IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 215 OF 2022

LILIAN SIMULE ..... APPLICANT

VERSUS

INTERNATIONAL RESCUE COMMITTEE ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Chacha: Arbitrator)

Dated 31st May, 2022

in

REF: CMA/DSM/KIN/468/21/187/21

JUDGEMENT

06th & 16th February 2023

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/468/21/187/21. This court has been asked to revise the award of the CMA dated 31st May 2023.

Briefly, it has been stated; the applicant was employed by the respondent as the grant coordinator from 16th July, 2021 and was paid TZS. 10,000,000. per month. Her contract for two years started on 09th August, 2021 and was supposed to end on 31st July, 2023.

It started with a probation period of three months which was to end on 05th November, 2021. However, the applicant was not confirmed for the reason of not meeting the standards set by the respondent. Not satisfied, the applicant filed a dispute with the CMA to challenge the decision of the respondent. After a hearing, the dispute was dismissed by deciding in favour of the respondent. The decision of the CMA as well, did not please her, hence this application.

The application is supported by the applicant's affidavit advancing the three grounds, but at the hearing one was abandoned and argued the following;

i. *Whether the Commission for Mediation and Arbitration was right to make decision that the respondent had fair reasons for terminating the applicant's employment contract and*

ii. *Whether the Commission for Mediation and Arbitration, Arbitrator considered that the respondent followed a proper procedure in terminating the applicant's employment contract.*

The application was heard by written submissions. Both parties were represented. Mr. Ambrose Menace Nkwera, learned Advocate appeared

for the applicant, while Mr. Philip Lincoln Irungu, learned Advocate was for the respondent.

Mr. Nkwera advanced the following argument in respect of the first issue; He submitted that termination of the employment is unfair when the employer fails to prove, if there were valid reasons for termination, citing section 37(2)(b) of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019] (ELRA) to support his position.

He argued, that issues of misconduct have to be proved, while citing the guiding rule as rule 12(1)(a) of the Employment and Labour Relations (Code of Good Practice), Rules 2007, G.N. No. 42 of 2007.

Mr. Nkwera continued to argue that the applicant's 90 days probation period was to be followed by an assessment, which he said, was conducted on 28th October, 2021 instead of 05th November, 2021. In his view, it was not done according to the law because 90 days had not elapsed as planned. To support his point, he cited the case of **David Nzaligo v National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016, Court of Appeal of Tanzania. According to him, the respondent terminated the applicant for underperformance without proof.

Mr. Nkwera submitted further that, termination of the applicant occurred when the respondent knew the applicant was pregnant. The said pregnancy according to him, had some complications. He stated that during the assessment meeting, the respondent did not outline the percentage the applicant was unable to accomplish. He also said, she was not given a chance to improve. Further, he submitted that exhibit P2 (90-day goals) did, neither contain applicant's signature nor the respondents.

On the second issue, Mr. Nkwera submitted that the respondent failed to follow procedures on how to deal with a probationary employee. He said, it is contrary to Rules 10(1), (4), (5), (6)(a)(b), 7, 8(a)(b)(c) and 9 of the Employment and Labour Relations (Code of Good Practice), G.N. No. 42 of 2007, and referred to the case of **USAID Wajibika Project v Joseph Mandago & Edwin Nkwanga**, Labour Division at Dar es Salaam, Revision No. 208 of 2014.

It was his argument that no member of the unit that worked with the applicant and the supervisor was called to testify on the applicant's performance. To support this, he referred to the case of **Abdallah v Republic**, TLR 71. He was of the view that the respondent relied on Julie Hefners' opinion. And that it did not consider the applicant's concerns that is, she was mistreated by her, due to her pregnancy. He said, she was

discriminated because of being pregnancy which is contrary to section 7(4)(j) of ELRA and paragraph three of the introduction part of exhibit D5-the policy.

The learned counsel insisted that there was no performance review. Accordingly, he added, the applicant due to the position held, she could have been placed under a probation period of 12 months. To support this point, he cited rule 10(4) of G.N. No. 47 of 2017. He stated that assessing her, before the time given was not fair to the applicant and it is against the law. He prayed; the application be granted.

To reply, Mr. Irungu submitted on the first issue that the applicant was on probation period of three months. He stated that her contract depended on confirmation by the respondent upon successful completion of probation period. He insisted that the assessment was to be made within three months. In his view, it was made within time and found that the applicant could not fit to hold that position. The learned advocate added, discrimination for pregnancy, was not proved by evidence in record.

On the opportunity to improve as the Grant Coordinator, it was argued that the applicant was qualified to be a manager.

And he commented that according to the law, that requirement of extending a probation period would be dispensed with. To support his assertion, rule 18(5)(a) of G.N. No. 42 of 2007 and cases of **WS Insight Ltd (Formerly known as Warrior Security Limited) v Dennis Nguaro**, Revision No. 90 of 2019, unreported, regulation 10(3) of G.N. No. 42 of 2007 and **Stella Temu v Tanzania Revenue Authority** [2005] TLR 178, were referred to.

In his view, it was proper for the respondent not to confirm the applicant as she did not meet the standards set. He then cited the case of **Mwaitenda Ahobokile Michael v Interchick Co. Limited**, Labour Dispute No. 30 of 2010, High Court Labour Division, unreported.

Submitting on the second issue, Mr. Irungu clearly stated that, according to rule 10(7) and (8) of G.N. No. 42 of 2007, the applicant was informed of the respondent's concerns. She did not, it was submitted, meet the required standards to hold the post. To support this point as well, exhibits D1 and D3 have to be referred, the learned advocate added.

When dealing with the question of the reasonable time to improve, he submitted that, it is not a mandatory requirement for a senior position holder to be given a chance to improve, this is under rule 18(5)(a) of G.N.

No. 42 of 2007. It was not, he went on saying, to be given time to improve. In this position, he cited the case of **Gulf Badr Group (T) Ltd v Fredrick Massawe**, Revision No. 481 of 2019, High Court of Tanzania (Labour) Division at Dar es Salaam.

He submitted further that, the case of **USAID Wajibika Project v Joseph Mandago & Another** (supra) relied upon by the applicant is distinguishable because the employee in that case was not in the managerial level, as it is, in the case at hand.

On fairness of termination procedure, he stated that the applicant was paid her terminal benefits. He continued that the payment included one month's salary in lieu of notice, basic salary, housing allowance, leave and transport costs to the tune of TZS. 10,283,567.00. In his view, the acts of the respondent did not constitute breach of contract since there was no confirmation of the applicant's employment, as held in the case of **Gulf Badr Group (T) Ltd** (supra).

On the right to be heard, Mr. Irungu submitted that the applicant was properly heard even thought it was not mandatory. He fortified his point by citing the case of **Stella Temu v Tanzania Revenue Authority** [2005] TLR 178. When dealing with the question of sickness, he submitted

that exhibit P3 was about leave of five days and not that the applicant was unable to work due to the pregnancy.

On the issue of extending probation period to twelve months from three months, it was submitted that the applicant by signing the contract, it meant that she understood and acknowledged to be bound by it. In his view she cannot complain that time was not enough.

Mr. Irungu finalised by stating that the respondent adhered to the procedures required by the law citing Rule 10(7) and (8) of G.N. No. 42 of 2007 and the employment contract entered by the parties. He then prayed, the application to be dismissed.

In a rejoinder the applicant submitted that exhibit D3 is nowhere to be found. He continued that there is no exhibit evidencing that the applicant was informed of her shortfalls and that she admitted any of them. Mr. Nkwera, cited the case of **Mwaitenda Ahobokile Michael v Interchick Co. Limited**, (supra) that the applicant was supposed to be told standards expected as a probationary employee to meet.

After perusal of grounds for revision and submissions of both parties, I find the contest issue is *Whether the procedure for terminating a probationary employee was followed by the respondent.*

It should be noted here that there is not disputed that the applicant was on probation for three months in accordance with exhibit P1 (an employment contract). It is also evident that the applicant was not confirmed to the post as in terms of exhibit P3.

According to exhibit D4 (IRC Tanzania – Country Management Team 2021) it shows clearly the list of managerial positions in the respondent's office. Based on this document, there is no grain of doubt that the applicant was in the managerial position.

In exhibit P3, reasons for non-confirmation were referred as discussed previously between the parties. It was stated that the applicant did not meet expectations of her employer and therefore did not qualify for the job. I think, termination applies to employees without probation or after probation. It can therefore be held that, one in probation is an employee with the meaning of the law as to be covered under section 37 of the ELRA. The applicant's submission that section 37 of the ELRA was not followed is a misconception.

The Court of Appeal in the case of **Stella Temu v Tanzania Revenue Authority** (supra), held that:

"... we are of the opinion that there was no right of a hearing because there was no termination but it was merely a non-confirmation, while Stella remained in the employment of the MOF. It is our decided opinion that probation is a practical interview. We do not think that the right to be heard and to be given reasons extends even where a person is told that he/she has failed an interview..."

The applicant admitted to have been in a meeting on 28th October 2021, when her performance was discussed. She added, that the assessment was done before lapse of three months. She admitted failure to perform to the required standard but actuated her failure to meet the required goals due to her health problems, caused by her pregnancy status. True, to her statement. She was indeed pregnant and was in the last trimester, which I think is always tough and may adversely impact performance of an individual.

Exhibits D3 collectively are chain of emails in respect of her performance. She was informed by one Julie of her poor performance. But she never pleaded that it is due to her status which cause her poor performance. It was submitted that, Rule 17(1) of G.N. No. 42 of 2007 sets criteria to be considered when determining a termination for a poor work performance

(exhibit P3). Rule 18 of G.N. No. 42 of 2007 sets procedures to be followed before termination. But rule 18(5) of G.N. No. 42 of 2007 dispense an opportunity to improve to be given to the employees who are managers or senior employees.

With due respect to the applicant's submission, the provisions above do not apply to the probationary employee. This is because treatment of a probationary employee is governed by Rule 10 of the GN 42 of 2007. Having examined exhibits D1 and D2 which are a chain of email exchanges on her performance and action plan for 90 days and D3, which are also email exchanges on how she had to have improved, I am convinced that there was enough communication between the parties in respect of improving her performance. To prove her case, the applicant had to show that it is due to pregnancy that she could not meet the target set.

It is on record that the applicant complained of it after none-confirmation which I think was not proper. That being the case, I hesitate to hold that the applicant discharged that due. For the stated reasons, I find this application to have no merit. It is dismissed with no order as to costs.

A.K. Rwizile
JUDGE
16.02.2023

Delivered in the presence of Mr. Nuhu advocate for the applicant, the respondent is absent, this 16th February 2023

A.K. Rwizile

JUDGE

16.02.2023

Labour Court Tz.