**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 27663/2023**

*(Arising from an Award issued on 13/11/2023 by Hon. Msina,H.H, Arbitrator, in Labour Dispute No. CMA/DSM/ILA/432/2022/249/2022 at Ilala)*

**RELIANCE INSURANCE COMPANY TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**COSTANTINE GOMELA..... RESPONDENT**

# JUDGMENT

*Date of last Order: 21/02/2024*
*Date of Judgement: 27/02/2024*

**B. E. K. Mganga, J.**

Brief facts of this application are that, on 6th January 2011, Reliance Insurance Company (Tanzania) Limited the above mentioned applicant entered unspecified period contract of employment with Costantine J. Gomela, the abovementioned respondent. In the said contract, respondent was employed as Marketing officer and his duty station was at Head Office Dar es Salaam. In the said contract, the parties agreed *inter-alia* that, respondent will be under probation period for three (3) months. On 8th February 2021, applicant served respondent with a 28 days' notice of termination on ground that in the

year 2020 respondent's performance did not achieve the target of TZS 30,000,000/= because he did not achieve even the quarter of the said amount.

Respondent was aggrieved with termination of his employment as a result, on 24th August 2022, he filed Labour dispute No. CMA/DSM/ILA/432/2022/249/2022 before the Commission for Mediation and Arbitration(CMA) complaining that applicant terminated his employment unfairly. In the Referral Form(CMA F1)respondent indicated that the dispute arose on 26th July 2022. In the said CMA F1, on fairness of procedure, respondent indicated that there was no compliance of termination procedure. On fairness of reason, respondent indicated that, the reason advanced for termination was not amongst those recognized in Labour Relations and were not proved. Based on the foregoing, respondent indicated in the said CMA F1 that he was claiming to be paid (i) TZS 6,000,000/= being payment of unpaid salaries for 15 months, (ii) TZS 24,000,000/= being 60 months salalries compensation for unfair termination, (iii) TZS 1,000,000/= being Severance pay, (iv)TZS 400,000/= being payment for unpaid leave and (v) payment in lieu of notice all amounting to TZS 31,800,000/=.

At CMA, five issues were drafted namely, (i) whether respondent was confirmed to his employment, (ii) whether the dispute was filed

within time, (iii) whether there were valid reasons for termination of the respondent's employment, (iv) whether procedures for termination were adhered to, and (v) to what relief(s) are the parties entitled to.

On 13th November 2023, Hon. Msina, H.H, Arbitrator, having heard evidence of the parties, issued an award that termination of employment of the respondent was on 26th July 2022 and that the dispute was filed on 24th August 2022 hence it was filed within time. The arbitrator also held that respondent was a confirmed employee and further that, termination was unfair both substantively and procedurally. With those findings, the arbitrator awarded respondent to be paid TZS 4,800,000/= being 12 months salaries compensation for unfair termination. In addition, the arbitrator awarded respondent to be paid TZS 6,000,000/= being salary arrears for 15 months, TZS 400,000/= being one month salary in lieu of notice and TZS 400,000/= being one month salary as leave pay all amounting to TZS 11,600,000/=.

Applicant was aggrieved with the said award hence this application for revision. In the affidavit Upendo Minja in support of the Notice of Application, applicant raised four(4) issues namely:-

1. *whether it was proper for the arbitrator to award respondent TZS 11,600,000/= as compensation despite the fact that arbitrator noted that respondent was not confirmed as applicant's employee.*

2. *whether it was proper for the arbitrator to make calculations of compensation amount basing on the salary of TZS 400,000/= despite the fact that the respondent brought no evidence to justify the salary of per month.*
3. *whether it was proper for the arbitrator to rely on the letter which was tendered as exhibit AP2 dated 28th February 2021 in holding that the matter was within time despite the fact that authenticity of the letter exhibit was questionable.*
4. *Whether the trial Commission acted properly to proceed to hold that the respondent was entitled to TZS 11,600,000/= without evaluating properly the evidence before it.*

Respondent filed both the Notice of Opposition and his counter affidavit opposing this application.

When this application was called on for hearing, Disckson Sanga, advocate, appeared and argued for and on behalf of the applicant while respondent appeared in person.

Arguing in support of the 1st issue, counsel for the applicant submitted that, on 6th January 2011, applicant employed the respondent for unspecified period contract but the said contract was terminated on 02nd February 2021 by a letter that was admitted as exhibit D1. Counsel submitted that, from the date of commencement employment to the date of termination, respondent was never confirmed as employee. He added that, respondent was not confirmed because he did not meet targets from the date of employment to the date of termination. He

went on that, since respondent was not confirmed employee, he was not entitled to the remedies provided for under part III sub -part E of the Employment and Labour Relations Act[Cap. 366. R.E. 2019]. To cement on his submissions, learned counsel cited the case of ***David Nzaligo v. National Microfinance Bank PLC,*** Civil Appeal No. 61 of 2016, CAT(unreported).

Arguing in support of the 2nd issue, counsel for the applicant submitted that, respondent tendered the contract (Exh. D1) which shows that his salary is TZS 150,000/=. During hearing, counsel for the applicant conceded that, applicant did not adduce evidence relating to salary of the respondent. Upon reflection and as a u-turn, learned counsel for the applicant submitted that, DW1 testified that respondent's monthly salary was TZS 150,000/=. He was quick to submit that, when there is no salary slip, the contract of employment is taken as proof of salary of the employee. To support that position, learned counsel cited the case of ***Winfrida Lwasa vs. The Managing Director Lancent Laboratories,*** Revision No. 288 of 2019, HC(unreported). He went on that, in alternative, respondent was supposed to adduce evidence relating to the amount that was being deposited in his bank account as it was held in the case of ***Saint Augustine University of Tanzania***

***vs. Andrew Eugine Kasambala***, Revison No. 20 of 2022, HC(Unreported).

On the 3rd issue, learned counsel for the applicant submitted that, the dispute arose on 2nd February 2021 but respondent filed it on 24th August 2022. Counsel for the applicant strongly submitted that, the dispute arose on 8th February 2021 and referred the court to exhibit D2 that was authored and signed by Rukia Goronga. In his submissions, learned counsel for the applicant conceded that Rukia Boronga did not testify.

Arguing the 3rd issue, Mr. Sanga, submitted that, it was alleged by the respondent that exhibit AP2 was also authored by Rukia Boronga. He added that, during cross examination, respondent testified that the said exhibit AP2 was signed by Upendo Minja(DW1). When probed by the court as to what was evidence of DW1 in relation to exhibit AP2, Mr. Sanga submitted that, in her evidence, DW1 said nothing in relation to exhibit AP2. He conceded that the said letter (exhibit AP2) was amongst the documents submitted by the respondent as documents to be relied upon during hearing. Mr. Sanga submitted further that, there was no need of calling Rukia Boronga as a witness but maintained that, authenticity of exhibit AP2 is questionable. He strongly submitted that, it was not correct for the arbitrator to calculate limitation of time based on

exhibit AP2 that was questionable. He went on that, a document which its aunthenticity is questionable, cannot be relied upon. To support his submissions, learned counsel cited the case of ***Prucheria John vs. Wilbard Wilson and another***, Land case appeal No. 64 of 2019, HC(Unreported). When further probed by the court, learned counsel conceded that exhibit AP2 was admitted without objection. Counsel for the applicant maintained that the dispute was time barred and concluded his submissions praying the court to allow this application.

Resisting the application, Mr. Gomela, the respondent, submitted that, his employment relationship with the aplicant commenced on 6th January 2011 and that the employment contract had a three (3) months probation period. He submitted further that, his monthly salary during probation was TZS 150,000/=. He added that, after three months, he was confirmed and that, he prayed applicant to produce his confirmation letter but she did not. He went on that, after confirmation, his salary increased to TZS 400,000/=. He submitted further that he was paid the said salary through his bank account. He further submitted that, he prayed the applicant to submit his salary slips but she did not. Respondent strongly submitted that the arbitrator did not error to award him to be paid TZS 11,600,000/=. Respondent also submitted that, it

was proper for the arbitrator to make calculations based on TZS 400,000/=.

Respondeng to submissions relating to date of termination of employment, respondent submitted that, applicant terminated his employment on 26th July 2022 through exhibit AP2 and that, he filed the dispute at CMA on 24th August 2022. Respondent further submitted that, exhibit AP2 was signed by DW1 who admitted in her evidence that termination of employment was through exhibit AP2. Respondent maintained that the dispute was filed within time. Respondent concluded his submissions praying this application be dismissed for want of merit.

In rejoinder, counsel for the applicant reiterated his submissions that respondent was a probationer.

I have examined the CMA record and considered submissions of the parties in this application and wish, for obvious reason, to start with the issue relating to jurisdiction namely, whether the dispute was filed within time or not. As pointed out hereinabove, respondent indicated in the CMA F1 that the dispute related to termination of employment and that it arose on 26th July 2022. In the said CMA F1, he also indicated that he was claiming to be paid 15 months unpaid salaries. In the award, the arbitrator awarded respondent to be paid TZS 6,000,000/= being salary from May 2021 to July 2022. I should point out that, there

is no didpute that respondent filed the dispute at CMA on 24th August 2022. It is my view that, the claim of 15 months unpaid salaries and the award of salaries from May 2021 to July 2022 was time barred because there was neither application nor order for condonation. Rule 10(2) of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007 is clear that, all other claims other than termination, must be referred to the Commission within Sixty(60) days from the date when the dispute arose. Since respondent indicated that the dispute arose on 26th July 2022, in no way, he can claim the said 15 months unpaid salaries from May 2021 to July 2022 without an order for condonation. It is my view, as I will demonstrate in this judgment that, the dispute did not arise on 26th July 2022.

It was evidence of Upendo Minja(DW1) that, on 08th February 2021, applicant served respondent with a 28 days' Notice to terminate employment(exhibit D2) and that, since then, respondent was not paid salary and did not work with the applicant. I should point out albeit briefly that, exhibit D2 was admitted without objection. In his evidence, Costantine Gomela(PW1), the respondent, testified *inter-alia* that, applicant terminated his employment on 26th July 2022 vide a letter dated 28th February 2021(exhibit AP2). In his evidence, applicant(PW1) is recorded stating *inter-alia* that:-

*"…Naomba kutoa barua ya kuachishwa kazi ya tarehe 28/02/2021 iwe sehemu ya ushahidi wangu.*

*Mlalamikiwa: sina pingamizi.*

*Tume: barua ya kuachishwa kazi ya tarehe 28/02/2021 imepokelewa kama kielelezo AP2. Barua ya kuachishwa kazi niliipokea tarehe tarehe 26/7/2022 na barua ni ya 28/02/2021…*

*Niliipokea baada ya miezi 15. Mwajiri hakuniambia kwa nini hakunipa kwa wakati.*

*…Narejea kielelezo D2 kilichotolewa na mlalamikiwa barua ya tarehe 02/02/2021 kielelezo hiki sikitambui sababu ni tofauti na nilichopewa changu kinasema nine months chao past one year, pia sahihi ni tofauti na ya tarehe 26/7/2022 na tarehe iliyopokelewa pia ni tofauti."*

From the quoted evidence of the respondent(PW1), it is not true that respondent was served with termination letter on 26th July 2022 showing that his last day with the company was 28th March 2021 as I will point out hereinbelow. It defies the dictate of wisdom that, any reasonable employer can serve her employee with termination letter showing the date of termination but fail to handle the said termination to the employee for 15 months. Respondent (PW1) wants this court to believe him, as he was believed by the arbitrator at CMA that, the applicant signed exhibit AP2 showing that termination was on 28th March 2021 but kept the said letter in the draw without serving it to him. In other words, respondent wants the court to believe him that the whole period starting from 28th February 2021, the date exhibit AP2 was authored and signed to 26th July 2022 he was attending at work. I have

carefully read evidence of the respondent (PW1) and find that, he did not state in his evidence that from 28th February 2021 to 26th July 2022, he was attending at his workplace. In my view, it was open to the respondent to adduce evidence showing that, for all that period from 28th February 2021 to 26th July 2022, he was attending at work but he was not paid salary to justify among other things the claim of 15 months unpaid salaries. Again, Upendo Minja(DW1) the only witness for the applicant testified that, respondent was served with a 28 days' notice on 8th February 2021 and tendered the said notice as exhibit D2. The said notice (exhibit D2) reads in part:-

> *"…The management has decided to give you a 28 days' notice of termination from 02nd February 2021. Upon completion of one-month notice, your employment will automatically cease and you will be requested to hanover all working equipments, medical card and identity card to your branch Manager."*

DW1 was not cross examined by the respondent in relation to exhibit AP2 for DW1 to confirm that the said exhibit was signed by DW1 and that it was served to the applicant on 26th July 2022. In my view, it was open to the respondent, during cross examination, to lay a foundation that exhibit AP2 was signed by DW1 and that, DW1 served him with the said letter on 26th July 2022. In my view, that would have laid a foundation and justification for the respondent to rely on exhibit

AP2. It was not open to the respondent to hide his card and throw it in the last minutes knowing that applicant had no chance to counter. In short, respondent prayed a foul pray of seek and hide but denying applicant a chance to be heard properly on that exhibit. More so, at the time DW1 was testifying, it was also open to the respondent to cross examine the said witness on the contents of exhibit D2 and the signature thereon that respondent alleged in his evidence that it does not belong to him. The Court of Appeal, in several cases, had an advantage of discussing the effect of failure to cross examine a witness on important matter and concluded that, the person who failed to cross examine the witness on an important matter is estoped from asking the court to disbelieve what the witness stated. See for example the case of ***Issa Hassani Uki vs Republic*** (Criminal Appeal 129 of 2017) [2018] TZCA 361 (9 May 2018) wherein it held:-

> *"It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony- See. **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, **Nyerere Nyagua v. Republic**, Criminal Appeal No. 67 of 2010 and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 (all unreported). In **Nyerere Nyague** for instance, we relied on our previous decisions of **Cyprian A. Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 and **Paul Yusf Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another**, Civil Appeal No. 85 of 2005 (both Unreported) to observe:*

*"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelievewhat the witness said."*

*Likewise, in **Damian Ruhele**, again relying on the case of **Cyprian Athanas Kibogoyo** (supra), we underlined:*

*"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross- examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*

See also the case of ***Paulina Samson Ndawavya vs Theresia Thomasi Madaha*** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019). Since respondent did not cross examine DW1 on exhibit AP2 or the date he was serviced with the 28 days' notice, I find, as pointed above, that evidence of the respondent is an afterthought.

My afore conclusion is fortified by what respondent stated while under further cross examination that:-

*"…**Katika maelezo yangu nimeomba fidia ya likizo ya mwaka mmoja ya 2020 mwezi wa pili nilipoona silipwi nililalamika kwa uongozi hawakufanya chochote nikaja Tume ikiwa imepita miaka miwili."*** (Emphasis is mine)

The quoted part of respondent's evidence while under cross examination, clearly shows that respondent filed the dispute at CMA after two years. While exhibit AP2 that was tendered by the respondent shows that the dispute arose on 26th July 2022, the quoted part of respondent's evidence under cross examination shows that the dispute

arose two year prior to filing the dispute at CMA. For the foregoing, it is my view that, evidence by the respondent that, the signature on exhibit D2 is not his, and that he was not served with the said notice on 8th February 2021, is an afterthought. I therefore hold that, respondent was served with the notice of termination of his employment on 8th February 2021 showing that the said employment will automatically be terminated after expiry of 28 days counting from 2nd February 2021. I further hold that, applicant was terminated on 28th March 2021 after expitaion of the 28 days provided in the notice of termination and that is the date the dispute arose. Since applicant indicated in CMA F1 that the dispute was relating to termination of employment, he was supposed, in terms of Rule 10(1) of GN. No. 64 of 2007(supra) to file the dispute within 30 days from the date the dispute arose. In short, respondent was supposed to file the dispute on or before 28th April 2021. The only option that was availbale to the applicant after noticing that he was out of time, was to file an application for condonation (CMA F2) as per Rule 11(1), (2), (3) and (4) and Rule 29 of GN. No. 64 of 2007(supra). Since there was no condonation, the dispute was time barred and CMA had no jurisdiction to arbitrate the parties and issue the impugned award.

It was submitted on behalf of the applicant that, respondent was a probationer hence not entitled to the relief relating to fairness of

termination. On the other hand, respondent submitted that, he was not a probationer. I have examined evidence of the parties in the CMA record and find that, DW1 testified both in chief and under cross examination that, respondent was never confirmed. According to DW1, the reason for non confirmation of the respondent was failure to meet targets. On the other hand, respondent(PW1) relied on the medical card (exhibit AP1) and a clause in the employment contract showing that upon confirmation he will be covered with insurance scheme to show that he was not a probationer. But while under cross examination, respondent(PW1) admitted that he did not have any letter or email correspondences showing confirmation to his employment. In fact, respondent(PW1) is recorded stating:-

> *"…Sijaleta barua au email yoyote ambayo inaonyesha nimethibitishwa. Mkataba una kipengele cha probation uki-achieve target utapewa barua ya confirmation ila sijaleta barua ya kuonyesha nime-achieve."*

The quoted evidence of the respondent(PW1) while uder cross examination is loud that confirmation was subject to meeting targets. But, no evidence was adduced by the respondent showing that he met targets and further that he was confirmed. On the other hand, the reason for termination as stipulated in the 28 days' notice (exhibit D2)

was failuer to meet targets. I therefore hold that, at the time of termination, respondent was a probationer.

I have read the contract of employment between the parties (exhibit D1) and find that it has a clause relating to probation that reads: -

> *"Probation:*
>
> *You will be under probation for a period of 3(three) Months. On satisfactory completion your probation period which requires achieving the target set, you will be confirmed."*

It is my view that, since respondent was alleging that he was not a probationer, he was supposed to adduce evidence including confirmation letter that he was, at the time of termination of his employment, not a probationer. It has been held several time by this court and the court of Appeal that, he who alleges, must prove. See the case of ***Anthony M. Masanga vs Penina (mama Mgesi) and Another*** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015).

In the award, the arbitrator relied on the case of ***Commercial Bank of Africa(T) Ltd v. Nicodemus Mussa Igogo***, Revision No. 2012, HC(Unreported) to the position that, after expiration of probation period, an employee is entitled to confirmation. Unfortunately, the arbitrator quoted in full what was held by this court in that case but in applying the case to the dispute that was before him, he left out the

main holding that was relating to the circumstances of this application. In ***Igogo's case*** (supra) it was held, as it was correctly quoted by the arbitrator, that, "***a probationer employee remains with that status until confirmed by the appointing authority"***. It is my view that, had the arbitrator correctly applied the quoted holding in ***Igogo's case*** (supra), that, a probationer remains to be a probationer until confirmed, he would, in absence of evidence that respondent was confirmed, have held that respondent was a probationer. In fact, that is the correct position of the law as it was held by the Court of Appeal in the case of ***David Nzaligo vs National Microfinance Bank Plc*** (Civil Appeal 61 of 2016) [2019] TZCA 287 (9 September 2019) that:-

> *"The status of employment for an employee under probation who continues working after expiration of probation period without the employer having made a decision to confirm or not to confirm was discussed in* ***Mtenga vs University of Dar es Salaam*** *(supra) and stated that, being on probation after expiry of probation period does not amount to confirmation and that confirmation is not automatic upon expiry of the probation period.This being the position, we find no reason to depart from the finding of the High Court on this issue. There is no evidence that the appellant did fulfill the required conditions to warrant confirmation and thus move from the status he was, that of a probationer as required by the contract of employment.*
>
> *We are therefore of the view that confirmation of an employee on probation is subject to fulfilment of established conditions and expiration of set period of probation does not automatically lead to change of status from a probationer to a confirmed employee. Therefore since the appellant failed*

*to fulfil the conditions set, he was still a probationer at the time he resigned and thus the 1st ground of appeal fails."*

The above quoted decision in ***Nzaligo's case*** (supra) has nailed it to the ground.

For all what I have discussed hereinabove, I find that the application is merited. I therefore hereby allow this application. I further nullify CMA proceedings, quash and set aside the CMA award arising therefrom.

Dated at Dar es Salaam on this 27th February 2024.

B. E. K. Mganga
**JUDGE**

Judgment delivered on 27th February 2024 in chambers in the presence of Noel Sanga, Advocate, holding brief of Dickson Sanga, advocate, for the Applicant and Costantine Gomela, the Respondent.

B. E. K. Mganga
**JUDGE**