IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LABOUR REVISION NO. 25 OF 2021

(Arising from the Award of the Commission for Mediation and Arbitration for Morogoro in Labour Dispute No. MSC/CMA/MOR/45/2020

Before Hon. Mwalongo, Arbitrator)

MAZAVA FABRICS AND PRODUCTION EAST AFRICA LIMITED ...APPLICANT

VERSUS

IDDY OMARY IDDY & 1702 OTHERS ..... RESPONDENTS

RULING

19Th September, 2022 & 05th October, 2022

Ndesamburo, J

The applicant, through legal representation of the learned counsel Prof. Cyriacus Binamungu, preferred this application for revision against the decision of the Commission for Mediation and Arbitration (the CMA) in Complaints No. MISC APP. CMA/MOR/45/2020 which was in favour of

the respondents, whom, in this application, enjoys the services of the learned counsel Mr. Noel Nchimbi. The application is by chamber summons supported by an affidavit deponed by Ms. Grace Likonde, Principal Officer of the applicant and it is made under the provisions of sections 91 (1) (b) (i) and (2) (b) (c) of The Employment and Labour Relations Act No. 6 of 2004, Act No. 17 of 2010, Act No. 4 of 2016, Rule 24(1), (2) (a) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28(1) (c) (d) and (e) of the Labour Court Rules, G.N No. 106 of 2007.

In order to appreciate the context as regards to the labour dispute between the parties, I think it is important to, albeit briefly, provide the material facts of the matter as found in the record and affidavits by the parties. The respondents were employed by the applicant at different periods. In 2020, Covid 19 erupted and affected the applicant's business. Due to that, on 27th May, 2020, parties entered into an agreement whereby the respondents were paid salaries at the tune of 60% for three and half months. On the expiration of that period, the applicant proposed an amicable settlement meeting with the respondents. Two meetings were held, one on the 10th September, 2020 whereby the applicant tabled two proposals to be selected by the

respondents that is, **one**, termination with payments of legal entitlements, and **two**, leave without payments for undefined period.

On day one meeting held on 10th September, 2020, respondents opted proposal number one, that is termination with payment of legal entitlements. Thereafter, parties went on and discussed the list of the legal rights brought by TUICO, serve for compensation of twelve months salaries were agreed by the parties. Subsequently, parties agreed to have a second meeting on the 11th September, 2020. However, on that meeting, parties did not reach into agreement. At the end of the said meeting, it was agreed that each part to pursue its rights before the CMA. Consequently, on 22nd September, 2020, the applicant decided to terminate all the employees and paid the legal entitlements.

Aggrieved by the applicant's action, the respondents instituted two applications before the CMA to pursue their rights. However, the applications ended up being struck out or dismissed. Later on, respondents instituted labour dispute No. CMA/MOR/155/2020 claiming for (a) negotiation for term of employment, (b) discrimination and (c) unfair labour practice. The application was determined by a panel of three arbitrators who dismissed the application for lack of merit.

Respondents still eagerly to pursue their rights, instituted another labour matter, to wit, Misc. CMA/MOR/45/2020. As per court record, both CMA F1 (referral of a dispute to the CMA) and CMA F2 (application for condonation of late referral of a dispute to the CMA) were received on 20 November 2020. It is shown in form CMA F1 that the respondents were claiming 12 months salary being compensation for unfair termination.

The matter for condonation was fixed for hearing, despite objection, prayer for condonation was granted. Thereafter the matter proceeded to mediation which was marked to have failed and pave way for arbitration.

Having heard the parties, the CMA came into a conclusion that respondents by the time of their termination were not confirmed and there is no automatic confirmation. However, it was satisfied that the termination procedures were flouted and awarded the respondents two months salaries as compensation. The applicant felt aggrieved hence this application.

The applicant has forwarded the following four issues for the determination by the court: -

i. *Whether the Commission was legally justified to convert annexture F. 1 which was the Condonation case, into a labour case and proceed to determine the same without even attempting mediation.*

ii. *Whether the respondents could be unfairly terminated while they were probationers and consented to termination of their employment.*

iii. *Whether, the Arbitrator was justified in law to disregard the Court of Appeal decision in* ***David Nzaligo vs National Microfinance Bank PLC****, civ Appeal no 61 of 2016 governing the rights of probationers in instituting labour cases.*

iv. *Whether the Hon. Arbitrator erred in law and facts to grant the reliefs sought.*

Submitting in support of the application, Prof. Binamungu adopted the applicant's affidavit. In his submission in support of the first issue of whether the CMA was justified to convert a condonation matter into a labour dispute, he stated that section 86 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019, (ELRA) a labour dispute is required to be filed in a prescribed form. It is his submission that, the

respondents did not institute any labour matter but an application for condonation. Although he admitted to have been served with a copy of CMA F1 which is ordinary used to institute a labour matter, he insisted that the same was contrary to section 86(1) of ELRA and it could not transform the matter for condonation into a labour dispute. Prof. Binamungu rested issue number one by asking this court to hold that the law and procedure were faulted and hence CMA was not justified to award the respondents as it did.

Prof. Binamungu then combined the second and third issue and urged them together in alternative to issue number one. He contended that, Ms. Grace P. Likonde (Dw1) did tender Exhibit D3 (contract of employment) and which was admitted without being objected. Exhibit D3 proved that, the respondents were yet to be confirmed. With that in mind, he submitted that, respondents were probationers, the fact which was supported by Iddi O. Iddy (Pw2) and therefore they could not be unfairly terminated. He disputed the claim by the respondents that they were confirmed simply for having worked beyond 6 months. He supported his submission on this issue with the case of **David Nzaligo vs NMB PLC** (supra) where the Court of Appeal upheld the finding of the decision of the High Court in the case of **Mtenga vs University of**

Dar es Salaam, (1971) HCD 247 which held that *being on probation after expiry of probation period does not amount to confirmation and that confirmation is not an automatic upon expiration of the probation period.* He thereafter concluded his submission by insisting that, the respondents were probationers, were not confirmed and hence not entitled to the reliefs granted by the CMA.

On the issue of agreement to termination, Prof. Binamungu asserted that, there is evidence on record that parties did enter into agreement and the respondents agreed on termination of their employment. He supported his argument with the Court of Appeal case of **Phillipo Joseph Lukonde V Faraji Ally Said**, Civil Appeal No. 74/2019. Following the agreement, there was nothing to hinder the appellant from paying legal due to the respondents.

Prof. Binamungu wrapped up his submission by asking this court to grant the prayer of reversing the CMA's award.

In response to the submission, Mr. Nchimbi also prayed to adopted his counter affidavit. He urged the court to dismiss the revision. He contended that, section 14(1)(a)(b) of the Labour Institution Act empowers the commission to mediate and determine all labour disputes. He insisted that, the dispute lodged by the applicants at CMA was in

accordance with section 86(1) and (2) of the ELRA as well as section 34(1) of the Employment and Labour Relation (General Rule) GN No. 47/2017. Both CMA F1 and CMA F2 forms were lodged, duly served and applicant has not denied. He further submitted that, the matter followed all procedures provided by section 86(1) and (2) of the ELRA. Although Mr. Nchimbi admitted the fact that the dispute was determined in the very MISC/CMA/MOR/45/2020 file where the matter for condonation was heard, he insisted that the procedure adopted by CMA was not objected by the applicant and that each part was given a fair hearing and there was no occasion of injustice to any party.

On whether respondents could be unfairly terminated while they were probationers, Mr. Nchimbi submitted that, there is no dispute that respondents had worked for more than 6 months prior to their termination. He referred to Rule 10(4) of The Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No. 42 which provides that the period of probation should be of reasonable length not more than 12 months. He stated that the respondents had worked over 12 months, much more the applicant was required to sit with the respondents as provided by Rule 10 (8) (a) (b) (c) and 10 (9) before terminating them.

On the argument of automatic confirmation, he insisted that, respondents had work for more that 6 months and that probation period for the respondents was to last for 6 months as supported by exhibit D3. Moreover, it was the applicant who was required to confirm them. He distinguished the facts of the case of **Mtenga vs University of Dar es Salaam** (supra) to this case, as unlike the facts in **Mtenga's** case, the respondents in the present case had a specific period of probation of 6 months, he claimed.

Mr. Nchimbi challenged the claim by Prof. Binamungu that, parties had entered into agreement for termination because, according to him, there was no any agreement signed by the parties and much more, provision of Rule 4(1) of GN No. 42 was not adhered to.

On the issue of reliefs, Mr. Nchimbi was of the view that, the award was right because the honourable arbitrator took into consideration the relationship between the parties and rightly exercised his discretion to award two months salaries as compensation.

In a brief rejoinder, Prof. Binamungu reiterated what he had submitted and added few remarks on the second issue. He agreed that Rule 10(4) of GN No. 42 provides that probation should not be more than 12 months, but the same Rule does not stipulate that confirmation

is automatic where the probationer has worked for more than 12 months.

Having heard the rival submission by the learned advocates and perused the record, the main issues for determination are **first**, whether the procedure adopted by the CMA in handling this matter was justified, **second**, whether the respondents could have been unfairly terminated while they were probationers, **third**, whether respondents consented termination and **fourth** what relief are parties entitled to.

To start with, let me iron out matters which are not in dispute, which are; respondents were employed at various capacity ranging from various years and none of them were confirmed; the CMA determined both applications for condonation and Labour dispute in one case file (MISC/CMA/MOR/45/2020); CMA F1 and CMA F2 were duly filed at CMA and served to the applicant; Form CMA F1 indicated that Iddy Omary and 1702 others were claiming compensation for 12 months salaries for being unfairly terminated from their employment without any agreement. Termination of employment was the nature of claim indicated in CMA F1.

Starting with the first issue of whether the procedure adopted by CMA in tackling the matter was legally justified. Let me start by

reproducing the provisions of section 86(1)(2)(3)(4) and (5) of ELRA which read as follows:

> *"86(1) Disputes referred to the Commission shall be in the prescribed form.*
> *(2) The party who refers the dispute under subsection (1), shall satisfy the Commission that a copy of the referral has been served on the other parties to the dispute.*
> *(3) On receipt of the referral made under subsection (1) the Commission shall –*
> *(a) appoint a mediator to mediate the dispute;*
> *(b) decide the time, date and place of the mediation hearing;*
> *(c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b).*
> *(4) Subject to the provisions of section 87, the mediator shall resolve the dispute within thirty days of the referral or any longer period to which the parties agree in writing.*
> *(5) The mediator shall decide the manner in which the mediation shall be conducted and if necessary, may require further meetings within the period referred to in subsection (4)."*

My understanding to the above provisions of law is that any dispute referred to the Commission shall be in the prescribed form and that the same must be served to the other party. Also, it is dictated under the same provision that the Commission shall appoint a mediator.

What I gathered as a complaint from Prof. Binamungu is the fact that the honourable arbitrator proceeded to determine the matter in the same file used to determine the condonation application. In his views, he believes that was contrary to the law and the court should quash the proceedings of the MCA and set aside its award. In contrary, Mr. Nchimbi aired his views that despite the facts that the matter proceeded in the same file, the law was not violated.

I had a chance of going through the courts record. The record reveals that, after hearing of the application for condonation, mediation was conducted and marked to have failed and the matter proceeded to arbitration. Indeed, as submitted by the parties, everything was conducted in the same file. The immediate question here is whether the irregularity occasioned any injustice to the parties. In my view, as much as I may agree with Prof. Binamungu that the CMA ought to have not proceeded to determine the matter in the same file, I am, nevertheless, in agreement with Mr. Nchimbi that the applicant was not prejudiced. My reasons are, **one**, all crucial and necessary requirements stipulated under section 86 of the ELRA were adhered to, **two**, all parties were present during the hearing and none of them raised any objection to the modality adopted by the CMA, **three**, each part was given a fair hearing

and fully participated to the hearing, **four** the spirit of accelerating the labour disputes matters might have prompted this kind of modality which in my finding did not violate the requirements of section 86 of ELRA, and **five**, the courts are required not to be tied up by technicalities but rather to deal with cases justly and to have regard to substantive justice as opposed to procedural irregularities; this is the spirit of Overriding Objective principle. The Court of Appeal pronounced itself in the case of **Yakobo Magoiga Gichere Vs Peninah Yusuph**, Civil appeal no. 55 of 2017 (unreported) as follow:

> *"With the advent of the principle of Overriding Objective brought by the written laws (Miscellaneous Amendment) (No. 3) Act, 2018. [Act no. 8 of 2018] which now requires the court to deal with substantive justice ..... cut back an over reliance on procedural technicalities"*

On the above reasoning, I am of the view that, technicalities should not be allowed to overrule substantive justice. With all that in mind, the first issue is answered in affirmative, that the procedure adopted by CMA was justified.

This takes me to the second issue, whether the respondents could have been unfairly terminated while they were probationers. Looking at

the CMA F1, respondents were claiming compensation for unfair termination. All along, the applicant has been claiming that the respondents were probationers and therefore, they were not intitled to the award granted by the CMA. Respondents on their side claimed the opposite and insisted that they had worked for over six months as evidenced by Exhibit D3 which indicates that the probation period was to last for six months and further Rule 10(4) of GN No. 42 provides period of probation not to exceed 12 months. This, in essence, respondents are resisting that they were probationers.

It is important first to ascertain the status of the respondents before subjecting them to an issue of whether or not they were unfairly terminated. The question is whether the respondents were probationers or not.

From the record and submission by both counsel, it is not in disputes that the respondents were employed for over 6 months ranging from different years but were not confirmed to their positions. Respondents are relying on Exhibit D3 that their probation period was termed to be 6 months and that the period of 6 months had lapsed. Further that, as per same exhibit, their probation period was for a fixed period of 6 months. It is their submission that it was the employer who

was supposed to confirm their employment. Mr. Nchimbi also relied on Rule 10(4) of the GN No. 42.

Clause 5.1 of Exhibit D3 which the respondents are relying on is written that as follows:

> *"The employment is subject to a probationary period of 6 (six) renewable months. During this probationary period, the performance will be regularly reviewed and if satisfied, the management will give a written notification confirming full time employment with the company..."*

Reading Exhibit D3, I gather the following; the contract is for probationary period of 6 months; it is subjected to regularly review of the performance of the employee by the employer and lastly, upon satisfaction by the management, the management will issue of a written confirmation of full-time employment. With due respect to Mr. Nchimbi, the clause does not suggest a fixed term contract upon expiration of probationary period. As much as I agree with Mr. Nchimbi that the applicant was under duty to regularly review the performance of the respondent (the fact which we are not told if he did) and upon satisfaction to confirm them, but its failure as alluded by Prof. Binamungu, does not amount to automatic confirmation.

Likewise, as correctly raised by Prof. Binamungu, the provisions of Rule 10(4) of the GN No. 42 does not states that where the period of probation exceeds 12 months, an employee is automatic confirmed. The assertation raised by the respondents on this issue is therefore misconceived. The position is supported by the decision of the Court of Appeal in the case of **David Nzaligo** (supra), whereby the court held:

> *"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****".*

With the above finding therefore, I join hand with the finding of the CMA that the respondents were still probationers when terminated.

Having ascertain the status of the respondents, what follows is whether, as probationers, could lodge matter for unlawfully termination.

Section 35 of the ELRA governs institution of a labour matter for compensation on unfair termination of employment. The section states:

> *"The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts".*

The above provision means that employee with less than 6 months employment with the same employer whether, under one or more contract cannot institute a labour matter for unfair termination. In the case at hand, it is not in dispute that the respondents have worked for applicant for over 6 months, an argument which the respondents are relying on to substantiate their claim for unfair termination. However, the applicant is challenging the same.

To answer this, I am obliged to seek refugee from case laws. I have in mind the case of **Agnes Buhere vs UTT Microfinance PLC**, Lab. Revision No. 459 of 2015, where the Court of Appeal stated that employees who are under probation cannot institute a claim of unfair termination under section 35 of the ELRA. The Court when assessing this provision, pronounced itself as follows:

> *"We find that the import of section 35 of ELRA though it addresses the period of employment and not the status of employment, the fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination. It suffices that when assessing this provision,* ***it is a provision that envisages an***

employee fully recognized by an employer and not a probationer".

In the light of the above, it is my finding that, the respondents as probationers were not intitled to institute a labour matter for unfair termination. Thus, this issue is answered in negative.

The third issue is whether, the respondents consented termination. Prof. Binamungu claimed that parties had entered into agreement whereby the respondents agreed on termination of their employment. On the other hand, respondents argued that there was no any agreement for termination signed between the parties and furthermore, provisions of Rule 4(1) of GN No. 42 were not adhered to.

To address this issue, I would like to start by visiting provisions which governs termination of employment and in particularly, termination by agreement. Rule 3(2)(a) of GN No. 42 allows the employer and employee to enter into an agreement to terminate the employment. Such termination shall be executed in accordance to the terms of the agreement entered to: Rule 4(1). Rule 4(1) provides:

"An employer and employee shall agree to terminate the contract in accordance to agreement".

In this application, as it was explained above, the agreement for termination of employment of the respondents was initiated by the employer following an outbreak of COVID 19. Two meetings were held between the parties prior to the institution of the matter before the CMA. The minutes of those meetings were tendered and admitted as Exhibit D1. It is this exhibit that the applicant is relying on to impress the court that the respondents had consented to termination.

Exhibit D1 is the minutes of meetings held on 10/09/2020 and 11/09/2020 in attendance of the applicant, TUICO and respondents' representatives. For the sake of clarity, part of the document of the meeting held on the 10/09/2022 is reproduced to show what was stated therein:

> *"Mwenyekiti alieleza madhumuni ya kikao hicho...kwamba aidha wafanyakazi waende likizo bila ya malipo au mikataba yao ya ajira isititwe na kulipwa haki zao kwa mujibu wa sheria.*
>
> *Hata hivyo mwanasheria msomi wa TUICO (Mr. Nchimbi) alieleza wahudhuriaji kuwa kwa upande wa TUICO na wafanyakazi wameshakubaliana kuwa suala la kwenda likizo bila malipo wafanyakazi hawalitaki, lakini wako tayari kuendelea na majadiliano kwenye suala la kusitishwa mikataba yao ya ajira*

Hivyo pande zote mbili zilikubaliana na suala la kusitisha mikataba ya ajira kwa wafanyakazi wote na kuwalipa haki zao kwa mujibu wa sheria. . ."

What can be deduced from the above quote is; **one**, two options were made for the employees/respondents to select; leave without payments or termination of employment with payment of legal entitlements, **two**, the respondents were not ready to take leave without payments but were ready to proceed with negotiation for the termination of employment, and **three**, that parties agreed to termination and payment of legal entitlements.

Exhibit D1 is written in simple language, clearly stipulates rights and obligations of each side, it was signed and parties were represented. It is important to note that Ms. Grace Likonde for Mazava F&P EA Ltd, Mr. Noel Nchimbi, advocate from TUICO, Mr. Hanson L. Zephania – Deputy Secretary from TUICO and Mr. Iddy Omary – representative of employees attended and signed the document. It is also important to further note that, there is no any complaints from the respondents that, the document was not freely obtained.

It is my view that, the document concludes that, parties accepted termination of contract and payment of what was termed as legal entitlements. The respondents cannot withdraw their consent at this moment as parties are bound by their agreement: **Yara Tanzania Limited Vs vs Catherine Assenga,** Revision No. 88 of 2020.

I understand there was a second meeting whereby the issue of 12 months' salary compensation was discussed and parties did not manage to reach into agreement. In my view, however, it does not mean that the respondents reversed their prior consent to terminate their contracts. There is also a concern from Mr. Nchimbi that, there is no any agreement for termination signed by parties, this argument, with due respect, does not eliminate the evidence of Exhibit D1 and what was agreed in there.

With the above finding, the respondents therefore, could not institute suit for unfairly termination while they had consented to the termination.

Having found that the respondents consented to their termination and the applicant discharged its duty by paying the legal entitlements, it cannot be said that the respondents were denied the right to a procedurally fair dismissal. As such with due respect, the CMA wrongly

awarded the respondents the compensation. Thus, the CMA was not justified to award 2 months salaries as compensation. On the strength of that, the application is granted. The proceedings and the award by the CMA are hereby quashed and subsequent orders set aside. This being a labour matter, each party is to bear its costs.

It is so ordered.

DATED at **MOROGORO** this 5th day of October, 2022

H. P. NDESAMBURO

JUDGE

05.10.2022

Court: Ruling delivered on 5th October, 2022 in the presence of Ms. Esther Shoo, learned counsel for the Applicant and Mr. Noel Nchimbi, learned counsel for the Respondents.

H. P. NDESAMBURO

JUDGE

05.10.2022