IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 242 0F 2022

BETWEEN

UNISOFT TECHNOLOGIES (T) LIMITED ---------- APPLICANT

AND

SUBIRA MAULIDI ---------- RESPONDENT

JUDGEMENT

Date of last Order: *28/02/2023*
Date of Judgement: *07/03/2023*

MLYAMBINA, J.

The Applicant filed the present application imploring this Court to revise and set aside the Award issued on 10th June 2022 by the Commission for Mediation and Arbitration (to be referred as 'CMA') in *Labour Dispute No. CMA/DSM/ILA/672/20/354* by Honourable Massawe Y, (Arbitrator). The facts giving rise to the present application can be briefly stated as follows; on 01st October, 2014, the Respondent was employed by the Applicant in the position of Helper as per the Letter of appointment and Employment Terms (exhibit D7). In the referred contract, the agreement was for the Respondent to serve the Applicant's organization for minimum period of two years. On 21/08/2020, the Respondent was terminated from

employment on the ground of misconducts. Aggrieved by the termination, the Respondent referred the dispute at the CMA claiming for unfair termination as indicated in the CMA Form No. 1.

After considering the evidence of the parties, the CMA found that the Respondent was unfairly terminated both substantively and procedurally. Following such findings, the CMA awarded the Respondent a total of TZS 2,256,000/= being twelve months salaries as compensation for the alleged unfair termination and a certificate of service in accordance with *Section 44(2) of the Employment and Labour Relations Act, [Cap 366 RE 2019]* (to be referred as 'ELRA'). Being dissatisfied by the CMA's decision, the Applicant filed the present application on the following grounds:

i. That, the Hon. Arbitrator erred in law and fact by deciding that the Respondent was terminated while she was on a fixed term contract; and until her termination she was not confirmed in employment.

ii. That, the Hon. Arbitrator erred in law and fact in deciding that the Respondent was on a fixed term contract and was not confirmed but she is entitled to claim for unfair termination as she continued to work without confirmation.

iii. That, the Hon. Arbitrator erred in law and fact in deciding that the Applicant had no valid reason to terminate the Respondent while the Respondent admitted her misconduct and asked for forgiveness.

The application proceeded by way of written submissions. Mr. Willington Theobard, learned Counsel appeared for the Applicant, whereas Mr. Abraham John Mkenda, learned Counsel was for the Respondent.

Arguing in support of the application, Mr. Theobard argued the first and second grounds jointly, and the last ground separately. He started his submissions by referring the Court to the case of **David Nzaligo v. National Microfinance Bank Plc**, Civil Appeal No. 61 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported), where it was stated that a probationer cannot claim for unfair termination. He argued that the Respondent was a probationer employee who in terms of *Section 35 of the ELRA* cannot claim for unfair termination as she did in the CMA F1.

It was submitted that; the employment of the Respondent commenced on 01st October, 2014 subject to probation period of three months. That the contract was subject to approval at the expiry of probation which would invite to enter into the fixed term contract of two years as it appears in the letter of appointment (exhibit D7). It was added

that; despite the fact that the Respondent continued to work after the expiry of the probation period her status remained as a probationer as was held in the case of **David Nzaligo** (supra).

Mr. Theobard further referred the Court to another decision of **Salkaiya Khamis v. JMD Travel Services (SATGURU),** Revision No. 658 of 2018 which took the position in the case of **Unilever Tanzania Limited v. Benedict Mkasa Bema Enterprises**, Civ. Application No. 41 of 2009 where it was held that:

> Parties are bound by the agreements they freely entered into. No party would therefore be permitted to go outside of that agreement for remedy.

Also, the Counsel cited the cases of **Hotel Sultan palace Zanzibar v. Daniel Laizer & Another**, Civ. App. No. 104 of 2004, **Yusto Habiye v. Knight Support (T) Limited**, Revision No. 101 of 2019 and the case of **Commercial Bank of Africa (T) Limited v. Nicodemus Mussa Igogo**, Revision No. 40 of 2012 where the Court decided that a probationer is excluded from fair termination provisions of the Act.

It was further submitted that; the Respondent was on probation as per the contract of employment and she had never been confirmed. He

stated that the Arbitrator errored in law and facts to hold that the Respondent was confirmed at the time of termination. It was added that; the Respondent was terminated basing on misconduct. Therefore, the procedures under *Rule 10(7), (8) and (9) of GN. No. 42 of 2007* were dully adhered to.

Mr. Theobard argued that; the findings that the procedures provided under *Sections 36, 37 and 39 of ELRA* were not followed is misconceived since the referred provisions are not applicable to the Respondent. In support of his argument, the Counsel referred the Court to the case of **Stella Temu v. Tanzania Revenue Authority** [2005] TLR 178 whereby the Court of Appeal followed the position stated in the case of **Mtenga v. University of Dar es salaam**, (1971) CHD 247 where it was held that:

> Expiration of probationary period does not amount to confirmation and the confirmation is not automatic upon expiry of probation period.

The Counsel insisted that there is a reason to interfere with the decision of the CMA since the procedures for terminating the Respondent as a probationary employee were dully followed. It was further submitted that; one of the claims of the Respondent at the CMA was a claim of

compensation for unfair termination. He argued that; for an employee to initiate a claim of unfair termination, he or she must be an employee who is not under probation and does not have less than six employment contracts. He added that; the Respondent is among the employees prohibited to sue for unfair termination. To support his submission, he put reliance to the case of **Agness B. Buhere v. UTT Microfinance Plc**, Lab. Revision No. 459 of 2015 (unreported).

As to the reason for termination it was submitted that; the cause of action was the act of the Respondent to disobey the directives of the employer given to her after she resumed her duties. He added that; even in the disciplinary hearing, the Respondent admitted to have shouted to her supervisor in the course of being instructed and she asked for forgiveness. It was further submitted that; during hearing, the Respondent admitted that she was issued with the show cause letter of which she prior refused to receive.

After receiving the said letter, she had nothing to explain, a response which attracted to call for disciplinary hearing. Under the circumstances, the Counsel insisted that there was no any other option than to terminate

the Respondent's employment. He therefore, prayed for the application to be allowed and the CMA's Award be quashed and set aside.

In response to the first and second grounds, Mr. Mkenda submitted that the case of **David Nzaligo v. National Microfinance Bank PLC** (supra) is not applicable in this matter because the Respondent was not under probation period as stated by the Counsel for the Applicant.

Mr. Mkenda submitted that; it was undisputed facts that the Respondent was employed by the Applicant on 1st October, 2014 until she was terminated on 21st August, 2020. This means that, the Respondent worked with the Applicant for six years and when the Respondent commenced her employment, she was given a Letter of Appointment and Employment Terms. Also, Mr. Mkenda referred to clause 3 of paragraph 3 of the Letter of Appointment which states that:

> You will be on probation for a period of three months with a possible extension based on the evaluation of your performance by management...

He further referred to paragraph 5 of the same letter. Mr. Mkenda argued that; according to paragraph 3 and 5 of the Letter of Appointment and Employment Terms, the probation period of the Respondent started on

1st October, 2014 and ended on 31st December, 2015. He stated that; the Respondent testified before the CMA that, when the probation period of three months expired, her employment contract was confirmed orally by the Applicant.

It was argued by Mr. Mkenda that; if the Applicant was not satisfied by competence of the Respondent in doing the job, he would have extended time for probation period. It was further submitted that the case of **Salkaiya Seif Khamis v. JMD Travel Services** (supra) and **Hotel Sultan Palace Zanzibar v. Daniel Laizer & Another** (supra) cited by the Counsel for the Applicant are in favour of the Respondent because the Applicant was the one who violates the provision of the Letter of Appointment and Employment Terms as well as the rights of the Respondent as per the ELRA.

The Counsel further contended that the cases of **Yusto Habiye v. Knight Support (T) Limited** (supra) and **Commercial Bank of Africa (T) Ltd v. Nicodemus Mussa Igogo** (supra) are distinguishable to the case at hand. He stated that; in the cited cases talks about an employee with less than 6 months' employment with the same employer. He said, the

Respondent worked with the Applicant for six years and thus, the Respondent cannot be regarded as a probationary employee since she worked for 6 years with the Applicant.

It was strongly submitted that the Respondent was not under probation period as stated by the Applicant. Mr. Mkenda argued that the Applicant was duty bound to comply with the provisions of *Section 36, 37 and 39 of the ELRA* because the employment contract of the Respondent was terminated by the Applicant without complying with the legal procedures.

It was further contended by Mr. Mkenda that the cases of **Stella Temu v. Tanzania Revenue Authority** (supra), **Agnes. Buhere v. UTT Microfinance PLC** (supra) and *Section 35 of the ELRA* bars the employee who works for not less than six months to file a dispute for unfair termination but for those who worked for more than six months are not barred to file a dispute for unfair termination.

As regards to the reason for termination, it was submitted that; the Applicant failed to prove at the CMA which kind of misconduct led the employment of the Respondent to be terminated. The Counsel was of the

view that the trial Arbitrator was keen in analyzing the evidence adduced by both parties and she considered the Labor Laws, hence justice done to both parties. In conclusion, Mr. Mkenda stated that; the application has no merit and urged the Court to dismiss the same.

I have dully considered the rival submissions of the parties, CMA and Court records as well as applicable laws. I find the Court is called upon to determine the following issues; *firstly, whether at the time of termination of employment, the Respondent was still under probation, secondly; whether the Applicant fairly terminated the Respondent both substantively and procedurally and; what reliefs are the parties entitled.*

To start with the first issue, the employment contract (exhibit D7), stated that the Respondent was employed in the position of a Helper with effect from 01st October, 2014. The contract further provided that the Respondent will be on probation period of three months with a possible extension based on the evaluation of performance by management. Mr. Theobard strongly argued that; since the Respondent was not confirmed in the employment, she was still a probationer employee who can not claim for unfair termination. The Counsel urged the Court to rely to the Court

decision in the case of **David Nzaligo** (supra). In the referred case, the Court held as follows:

> We are therefore of the view that confirmation of an employee on probation is subject to fulfilment of established conditions and expiration of set of periods does not automatically lead to change of status from a probationer to a confirmed employee.

In the instant matter, as stated above, it is undisputed that the Respondent's employment was subject to probation of three months. After expiry of the probation period, the Respondent continued to work until 21/08/2020 when she was terminated from employment on the ground of misconduct. After the expiry of the probation period, the Respondent continued to work for the Applicant for five years and months. On such length, the question to be addressed is; *whether the Respondent was still under probation.* In the parties' employment contract, it was also provided as follows:

> On confirmation of your employment you should serve for minimum two years in our organization.

Notwithstanding the above clause, there was no confirmation nor extension of probation period but the Respondent worked for the Applicant for not less than five years. On such circumstance, it is my view that there was confirmation of employment in the present case on the following reasons. *First*, **the case of David Nzaligo** (supra) is distinguishable to the circumstances at hand. In **the case of Daivid Nzaligo** (supra), the Appellant employment commenced on 01st July, 2010 subject to a probation of six months period. Upon completion of the probation period, assessment was done. While waiting for the assessment result, the Appellant tendered resignation letter on 13th January, 2011. That was soon after the completion of the probation period. After resignation, the Appellant referred the matter to the CMA claiming for unfair termination.

On circumstance of the above, the Court of Appeal was right to rule that the Appellant was a still a probationer employee because the Appellant was yet to be confirmed. Unlike in the circumstances at hand, the Respondent proceeded with the employment for almost six years and no assessment was done. Thus, the facts and circumstances of that case are different from the present one.

Secondly, it is the requirement of the law that probation period should be of a reasonable length. This is pursuant to the provision of *Rule 10(4) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 (to be referred as 'GN. No. 42/2007')* which states:

> Rule 10(4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standard required, the custom and practice in the sector.

In the instant matter, the period of six years to subject an employee on a probation period is not reasonable at all. The record is silent as to whether the Respondent performed to the required standard or not. Under such circumstance, the Applicant violated the above mandatory provision in dealing with probationary employees.

Third, when determining as to whether an employee is still on probation or not, the intention of the parties have to be looked at. In the matter at hand, the above quoted clause of the contract specifically stated that upon confirmation, the Respondent would serve for minimum of two

years in the organization. Therefore, since the Respondent served the contract for the agreed period, there is no hesitation to state that he was confirmed in the employment.

Furthermore, in the application at hand the Applicant did not terminate the Respondent as a probationary employee. As the record speaks, she was terminated on the ground of misconduct through the procedures thereto. However, the procedures for terminating a probationer employee are provided under *Rule 10 of GN. No. 42/2007.*

On the basis of the foregoing analysis, it is my view that the Respondent was a confirmed employee. An allegation of probation is an afterthought tabled by the Applicant to deprive the Respondent to pursue her employment claims. If the case of **David Nzaligo (supra)** and similar cases cited are applied blindly, the employers will be left to treat probationary employees as they wish under the ambit that probationary employee has no right as a confirmed employee. Thus, in this case, the Respondent properly sued for unfair termination for the reasons stated above.

Coming to the second issue ass to whether the Respondent was fairly terminated; it should be noted that; it is the duty of the employer to prove that the Respondent's termination was fair pursuant to the provision of *Section 39 of the ELRA*. As to the substantive fairness, the Respondent was terminated for three misconducts namely, using of abusive language, misconduct and insubordination as indicated in the termination letter (exhibit D1).

After going through the record, I noted there is no proof of the listed misconduct levelled against the Respondent as rightly found by the Arbitrator. During the disciplinary hearing, the Respondent denied all the misconducts. Therefore, Mr. Theobard's submission that the Respondent admitted the said misconducts is contrary to the records available. The alleged abusive or insulting words were never stated throughout the proceedings.

The Respondent was further charged for insubordination, that she refused to receive a letter from the Applicant. On the other hand, the Respondent at the disciplinary hearing fended herself that she received the alleged letter from the Applicant on 06/08/2020 and on the next day, that

is on 07/08/2020, she replied. The Respondent's testimony is in line with the evidence on record. DW1 tendered the show cause letter (exhibit D2), which was received by the Respondent on 06/08/2020. Also, the witness tendered the Respondent's reply dated 07/08/2020 (exhibit D3). Under such circumstance, the allegation of insubordination lacks proof.

On the basis of the foregoing analysis, it is crystal clear that the Respondent's termination was unfair. In the result I find the present application has no merit. The CMA's award is hereby sustained.

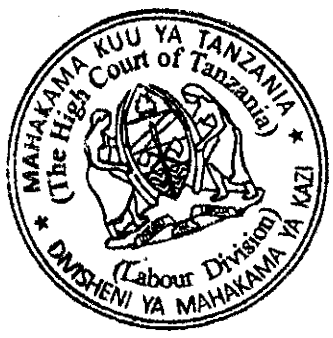
It is so ordered.

Y. J. MLYAMBINA

JUDGE

07/03/2023

Judgement pronounced and dated 7th March, 2023 in the absence of the Applicant and in the presence of the Respondent in person.



Y. J. MLYAMBINA

JUDGE

07/03/2023