

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT DAR ES SALAAM

REVISION NO. 268 OF 2023

BETWEEN

KIGEMU TOURS SAFARI & GENERAL SERVICES LTD APPLICANT

VERSUS

TISHI SELEMANI ULIZA RESPONDENT

JUDGEMENT

Date of last Order: *27/11/2023*

Date of Judgement: *06/12/2023*

MLYAMBINA, J.

The dispute at hand emanates from the following facts: The Respondent was employed by the Applicant as a Driver through a fixed term contract of one year commencing from 15/07/2022. It is alleged that; while performing his duties, sometimes in July 2022, the Respondent negligently knocked the Applicant's engine of a car make Toyota Land Cruiser Prado T-510 AQK. Following such incident, the Applicant terminated the Respondent from employment. Aggrieved by the termination, the Respondent referred the matter to the Commission for Mediation and Arbitration (herein CMA). Upon consideration of the parties' evidence, the CMA concluded that the Respondent was unfairly terminated from employment. He was therefore awarded a total of TZS.

2,500,000/= ten months salaries as compensation for the remaining period of the contract.

Being dissatisfied by the CMA's decision, the Applicant filed the present application on the following grounds:

- i. That, the honourable arbitrator erred in law and in fact by holding that there were no valid/reasonable reasons for terminating the contract between the Applicant and Respondent herein.
- ii. That, the honourable arbitrator erred in law and in fact by holding that there were no proper procedures adopted by the Applicant in terminating the contract against the Respondent while there was fundamental breach of the contract by the Respondent who was still under probation.
- iii. That, the honourable arbitrator erred in law and in fact by awarding the Respondent TZS 2,500,000/= as compensation of ten months as remaining contractual period while the Applicant was justified to terminate the contract based on valid reason acceptable by the law.

The application proceeded by way of written submissions. Before the Court, the Applicant enjoyed the services of Mr. Msalaba Kaunda

Bernard, learned Counsel, whereas Ms. Janeth Kazimoto, learned Counsel appeared for the Respondent.

Arguing in support of the first ground, Mr. Msalaba strongly submitted that the Respondent was still under probation until the time of his termination. Mr. Msalaba stated that it is ironical that the Arbitrator agreed with the parties that there was an oral contract but demanded written document to prove the probation period of three months as testified by DW3.

As regards to the reason of termination, Mr. Msalaba submitted that the Respondent negligently caused knock of an engine of Toyota Land Cruiser Prado T-510 AQK as per DW1, DW2, DW3 and DW4's testimony. Thus, the Respondent rightly ended his employment contract. He put reliance of his submission on *Section 37(2)(b)(i) of the Employment and Labour Relations Act [Chapter 366 Revised Edition 2019]* (herein ELRA) as well as *Rule 9(4) of the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice No. 42 of 2007 (herein GN. No. 42/2007)*.

On the second ground, Mr. Msalaba argued that the probationer cannot enjoy the rights and benefits enjoyed by a confirmed employee. He was of the view that a probationer can neither claim for unfair

termination nor breach of contract. He added that he was supposed to sue for unfair labour practices. It was further submitted that in the CMA F1, the Respondent alleged that the dispute arose on 07/09/2022 but waited until 27/10/2022 to lodge his complaint which was about 50 days. He argued that; as per *Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 67 of 2007 (herein GN. No. 64/2007)*, the dispute of unfair termination must be filed at the CMA within 30 days from the date of termination. Therefore, the dispute at hand was filed out of time hence, the CMA lacked jurisdiction to determine the same.

On the third ground, Mr. Msalaba was of the view that the award of 2,500,000/= is excessive and not justifiable. He contended that probationary employee is not liable for grant of certificate of service. He maintained that; there was valid reason for termination hence the termination was justifiable as the Respondent occasioned substantial loss to the Applicant. That, the Respondent claimed for salary arrears while he was paid the same on 08/09/2020 as evidenced by the Bank Statement (exhibit P1). He further argued that the procedures for terminating a probationer employee can not apply to the circumstances

of this case. In the upshot, Mr. Msalaba urged the Court to revise and set aside the CMA's decision.

In response to the application, Ms. Kazimoto jointly responded to the grounds for revision. She stated that the Respondent referred the dispute of breach of contract at the CMA as indicated in the CMA F1. She argued that; *Section 35 of ELRA* does not apply to employees who worked under six months contract. The Respondent only worked for two months. He therefore rightly sued for breach of contract. She added that; the remedy awarded by the CMA was on account of breach of contract. That, such employee is entitled to the remaining period of the contract as was decided in the case of **City Square Hotel v. Kassim Capriance**, Revision No. 373 of 2022, High Court, Labour Division, Dar es Salaam (unreported).

Ms. Kazimoto argued that; *Section 15(6) of ELRA (supra)* puts obligation to the employer to keep a written statement of particulars of an employee. That, in this case, the Applicant breached such obligation. Thus, the Arbitrator rightly awarded him. In support of his submission, the Counsel referred the Court to the case of **Hotel Sultan Palace Zanzibar v. Daniel Laizer & Another**, Civil Appeal No. 104 of 2004.

Ms. Kazimoto further submitted that the Respondent was awarded ten month's salaries as compensation for breach of contract. The position which was held in numerous decisions including the case of **Good Samaritan v. Joseph Savari Munthu**, Revision No. 165 of 2011, High Court Labour Division, Dar es Salaam. She further submitted that granting of compensation is within the discretion of the CMA. As to the reason and procedures for termination, Ms. Kazimoto submitted that the Applicant did not adhere to the same. She submitted that the procedures for terminating a probationary employee are provided under *Rule 10 of GN. No. 42/2007* and the same were not followed in this case.

Ms. Kazimoto went on to submit that no invoice or receipt was produced to prove that the new engine was brought and fixed to the car made Toyota Land Cruiser Prado T510 AQK. She added that the only evidence tendered is the invoice for maintenance of the named car. In response to the allegation of referring the dispute out of time it was submitted that the dispute at hand was timely filed as per *Rule 10(2) of GN. No. 64 of 2007*.

She further submitted that the dispute determined at the CMA was on breach of contract and not unfair termination as claimed.

Conclusively, Ms. Kazimoto submitted that, the Respondent's contract was breached without justifiable reasons and in violation of procedures stipulated by the law. She therefore urged the Court to dismiss the application at hand.

In rejoinder, Mr. Msalaba reiterated his submission in chief and maintained that the Respondent was still under probation. As to the cases cited by Ms. Kazimoto, Mr. Msalaba stated that the same are distinguishable to the circumstances at hand. He further argued that *Rule 10(1) of GN. No. 42/2007* is inapplicable to employees with less than six months' probation period. He sustained his prayer of urging the Court to revise and set aside the CMA's decision.

After considering submissions of both parties' CMA and Court records as well as relevant laws, I find the Court is called upon to determine; whether the Respondent was a probationary employee and whether the Applicant followed procedures in terminating the Respondent.

To start with the first issue, it is known that a probationary period is a trial period at the commencement of employment whereby, its duration is upon agreement between the employer and the new employee. In Tanzania, the probation period should not be more than

twelve months as per *Rule 10(5) of GN. No. 42/2007*. In the matter at hand, the Applicant strongly alleges that the Respondent was on probation period of three months, therefore, he was terminated while on probationary period, thus, a probationary employee.

While examining the records, I noted there is no written contract tendered by the parties. Both parties are in agreement that they entered into an oral contract. *Section 15 (supra)* requires employer to supply an employee with the written contract which includes the following particulars:

- 15.-(1) Subject to the provisions of subsection
- (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely-
- (a) name, age, permanent address and sex of the employee;
- (b) place of recruitment;
- (c) job description;
- (d) date of commencement;
- (e) form and duration of the contract;
- (f) place of work;
- (g) hours of work;
- (h) remuneration, the method of its calculation, and details of any benefits or payments in kind; and

(i) any other prescribed matter.

In this case, the written contract was not supplied with. In absence of written contract, the law imposes the duty to the employer to prove the particulars quoted above. This is pursuant to *Section 15(6) of ELRA (supra)* which provides as hereunder:

(6) 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.

The obligation to prove that the Respondent was under probation period lies to the Applicant. Examining the evidence adduced in the case at hand, it is my view that the Applicant failed to prove the allegation that the Respondent was on probation period. Therefore, the allegation of being under probation cannot stand in the case at hand. The law places a duty on employers to provide employees with written contracts for the purposes of avoiding disputes of this nature. Thus, when an employer fails to comply with the requirements of the law, it result into losses that could have been avoided by complying with the law. Hence, in the instant matter, there is no prove that the Respondent was on probation period.

Furthermore, the Applicant strongly claims that the Respondent was a probationary employee but yet the procedures for terminating a probationer employee were not followed as stipulated under *Rule 10 (supra)*.

Turning to the last issue, the Respondent was terminated for negligently causing knock of an engine of Toyota Land Cruisre Prado T-510 AQK. Which falls in misconduct. Therefore, the termination procedures on the ground of misconduct ought to have been followed. However, the same were not adhered in the case at hand. Hence the Respondent was unfairly terminated from employment.

I am not in disregard of the Applicant's allegation that the dispute was filed out of time. That, the dispute was filed after 50 days from when the dispute arose. However, as rightly submitted by the Respondent the dispute before the CMA was on breach of contract which was filed timely as per *Rule 10(2) of GN. No. 64/2007*. This is evidenced by the CMA F1.

The Applicant also contended that the dispute determined by the arbitrator was on unfair termination while the dispute instituted was for breach of contract. The allegation should not detain me because it has long been determined that the principles of unfair termination extend to

fixed term contract. That is the Court of appeal position in the case of **ST. Joseph Kolping Secondary School v. Alvera Kashushura** (Civil Appeal 377 of 2021) [2022] TZCA 445 (18 July 2022) where it was held that:

We also do not agree with him that, under our laws a fixed term contract of service can be prematurely terminated without assigning reasons. This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. *(See section 35 of the ELRA).*

On the basis of the foregoing analysis, it is my view that the Arbitrator properly awarded the Respondent. The award of ten months' salaries as remaining period of contract is justifiable to the circumstances at hand.

In the result, I find the present application has no merit. In the premises, the CMA's award is hereby upheld. This application is dismissed accordingly.

It is so ordered.



Y. J. MLYAMBINA

JUDGE

06/12/2023

Judgement pronounced and dated 6th December, 2023 in the presence of the Applicant's Counsel Mr. Haron Koyugi and the Respondent in person.



Y. J. MLYAMBINA

JUDGE

06/12/2023