IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO.9 OF 2022

(Originating from Labour Dispute No.CMA/MZ/ILEM/55/2021/36/2021.)

SUZAN EDWARD KHUZWAYO ..... APPLICANT

VERSUS

GOLD CREST HOTEL ..... RESPONDENT

JUDGMENT

16th December, 2022, & 24th March, 2023

ITEMBA, J.

This is an application for revision against the award issued by the Commission for Mediation and Arbitration (CMA) at Mwanza, delivered on 18th November, 2021 in Labour Dispute No. CMA/MZ/ILEM/55/2021/36/2021. In the said dispute, the applicant's the respondent for unfairly terminating her employment.

Facts leading to this application are that, in November 2020, the applicant secured a one-year contract with the respondent as a marketing manager, at a salary of TZS 2,000,000/=. The probation period was termed to be three months. When the applicant had worked for three months and five days, she was faced with allegations of tarnishing the image of her manager on social media, an act which was a misconduct. A disciplinary hearing was held against her and at the end, her employment

was terminated. As a result, the applicant filed a complaint before the CMA where she claimed a total of Eighteen Million Tanzanian Shillings (TZS 18,000,000/=) as compensation for breach of contract. The applicants' claims were dismissed by the CMA on grounds that she was an employee with less than six months of employment hence according to Part E of the Employment and Labour Relations Act, **(ELRA),** her claims were in a wrong platform. The applicant was aggrieved with the said decision and has filed this application armed with eight grounds as follows:

(i) That the arbitrator erred in law and in fact by determining the dispute as unfair termination while the nature of the dispute was breach of contract;

(ii) That the arbitrator erred in law and in fact by not analyzing properly the evidence of all parties in the dispute and relied only in one side of the respondent;

(iii) That the arbitrator erred in law and in fact by not taking into account that disciplinary committee was not properly constituted.

(iv) That the arbitrator erred in law and in fact by not taking into account that the applicant was terminated for the offence she was not charged with;

(v) That the arbitrator erred in law and in fact by not taking into account that the applicant was not properly investigated to the offence charged;

(vi) That the arbitrator erred in law and in fact by deciding the dispute in favour of the respondent while there was insufficient evidence or not at all;

(vii) That the arbitrator erred in law and in fact for failure to frame the issues concerning the dispute before the commission; and

(viii) That the arbitrator misdirected himself by proving the award in favour of the respondent by holding that the applicant was still under probation while the breach of contract occurred after the expiration of probation.

In opposing the application, the respondent's counsel filed a counter affidavit. He took the view that the arbitrator was correct in dismissing the applicant's claims. That, at the CMA, there was no irregularity or impropriety in resolving the dispute.

When the application was scheduled for hearing, both parties were represented by learned counsels. The applicant was represented by Messr. Msafiri Henga and Masanja Ngofilo, while the respondent enlisted the services of Mr. Musa Nyamwelo.

Submitting in support of the application, the applicant argued the 1st ground separately, the 3rd, 4th, 5th grounds jointly, the 2nd and 6th grounds jointly and 7th and 8th grounds jointly. Mr. Ngofilo argued that, the CMA was unjustified by determining the dispute as unfair termination while the nature of the dispute was breach of contract, based on CMA

form no. 1, filed by the applicant. To support his argument, he cited the case of **Bremen Transport Ltd v Shaban Salum Omar**, Labour Revision no. 73.2022. HC Dar es Salaam.

With respect to the 3rd, 4th and 5th grounds, the applicant's counsel contended that the procedure of the disciplinary hearing against the applicant was contrary to Employment Labour Relation Code of Good Practice GN 42.2007. That, the applicant was fired for the offence under rule 13 (e) which she was never charged with. Hence, findings of the disciplinary committee are invalid.

In respect of the 2nd and 6th grounds the learned counsel submitted that the evidence was not properly analyzed which led to issuance of unlawful award.

Submitting on the remaining issues, he argued that there were a number of irregularities, including the committee being constituted by junior members only while the applicant was senior, there was no applicant's signature in the committee hearing form and that at the time of termination, the applicant was no longer at the probation phase. Furthermore, that the arbitrator failed to frame proper issues which is against rule 24 (4) of the Labour Institution (Mediation and Arbitration) GN. 64 of 2007.

Mr. Nyamwelo's rebuttal was equally vociferous. He began by stating that the proceedings before CMA were in order. Replying on 1st ground, he argued that the CMA decision is justified because the applicant was still under probation and therefore, she could not claim the advantages of an employee. He also submitted that if the employee is not confirmed, he remains a probationer even if he continues to work after the time of probation. He relied in the case of **Stella Temu v. Tanzania Revenue Authority**, CAT-Civil Appeal No. 72 of 2002 (unreported), and **David Nzaligo v NMB PLC** Civil Appeal No. 61/2016.

The respondent's counsel was insistent that the proceedings were unblemished as the applicant knew of the offence she was charged with that is why she replied by saying she had nothing to add because all what was needed has already been explained at the police station, as per exhibit D3 and D4.

The counsel for respondent submitted further that, the CMA heard both parties considered and answered all the issues which arose. He argued that the applicant's termination adhered to the legal requirements as the applicant was called before the disciplinary committee and she was given an opportunity to defend herself. Still on this point, the respondent's counsel moved the court's attention to exhibit D6 which shows that all

signatures appear in the minutes including the applicant's signature. He concluded by urging the court to dismiss the application.

In rejoinder, Mr. Ngofilo submitted that the award was improperly procured in that, the arbitrator treated the dispute as an unfair termination intead of breach of contract. He also argued that, the contract never explained that the applicant was required to have confirmation after the probation phase, and that, the contract was not in permanent but in fixed terms. He therefore distinguished the cases of **Stella Temu** and **David Nzagilo** as in those, there were a clause which provides for probation conditions. He reiterated his prayer that the application be granted.

From the parties' rival submissions, the question is whether the arbitral award was irrational and improperly procured and whether proceedings in the CMA were flawed.

Starting with the 1st ground of revision, the following will be useful as a guide **One**; There is no dispute that, the applicant's probation period was three months and at the time of termination of her employment she had worked for three months and five days and she was not yet confirmed. **Two**; It trite law that, a challenge based on unfair termination is not available to an employee with less than six months. See section 35

of the ELRA and the case of **Serenity on the Lake Ltd v. Dorcus Martin Nyanda**, Civil Appeal No. 33 of 2018 (unreported). **Three**; It is also trite law that an employee is not automatically confirmed upon expiry of probation period even if the employee continues to work after the time of probation and; that the probationer cannot enjoy the rights of the confirmed employee. See the case of **David Nzaligo v NMB Plc**, Civil Appeal No. 61.2016, CAT at Dar es salaam. This position has been restated in numerous decisions of this court and the Court of Appeal of Tanzania. In **Commercial Bank of Africa (T) Ltd v. Nicodemus Mussa Igogo** [2014] LCCD 98, the Court quoted, with approval, the decision in **Mtenga v. University of Dar es Salaam** [1971] HCD 247, that **"***being kept on after expiry of probation does not amount to confirmation.*" In yet another decision in **Stella Temu v. Tanzania Railways Authority**, CAT-Civil Appeal No. 72 of 2002 (unreported), the Court of Appeal drew the following conclusion:

> "*…. in the present case, however, we are of the opinion that there was no right of 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 be given reasons extends even where a person is told that he/she has failed an interview."

Bearing the above in mind and deducing from applicant's affidavit and submissions, Mr. Ngofilo has taken the view that the arbitrator misdirected himself by tackling the matter as unfair termination while the applicant's complaint was based on breach of contract. Indeed looking at the CMA Form no. 1, at part 3, the appellant has ticked the box which says '*breach of contract*' as the nature of dispute. However, having read the CMA award, the arbitrator has throughout referred the dispute as unfair termination and dismissed it for lack of jurisdiction as per Section 35 of ELRA. **Section 35 of the Employment and Labour Relation Act, Cap 366 R.E 2019**, stipulates that: -

"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 applicant's counsel is arguing that the applicant's complaints before the CMA were lawfully and the CMA should have entertained the dispute because it was relating to breach of contract and not unfair termination. That, section 35 of the ELRA limits employees who have worked under 6 months to approach the CMA when they want to complain

about unfair termination only, and not for breach of contract. The respondent thinks otherwise; that, the CMA was justified in its decision. In this 1st ground, the question is whether section 35 of the ELRA applies to the disputes which arise from breach of contract. In dealing with this issue, I will borrow wisdom from the Court of Appeal as earlier on, it was faced with an almost similar situation in a case of **Stella Lyimo v CFAO Motors Tanzania Limited**, Civil Appeal No. 378 OF 2019, Court of Appeal of Tanzania at Dar es Salaam. Among the issues deliberated by the Court, was whether the CMA was supposed to entertain the dispute because it was based on breach of contract and not unfair termination, and the Court had this to say:

> *'Despite Mr. Ndosi's attempt to argue against the application of the section to the appellant, we are not persuaded by his argument. Contrary to the learned advocate's submission that his client's case before the CMA was one of breach of employment contract distinct from unfair termination which is what is targeted by section 35 of the Act, the facts on the ground speak otherwise. First of all, we do not think the learned advocate is correct in his submission that breach of an employment contract is distinct from a complaint based on unfair termination.* ***It***

> ***is trite, we think, that unfair termination is one and the same as a breach of contract by termination other than what is regarded as fair termination under section 36 (a)(i) of the Act. Obviously, there could be various forms of breaches of an employment contract not necessarily based on unfair termination.*** *However, the assertion that there was a breach of contract as the appellant did before the CMA attracting compensation of two years' salaries and damages falls squarely on a complaint that the respondent terminated the contract unfairly since the appellant considered herself to have been an employee of the respondent.* ***We find it difficult to follow the appellant whose cause of action was, for all intents and purposes, predicated upon repudiation of the binding contract of employment asserting breach of such contract without regard to unfair termination****.' (Emphasis added)*

Therefore, the Court resolved that breach of contract is one way which may constitute unfair termination although there could be other ways. I am inclined to this decision in that, breach of contract in labour disputes cannot be alleged exclusively from unfair termination as one

cannot claim the former without asserting the latter. As it happened in **Stella Lyimo**, I have also gone through the rest of CMA from No. 1 at page 3 of the form where the applicant was asked to make a summary of the facts of the dispute and she stated as follows:

> *'**My contract was unfairly terminated** on 5.2.2021, because the procedures were not followed, hence the act of termination is equivalent to breach of contract.' (emphasis added)*

If I can borrow the words from the Court in **Stella Lyimo** (supra) at page 16, The Court stated that:

> *"It is beyond peradventure that her case before the CMA was **breach of contract of employment by unfair termination.** That was regardless of the fact that the respondent denied that the appellant had never been her employee as no contract of employment came into existence following revocation of the offer. **Whatever the merits in the appellant's case, in so far as it was founded on unfair termination, it was expressly barred by section 35 of the Act."*** [Emphasis added]

To conclude, it is right to state that as the appellant was an employee with less than 6 months employment, therefore the CMA was

justified in deciding that, it did not have jurisdiction to entertain her dispute, be it as unfair termination or breach of contract. Therefore the 1st ground falls away. Considering the decisive importance of the first ground, I refrain from discussing the rest of the grounds. Finally, this appeal fails and it is hereby dismissed. I make no orders for costs, this being a labour dispute, each party will bear its own cost.

It is so ordered.

DATED at **MWANZA** this 24th day of March, 2023.

L. J. ITEMBA

JUDGE

Judgment delivered in Chamber in the presence of Mr. Musa Nyamwelo Counsel for respondent also holding brief for Mr. Masanja Ngofilo counsel for the applicant and Ms. Glady Mnjari, RMA.

L.J. ITEMBA
JUDGE
24.3.2023