised, this court makes a finding that the applicants were employed on permanent basis.

Coming to the second issue whether the applicants were fairly terminated. The termination letters (exhibits SW1 and SW2) indicates that the applicants were terminated on the basis of economic constrains of the respondent's company also known as retrenchment. However, the evidence of the respondent during arbitration was to the contrary. Their

witness, SU testified that the applicants were terminated because of what she termed as unsatisfactory performance. This is a serious contradiction between oral and documentary evidence.

The above notwithstanding, if we are to take the termination letters as the correct reasons for the applicant's termination, still, such reason is not proved by the respondent as it is required under Rule 23(1), (2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 ("the Code"). Again, the procedures for termination on the ground of retrenchment are provided under section 38 of ELRA read together with Rule 23, 24 and 24 of the Code which were not followed in this case. There is no proof of any meeting, negotiations or any procedures provides for under the ELRA and the Code. The evidence leads to only one conclusion, the applicants were unfairly terminated both substantively and procedurally. The CMA award is hereby revised.

The last issue is on the parties' reliefs. In the CMA F1, the applicants prayed for payment of terminal benefits and compensation for unfair termination. As it is found that the applicants were unfairly terminated both substantively and procedurally, they are entitled to the compensation prayed which is in accordance with section 40(1)(c) of the ELRA. With respect to other terminal benefits as per receipt of petty

cash voucher of final payment (exhibit SU1 and SU2) it is proved that the same were paid to the applicants thus, they cannot be repaid again by an order of this court. As for compensation, the applicants are awarded 12 months salaries as compensation for unfair termination expounded as Tshs. 150,000 X 12 totalling to Tshs. 1,800,000/= for each applicant. In total the respondent is ordered to pay the applicants a total of TZS. 3,600,000/= being 12 month's remuneration as compensation for unfair termination for both applicants.

Dated at Dar es Salaam this 28th day of September, 2022.

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S.M. MAGHIMBI

JUDGE