

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 28541 OF 2023

*(Arising from Award issued on 20/11/2023 by Hon. Nyagaya, P. Arbitrator in Labour Dispute No.
CMA/DSM/ILA/452/2022/266/2022 at Ilala)*

YUSUPH OMARY NGOGO APPLICANT

VERSUS

TRIX FURNITURES RESPONDENT

JUDGEMENT

*Date of Last Order: 22/02/2024
Date of Judgement: 28/02/2024*

B. E. K. Mganga, J.

It is undisputed fact that, on 1st January 2022, Yusuph Omary Ngogo, the herein applicant, and Trix Furniture, the herein respondent, entered an unspecified period contract of employment. In the said contract of employment, applicant was employed as a technician. In the said contract of employment, the parties agreed that applicant will be under probation period for three (3) months. It is also undisputed by the parties that, on 03rd August 2022, respondent terminated employment of the applicant, allegedly, due to poor performance. Dissatisfied with termination of his employment, on 31st August 2022, applicant filed

Labour dispute No. CMA/DSM/ILA/452/2022/266/2022 before the Commission for Mediation and Arbitration (herein after referred to as CMA) complaining that respondent terminated his employment unfairly. In the Referral Form(CMA F1), applicant indicated that the dispute arose on 3rd August 2022. In the said CMA F1, on fairness of procedure, applicant indicated among other things that, he was not given right to be heard, respondent did not conduct investigation to prove poor performance and that, he was not given training to improve performance. On fairness of reason of termination, applicant indicated in the said CMA F1 that, respondent did not train him on the required performance standard. In the said CMA F1, applicant prayed to be reinstated without loss of remuneration.

On 20th November 2023, Hon. Nyagaya P. arbitrator, having heard evidence of the parties, issued the award dismissing the dispute for want of merit. Applicant was aggrieved with the said award hence this application for revision. In the affidavit in support of the Notice of application, applicant raised Five(5) issues to be determined by this court namely:-

1. *Whether it was proper for the Honourable Arbitrator to disregard the principle of right to be heard, which was denied to the applicant by the respondent.*

2. *Whether it was proper for the Honourable Arbitrator to hold that applicant was on probation while there was no evidence to that effect in terms of the employment contract between parties.*
3. *Whether it was proper for the Honourable Arbitrator to disregard the law and regulations governing labour dispute procedures at the respondent's workplace.*
4. *Whether it was proper for the Honourable Arbitrator to hold that the applicant was trained and gave a proper working standard to meet the requirements of the respondent.*
5. *Whether it was proper for the Honourable Arbitrator to hold that the applicant was properly terminated on probation while there was no seven-day notice of terminating employment agreement.*

Respondent opposed this application and filed the Notice of Opposition and the counter affidavit of Jyoti Somji.

When the application was called on for hearing, Ms. Josepha Tewa, advocate appeared and argued for and on behalf of the applicant while Mr. Isaack Zake, advocate appeared and argued for and on behalf of the respondent.

Arguing in support of the 1st issue, Ms. Tewa, submitted that, at the time of termination, applicant was not heard but was only served with warning letter dated 2nd August 2022(exhibit D2) and the next day was served with termination letter (exhibit D3). She submitted that, that violated Article 13(a) of the Constitution of the United Republic of Tanzania. To support her submissions on the right to be heard, learned

counsel for the applicant cited the case of ***Simon Nanyaki v. Institute of Finance Management*** [1984]TLR 304.

Arguing the 2nd issue, learned counsel for the applicant submitted that, the contract of employment (exhibit D1) shows that applicant was to be placed under probation for three months from 1st January 2022 to March 2022 and that he was terminated after expiry of probation period. She added that, after the said 3 months' probation period, applicant continued to work on assumption that respondent was satisfied with his work performance. Ms. Tewa strongly submitted that there was no notice of extension of probation contrary to paragraph 5 of the employment contract (exhibit D1) that required extension of probation period to be in writing. Learned counsel submitted further that, the court should enforce the contract of the parties as it is, without amending it. To cement on that position, she cited the case ***Lulu Victor Kayombo v. Oceanic Bay Limited and Another***, Consolidated Civil Appeals No. 22 & 155 of 2020, CAT, (unreported). In her submissions, learned counsel conceded that there is no evidence as to when applicant was confirmed. She further conceded that, the employment contract(Exhibit D1) is silent as to whether, confirmation was also supposed to be in writing or by implication. With all these, learned counsel for the

applicant maintained that the arbitrator erred to hold that applicant was a probationer.

In regard to the 5th issue, learned counsel for the applicant submitted that, paragraph 11 of the employment contract(exhibit D1) provides that, respondent was supposed to serve the applicant with 7 days' notice when the employment is terminated within 3 months of employment. She added that, assuming that applicant was a probationer, respondent was supposed to serve applicant 7 days' notice but that was not done.

In regard to the 2nd issue, learned counsel for the applicant submitted that, at the time of termination, probation period had already expired hence it was an error on part of the arbitrator to hold that applicant was properly terminated while he was on probation.

Arguing the 3rd issue, Ms. Tewa, counsel for the applicant submitted that, applicant was terminated allegedly, due to poor performance. She further submitted that, DW1, the only witness for the respondent, did not show how applicant performed his work poorly. she went on that, respondent did not prove reason for termination. She also submitted that, DW1 testified that applicant was leaving his workplace without permission and return after others have completed the work. Learned counsel submitted that, leaving the workplace as reason for

termination was not indicated in termination letter and in the warning letter. She went on that, respondent did not follow procedures in terminating employment of the applicant. She added that, respondent did not comply with Rule 18(1), (2), (3), (4), (5)(a) and (b), (6), (7), (8) and (9) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 hence termination was unfair procedurally. She further submitted that, DW1 testified that only a meeting of three people was held and after discussion, they concluded that applicant should be terminated.

In regard to the 4th issue, learned counsel for the applicant submitted that, in his evidence, applicant (PW1) testified that he was not given training by the respondent. She also submitted that, in her evidence, respondent said nothing in relation to training. She added that, applicant was not cross examined on the issue of training and concluded that, the arbitrator erred to hold that applicant was given training. Learned counsel for the applicant concluded her submissions praying that the application be allowed, applicant be reinstated without loss of remuneration and be granted any other relief as the court may deem fit to grant.

Resisting the application, Mr. Zake, learned counsel for the respondent, responding to the 1st and 2nd issues submitted that, the

right to be heard was not violated as it was testified by DW1 that, there were complaints relating to poor performance of the applicant. Learned counsel submitted further that, DW1 testified that, on 2nd August 2022, while in office, she discussed with the applicant in relation to leaving the work assigned without permission and served him with a warning letter(exhibit D2). He added that, DW1 also testified that, after being served with exhibit D2, applicant was unhappy and stated that, respondent, if wishes, may terminate his employment.

Learned counsel for the respondent submitted further that, the employment contract(exhibit D1) shows that applicant was under probation for three months. He submitted that, applicant worked for 7 months but he was not confirmed. He further argued that, there is no automatic confirmation even after expiry of probation period. He went on that, applicant was not entitled to the remedy of confirmed employee provided under section 37 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019]. Learned counsel for the respondent further submitted that, the court cannot amend the contract of the parties as it was held in ***Victor' s case*** (supra) and that, the same applies that, since there was no written confirmation, the court cannot treat the applicant as confirmed employee in the absence of a confirmation letter.

Responding to the 5th issue relating to absence of 7 days' notice, Mr. Zake submitted that, DW1 testified that, after termination, applicant was paid salary for August and September 2022 though termination was on 3rd August 2022. He submitted further that, that evidence was not challenged. He added that, the parties agreed that instead of 7 days' notice, respondent was paid two months salaries.

Responding to the 3rd issue, Mr. Zake submitted that, section 35 of Cap. 366 R.E. 2019 (supra) is clear that, fairness of termination namely, procedure and reason, does not apply to probationers. He added that, Section 37(2) (a) and 37(2)(c) of Cap. 366 R.E 2019(supra) that relates to reason and procedure for termination respectively, cannot apply in the application at hand. He submitted that, the right procedure is Rule 10 of GN. 42 of 2007(supra). He further submitted that, respondent partly complied with this Rule. Learned counsel for the respondent further submitted that, applicant was supposed to file the dispute at CMA relating to unfair Labour practices instead of unfair termination because he was aware that he was yet to be confirmed.

Responding to submissions made on the 4th issue, Mr. Zake, counsel for the respondent submitted that, evidence of DW1 shows that applicant was not ready to continue working with the respondent. He further submitted that, the warning letter (Exhibit D2) gave applicant a

chance to improve but he was not ready. With those submissions, counsel for the respondent prayed this application be dismissed for want of merit.

In rejoinder, Ms. Tewa, learned counsel for the applicant submitted that, the warning letter (exhibit D2) cannot amount to right to be heard. She also submitted that, performance improvement cannot be obtained within few hours of performance as it happened in this application because shortly after being served with the warning letter, applicant was terminated. She maintained that, probation period expired in March 2022. She also argued that, employment contract(Exhibit D1) does not show modality of confirmation but only shows the probation period. She also submitted that, in her evidence, DWI did not tender proof of payment for the salary for August 2022 and September 2022 or state that applicant was paid. She added that, in his evidence, applicant denied to have been paid salary for August 2022 and September 2022. She maintained that applicant properly filed the dispute of unfair termination because there was no extension of probation period.

I have examined evidence of the parties in the CMA record and considered rival submissions in this application and find that, the main issues to be answered in this application are whether, at the time of termination of employment, applicant was a confirmed employee or a

probationer and whether the dispute was properly filed and heard at CMA.

I have read evidence of Jyoti Somji(DW1)who testified on behalf of the respondent and Yusuph Omari Ngogo(PW1), the applicant, the only witnesses in this application and find that, employment contract between applicant and respondent commenced on 1st January 2022. It is also undisputed by the parties that, in the said employment contract, applicant was under probation for three months. It was clearly stated in paragraph 5 of the employment contract (exhibit D1) that, the said probation period was to enable respondent to assess work performance of the applicant and that, upon being satisfied, applicant will be confirmed. It was evidence of both DW1 and PW1 that, applicant worked beyond the said three months' probation period. It was evidence of DW1 that, applicant was not confirmed and that, termination of his work was due to poor performance as reflected in the notice to terminate employment (exhibit D3) and a warning letter(exhibit D2). In his evidence, applicant(PW1) did not state that he was a confirmed employee. PW1 only stated that he worked eight months hence worked beyond the agreed period of probation.

It was argued on behalf of the applicant that, applicant continued to work after expiration of the said three months' probation period on assumption that respondent was satisfied with his work performance and that in so doing he was confirmed. With due respect to counsel for the applicant, there cannot be automatic confirmation of employment. Confirmation of employment must be proved by evidence. It was upon the applicant to prove that, at the time of termination, he was not a probationer. Confirmation of the applicant was subject to performance of his work as provided under clause 5 of the employment contract(exhibit D1). In fact, the Court of Appeal had an advantage of discussing a similar issue in the case of [David Nzaligo vs National Microfinance Bank Plc](#) (Civil Appeal 61 of 2016) [2019] TZCA 287 (9 September 2019) wherein it was held 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...”(Emphasis is mine).*

For the foregoing, I hold that the mere fact that applicant worked beyond the three months of probation period provided in the employment contract, did not change his status to be a confirmed employee. I therefore hold that, at the time of termination of employment, applicant was a probationer.

Having held that at the time of termination applicant was a probationer, the next issue is whether, it was proper for the applicant to file the dispute of unfair termination at CMA. As pointed out hereinabove, applicant filed at CMA the dispute for termination of his employment claiming that termination was unfair and prayed to be reinstated without loss of remuneration. Applicant being a probationer, was supposed to file the dispute relating to unfair labour practice relating to probation because the procedure for terminating employment of the probationer employee is specifically provided under Rule 10 of GN No. 42 of 2007 (supra). Unfortunately, applicant filed the dispute of termination of employment and prayed reinstatement without loss of

remuneration which is a remedy provided for under the provision of section 40(1)(a) of Cap. 366 R.E. 2019 (supra). The said remedy cannot be granted to a probationer employee because at that time, the employee is on practical training. See **Nzaligo's case** (Supra) wherein the Court of Appeal referred to its earlier decision in the case of **Stella Temu vs Tanzania Revenue Authority**, [2005] TLR 178 that,

"... while under the period of probation, the appellant was under a practical interview."

In the case of [Ngeleki Malimi Ngeleki Vs dimension Data Tanzania Ltd](#) (Rev. Appl. No. 890 of 2019) [2021] TZhCLD 344 (16 August 2021) this Court held that:-

"Probation period is akin to 'engagement before marriage. As the saying goes, 'The job interview is not over until employee has gone through the probation.'"

In **Nzaligo's case** (supra) the Court of Appeal further held:-

"...we are of the view that a probationer in such a situation, cannot enjoy the rights and benefits enjoyed by a confirmed employee...the fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination..."

What I have discussed hereinabove, has disposed the whole application. I therefore find it unnecessary to discuss the remaining issues raised by the applicant. I should point out briefly that, all other

issues raised by the applicant were supposed to be discussed had the dispute been properly filed at CMA.

For the foregoing and in the upshot, I find that this application has no merit and dismiss it.

Dated at Dar es Salaam on this 28th February 2024.



B. E. K. Mganga
JUDGE

Judgment delivered on 28th February 2024 in chambers in the presence of Josepha Tewa, Advocate, for the Applicant and Emmanuel Ndaga, Advocate, for the Respondent.



B. E. K. Mganga
JUDGE