

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO.9 OF 2022

***(C/f Labour Dispute No. CMA/ ARS/ ARS/618/20/01/21 at the Commission
for Mediation and Arbitration Arusha)***

EVANS PROCHES TESHA.....APPLICANT

VS

MANPOWER SOLUTION LTD.....RESPONDENT

JUDGMENT

Date of last Order:27-9-2022

Date of Judgment :7-11-2022

B.K.PHILLIP,J

Before me is an application for revision made under section 91(1) (a) (b) , (2) (a)(b) (c) and 94(1) (b) (i) (4) (a) (b) of the Employment and Labour Relations Act, (Henceforth " ELRA"), Rule 24(1), (2), (a),(b), (c), (d), (e), (f), (3) (a), (b), (c), (d), and 28 (1) (c), (d), (e) of the Labour Court Rules , G.N. No.106 of 2007 (Henceforth " GN. No. 106/2007").The applicant prays for the following orders;

- i) That this Honourble Court be pleased to call for examination the records of the proceedings and Award of the Commission for Mediation and Arbitration at Arusha in labour dispute No. CMA/ ARS/ARS/618/20/01/21 dated 13th December 2021, for the purpose of satisfying itself as to the regularity , legality and propriety thereof.
- ii) That this Honorable Court may be pleased to revise the Arbitrator's Award in Labour Dispute

No.CMA/ARS/ARS/618/20/01/21 dated 13th December , 2021 by quashing and setting it aside.

- iii) Any other relief and or further order the Court may deem just to grant.

The application is supported by an affidavit sworn by the applicant. The respondent's principal officer, Mr. Zacharia Nyaki, filed a counter affidavit in opposition to the application. The applicant was represented by his personal representative , Mr. Alex Michael whereas the respond was represented by the learned Advocate Emmanuel Matondo.

A brief background to this application is that on the 15th of October 2020, the applicant herein was employed by the respondent as a driver under a one year contract with a probation period of not less than three (3) months. He worked for seven (7) days only. While in course of his employment driving the respondent's motor vehicle loaded with soft drinks which were supposed to be delivered at Tengeru he was involved in an accident. The motor vehicle overturned and all goods loaded therein were damaged. The respondent was of the view that the accident was due to the applicant's negligence. Thus, he suspended him under full pay and conducted a disciplinary hearing. Consequently , on the 14th November 2020 the applicant's employment was terminated .The respondent decided to pay him a sum of Tshs 450,000/= and Tshs 105,000/= being one month salary and payments in lieu of seven days' notice. Aggrieved by the respondent's decision , the applicant lodged complaint for unfair termination at the Commission for Mediation and Arbitration (CMA).He prayed for the following reliefs;

- i) Payment of salaries for the remaining period of the contract-Tshs. 4,950,000/=
- ii) Repatriation costs from Arusha to Moshi -Tshs. 900,000/=
- iii) Payment of substance allowance up to the date of repatriation.
- iv) Issuance of Certificate of service.

Upon receiving evidence from both sides that Arbitrator made a finding that the applicant's termination was substantively and procedural unfair. He was of the view that the accident might have been due to mechanical default in the motor vehicle notwithstanding that the same was in good condition before starting the trip to Tengeru. In addition, the Arbitrator held that the respondent failed to demonstrate that the applicant was accorded the right to be heard. At the end of the day he ordered the respondent to pay the applicant a sum of Tshs 2,250,000/= which is equivalent to five months salary as remedy for breach of contract on assumption that since the probation period stipulated in the applicant's contract of employment was not less than three (3) months, the same could be extended to the minimum probation period stipulated in the Labour laws which is six (6) months. Thus, he was of the view that the remaining probation period was five months. Moreover, he made a finding that the applicant had anticipation that he would work with the respondent up to the end of the probation period. Also, he ordered for payment of repatriation costs from Arusha to Moshi, the applicant's place of recruitment.

The applicant was aggrieved by the decision of the Arbitrator. Thus, he lodged the instant application.

This application was heard ex-parte following the non – appearance of the respondent's advocate on the hearing date despite the fact that he was aware of the same.

Mr. Alex started his submission by adopting the contents of the affidavit in support of the application. He went on submitting that the Arbitrator erred in law for failure to grant the applicant the reliefs sought in his complaint before the CMA. He contended that the Arbitrator's decision is based on issues pertaining to the probation period which was not among the issues argued during the hearing and no evidence was presented at the CMA to prove that the applicant was supposed to be under probation for a period of six (6) months. He insisted that the Arbitrator was

supposed to determine whether or not the respondent complied with the requirements provided in the provisions of Rule 10 of GN.No.42/2007 and not otherwise. Mr. Alex argued strongly that since the respondent breached the respondent's contract of employment, then the applicant deserves to be paid salaries for the remaining period of the contract of employment.

Furthermore, Mr. Alex argued that the respondent was supposed to be paid substance allowances from the date of termination of his contract to the date of repatriation since he was recruited in Kilimanjaro Region. He contended that the Arbitrator did not say anything about the claim for substance allowance. He was emphatic that the payment of substance allowance is a legal right of an employee. He cited the case of **Elizabeth Glaser Aids Foundation Vs Sija Bandari Batchu, Revision No.112/2009** (unreported), **Arusha International Conference Center Vs Hamis A. Bani, Revision No 133/2017** (unreported). Mr. Alex prayed this appeal to be allowed.

Having dispassionately analyzed the submissions made by Mr. Alex, perused the CMA records as well as the labour laws, let me proceed with the determination of the merit of this application. The evidence adduced by the applicant at the CMA shows that he was employed under a one-year contract but was supposed to be under probation for a period of not less than three (3) months. He worked with the respondent for seven (7) days only. His contract of employment was terminated when he was under the probation period. Under the circumstances, in my considered legal opinion the applicant's complaints were supposed to be dealt with in accordance with the provisions of Sub-Part "F" of ELRA titled "Other incidents of Termination" which starts from section 41 to 44 of ELRA because she was employed under a fixed term contract. (Also, see the case of **Jane Chabruma Vs National Micro Finance Bank, Revision No. 159 of [2010, 2011-2012] LCCD 63**) Now, according to section 41 (1) (a) of the ELRA, if a contract of Employment can be terminated on notice, the period of notice shall not be less than seven (7) days if notice is

given in the first month of employment. With due respect to the Arbitrator, his finding that there was breach of the contract of employment and the award for the payment of Tshs 2,250,000/= are erroneous since the applicant was still under probation. He was not yet confirmed by the respondent since he was doing a practical interview, and as per the facts of the case, he failed the practical interview. In the case of **Commercial Bank of Africa (T) Ltd Vs Nicodemus Musa Igogo, Revision No.40 of 2012, [2014]LCCD 98**, this Court held that fair termination principles are not applicable to employees on probation and quoted the decision of Court of Appeal in the case of **Stella Temu Vs Tanzania Railways Authority, Civil Appeal No.72 of 2002** (unreported) in which the Court of Appeal held as follows;

*" in the present case, however, we are of the opinion that there was no right of a hearing because there was no termination but it was merely a non-confirmation while Stella remained in the employment of MOF. It is our decided opinion that **probation is a practical interview. We do not think that the right to be heard and to be given reasons extends even where a person is told that he/she has failed the interview**"*

(Emphasis is added)

In addition to the above, the applicant's contract of employment stipulated clearly that the probation period was not less than three months. The Arbitrator's assumption that the Arbitration period could be extended is completely unfounded. Not only that, the contract of employment stipulated clearly that it could be terminated during the probation period. Thus, the Arbitrator's finding that the applicant had anticipated that he would work up to the end of the probation period is baseless.

From the foregoing, it is also worth noting that since probation period is a practical interview, it is obvious that if an employee's contract is terminated during the probation period he is not entitled to the rights obtained upon completion of the probation period successfully. As alluded earlier in Ruling it is in record that the applicant's termination letter

indicates that the respondent decided to pay the applicant Tshs 450,000/= and Tshs 105,000/= being one month salary and payment in lieu of seven days' notice respectively. Taking into consideration the period the applicant worked with the respondent and his place of recruitment, it is my settled opinion that the payments given to the applicant by the respondent was quite enough and in compliance with the law. I have mentioned earlier in the Ruling that according to section 41 (1) (a) of the ELRA, if a contract of Employment can be terminated on notice, the period of notice shall not be less than seven (7) days if notice is given in the first month of employment. I am in agreement with the Arbitrator's findings that the applicant's claim for a sum of 900,000/= for repatriation costs was not proved.

I wish to point out that the case of **Elizabeth Glaser Aids Foundation** (supra) and **Arusha International Conference Center** (supra) relied upon by Mr. Alex in his submission are distinguishable from the facts of this case because they were not in respect of employees under probation period. Thus, the same are irrelevant in this matter.

In the upshot, this application is dismissed. In addition, I find myself compelled to invoke the revisional powers of this Court and set aside the award made by the Arbitrator as I hereby do. The Award made by the Arbitrator on 13th December 2021 is hereby set aside. This being a Labour case I give no Order as to costs.

Dated this 7th day of November 2022




B.K.PHILLIP

JUDGE.