IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 4065 OF 2024

CASE REFERENCE NO.202402281000004065

BETWEEN

EFC TANZANIA MICROFINANCE BANK LTD ..... APPLICANT

VERSUS

FATUMA MWAIMU ..... RESPONDENT

JUDGEMENT

Date of last Order: *30/04/2024*
Date of Judgement: *03/05/2024*

MLYAMBINA, J.

The dispute at hand emanates from the decision of the Commission for Mediation and Arbitration (herein CMA) in *Labour Dispute No. CMA/DSM/KIN/656/2022/19/2023.* In the mentioned dispute, the Respondent referred the matter to the CMA alleging unfair labour practices where he prayed for 12 months salaries as compensation for the alleged unfair termination and one month salary in lieu of notice. After considering the evidence of the parties, the CMA found the Respondent's claim had merit. Following such findings, the CMA awarded the Respondent six (6) months

salaries as compensation. Dissatisfied by the CMA's decision, the Applicant filed the present application calling for determination of the following issues:

i. *Whether it was proper for the honorable Arbitrator to find that there was irregularity for terminating the Respondent for unfair labour practice and;*
ii. *Whether it was proper for the honorable arbitrator to order payment of TZS 24,447,5701= being six (6) month's salary as compensation for unfair labour practice.*
iii. *Whether she evaluated the evidence adduced by the Applicant in order to reach to affair justice*

The matter proceeded by way of written submissions. Before the Court, the Applicant was represented by Cleophace James, learned Counsel. On the other hand, Mr. Adam Mwambene, learned Counsel appeared for the Respondent.

Arguing in support of the application, Mr. James jointly submitted on the first and third grounds that there was a valid reason and the procedures were proper for terminating the Respondent under probation. He stated that as per exhibit D-4 which was also admitted to be signed by the Respondent, she was underperforming. That, the Respondent did not submit the list of auction dates to be sold in June. Furthermore, as per exhibit D-2, the Respondent admitted to have participated during training to improve her performance. He added that the Respondent's performance

was evaluated by the Managing Director and she was supported by the Managing Director in order to improve. Therefore, the Applicant complied with *Rule 10(6), (7) and (8) of Employment and Labour Relations (Code of Good Practice) GN. No 42 of 2007* (*herein GN. No 42 of 2007*) which provide the procedures of terminating probationary employee. In support of his submission, He cited the case of **Water Mission Tanzania v. Deusdedith Mkunguru**, Labour Revision No 300 of 2021, High Court of Tanzania (unreported), where the Court stated the purpose of probation period.

Mr. James continued to submit that the Respondent was under performing and there was a monitoring of performance with appraisals by the Managing Director. That several warnings were officially communicated to the Respondent which she admitted to have received the same and they were admitted as exhibit D3 and D4. Mr. James contended that it was wrong for the Arbitrator to hold that there was no evidence proving that the employee was given an opportunity to improve during probation period. The Arbitrator disregarded Exhibit D-4 in which she was given time to improve and if she needed any support from the Managing Director she should have consulted him. It was Mr. James's strong position that poor performance is one of the reasons for terminating an employee as it was held in the case of

Josiah Zephania Warioba v. Bouygues Energies & Services, Labour Revision No 16 Of 2022 (unreported).

In response, Mr. Mwambene admitted that the Respondent was on probation period and that she was under performance (exhibit D-4). He stated that there were serious irregularities associated with the Respondent's termination. That, it was unfair labour practice to monitor an employee underground without her knowledge and participation. He added that evaluation and monitoring of an employee performance ought to be open and participatory. To strengthens his position, he cited the case of **Agness B. Buhere v. UTT Microfinance Plc**, Labour Revision No. 459 of 2015 (unreported) where it was held that:

> The code of good practice stresses that before terminating or resorting to termination of the probationary or extending the probationary period, the employer must invite the probationer to make representation and consider them. Such representation may also be made on behalf of the probationer by a trade union representative.

It was Mr. Mwambene's further submission that the Respondent was not accorded her right to be heard which is the fundamental right enriched under *Article 13(6) of the Constitution of the United Republic of Tanzania, 1977* (as amended from time to time). He also supported his submission

with the case of **Mbeya - Rukwa Auto parts & Transport Ltd v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 [2003] TLR 251. Mr. Mwambene maintained that the procedures for terminating the Respondent as they are provided under *Rule 10 of GN. No. 42 of 2007* were violated in this case.

In the instant matter, both parties are in agreement that the Respondent was employed by the Applicant as a Legal Manager effective from 13th February 2017 as it is reflected in the employment contract (exhibit D1). The contract had a condition of probation period of six months as it is provided under clause 2.5 of exhibit D1 which I hereunder quote for easy of reference:

> The Employee shall serve a probationary period of six months. During the probation period the employee's performance will be closely monitored and evaluated. Further, during this period the Employer will carry out a security and a security investigation on the Employee. If the Employee successfully completes the probation period, and is satisfactory cleared by the said investigation, the Employee shall be notified in writing.

The record shows that the Respondent's employment contract ended on 26th July 2017 when she was served with a non- confirmation letter (exhibit D5). It was one month before the end of her probation period, as

rightly submitted by Mr. James. Thus, the Respondent was a probationer employee and her termination procedures had to be in accordance with *Rule 10* (supra). The relevance of adhering to the mentioned provision was correctly highlighted in the case of **Hope Kivule Secondary School v. Matiku Alfred & 2 Others**, Revision Application No. 124 of 2021, High Court Labour Division, Dar es Salaam, where it was held that:

> Applicant seems to have a notion that one an employee is on probation or had just completed probation period can be terminated as the employer deems fit and without procedure. This notion is wrong because even *Rule 10 (7) and (8) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007* is clear on the procedure to be followed on termination of an employee who is on probation.

I subscribe to the above position. The procedures are there to limit the employer from terminating the probationary employee on his own whims. As stated above, the procedures for terminating a probationary employee are provided from *Rule 10 (6) (7) (8) of GN 42/2007* which is hereunder quoted for easy of reference:

> Rule 10 (6) During the period of probation the employer shall-
>
> (a) Monitor and evaluate the employee's performance and suitability from time to time;

(b) Meet with the employee with regular interval in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counselling to the employee during probation.

(7) where at any stage during the probation period the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.

(8) subject to sub-rule (1) the employment of a probationary employee shall be terminated if-

(a) the probationary employee has been informed of the employer's concerns;

(b) the employee has been given an opportunity to respond those concerns;

(c) the employee has been given a reasonable time to improve performance or correct behaviour and has fails to do so.

Mr. James submitted that the Respondent's performance was evaluated by the Managing Director. On the other hand, Mr. Mwambene strongly disputed the said evaluation on the ground that the evaluation was conducted without informing the Respondent. It is my view that the Respondent's contention is answered by clause 2.5 of exhibit D1 quoted above. From the commencement of the contract the Respondent was fully informed that during the probation period her performance will be closely

monitored and evaluated. She was also informed that if she successfully completes the probation period, and it is satisfactory cleared by the investigation, she would be notified in writing. Thus, the allegation that she was evaluated without her knowledge lacks merit. Moreover, it is the law's position that during the probation period the employer is required to make an informed assessment of whether the employee is competent to do the job and suitable for the employment, this is in terms of *Rule 10(3) of GN. No. 42 of 2007.*

Although the Applicant complied with some of the quoted provision, he also violated some of them as correctly contested by the Respondent. The Applicant did not afford the Respondent the right to be heard as it is required by the quoted provision. The non confirmation letter (exhibit D5) clearly indicated that the Applicant was not satisfied with the Respondent's performance. On that basis, the Applicant was supposed to inform the Respondent of her performance and afford her the right to be heard regarding of her performance. I don't disregard the fact that the Applicant warned the Respondent of her performance through a warning letter date 07th June 2017 (exhibit D4). It is my view that before reaching the decision to terminate the Respondent, she should have been afforded the right to defend herself. The decision was reached *suo motto* by the Applicant himself,

hence, infringing the right to be heard as it is provided under *Article 13(6) supra*. Therefore, there was unfair labour practices in this case as rightly found by the Arbitrator.

With respect to the second ground as to whether it was proper for the honorable arbitrator to order payment of TZS 24,447,5701= being six (6) month's salary as compensation for unfair labour practice, the Applicant's counsel submitted that there was no dispute that the Respondent worked for five (5) months from 13th February 2017 to 26th July 2017. She remained with one (1) month to complete six (6) months of probation. Therefore, it was wrong for the Arbitrator to award her TZS 24,447,570/= being six (6) month's salary while she under performed and she was still on probation. He was of the view that the Arbitrator was required to apply the principle of foreseeability of remaining period as it was held in the case of **Adnani Ally Sipuru & Others v. Resort World t/a Palm Beach Casino**, Revision No. 341 of 2022, where it was held that:

> That, since the Respondent breached employment contracts under probation period which was to expire in one month time, therefore I award the Applicant a compensation of one month each.

To sum up, the counsel urged the Court to grant the application and set aside the CMA's award.

In response, by referring to **the case of Agness Buhere** (supra), Mr. Mwambene urged the Court to reconsider the relief awarded to the Respondent and award her the minimum compensation of twelve (12) months.

In deciding this issue, the Court will be guided by the Court of Appeal decision in the case of **David Nzaligo v. National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016 where it was stated that:

> At the time the appellant was still in probation, we are of the view that, a probationer in such a situation, cannot enjoy the right and benefit enjoyed by a confirmed employee. Since the Respondent was still a probationer at the time he resigned, and he cannot benefit from remedies under *Part III E of the ELRA.*

The award claimed by the Respondent before this Court is awarded in cases of unfair termination to confirmed employees. As decided in the first ground, the Respondent was a probationary employee, hence, she cannot enjoy the rights of a confirmed employee, as it is the position in the above cited decision. The labour laws are silent on the award entitled to probationary employees but it is my position that where there is any breach

of provisions relating to termination of probationary employee, the affected employee deserves compensation. In the matter at hand, there was infringement of the right to be heard as decided herein above. Therefore, since the Respondent was terminated before one month of the completion of probation period, it is my view that the award of two month's salaries as compensation will serve justice to the case at hand. One month salary will serve as a notice pay of non-confirmation whistly the other one month is for the remaining period of the probation.

In the result, I find the present application to have partly succeeded to the extent explained hereinabove. The Award of six months is hereby reduced to two months. Hence, the Applicant is hereby ordered to pay the Respondent a total of TZS 8,149,180/= as compensation for unfair labour practice.

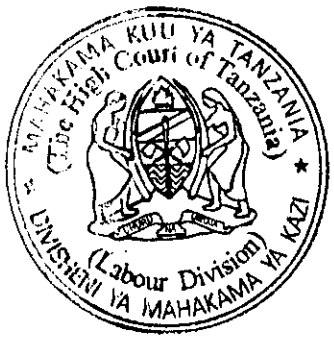
It is so ordered.

Y.J. MLYAMBINA

JUDGE

03/05/2024

Judgement pronounced and dated 3rd May, 2024 in the presence of Counsel Cleophace James for the Applicant and Augustino Mahela Masanja for the Respondent. Right of Appeal explained.



Y.J. MLYAMBINA

JUDGE

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