

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO 101 OF 2019

YUSTO HABIYE APPLICANT

VERSUS

KNIGHT SUPPORT (T)LIMITED.....RESPONDENT

JUDGMENT

Date of Last Order 14/08/2020

Date of Judgment 28/08/2020

Z.G.Muruke, J.

This decision is in respect of the application for revision of the decision of Commission for Mediation and Arbitration (herein to be referred as CMA) in labour dispute no. *CMA/ DSM/KIN/R.459/15/16/295* which was delivered by Hon. William R. - Arbitrator on 22nd December 2017 in favour of the respondents. The applicant **YUSTO HABIYE** being aggrieved with the award filed the present application seeking to revise and set aside the award.

The application is supported by an affidavit of the applicant's affidavit. The same was challenged by the counter affidavit sworn by respondent's Human Resource Officer Paschal Mayokoro.

The matter proceeded by way of written submission both parties were represented by the counsels, whereby the applicant was served by Advocate Miriam Ismail Majamba, whereas the respondent enjoyed the services of Advocates from Fides Attorneys.

The brief facts leading to the present application are that, the applicant was employed by the applicant on 26th May, 2015 as Sales Representative. The applicant alleged that he was under a probation of three (3) months, which ended successful continued to perform his duties. That on 11th September, 2015 he was terminated on ground of poor work performance. Aggrieved with the termination he filed a labour dispute before CMA where decision was not on his side. Being resentful with the award he filed the present application seeking the award be revised and set aside.

The applicant's counsel submitted that, the applicant termination was unfair both substantively and procedurally. There were neither the performance standard which were set by the respondent, consultation, warning, notice prior his termination nor element of incapacity to rely on his termination, referring to Rule 15,17 and 18 of Employment and Labour Relations (Code of Good Conduct) GN.42/2007 and the case of **Tanzania Breweries Limited v Leo Kobelo**, Rev.No.211/2014. Respondent did not adhered to the procedure for termination as required by the law no time to improve, right to representation and the applicant was denied of a right to be heard. That the arbitrator failed to consider the stated facts to reach in her decision the award was improperly procured, therefore it is unlawful, illogical and irrational.

Responding to the applicant's contentions the respondent counsel started by raising a preliminary objection that the application is incompetent for failure to attach the necessary document as per Rule 24(2)(f) of the Labour Court Rules GN 106/2007. It was insisted that the applicant in his submission did not argue on the grounds for revision, they prayed for this court to dismiss the same.

It was further argued that, the respondent had a valid reason for terminating the applicant and had complied with the procedure for termination as it was testified by DW1, DW2, and DW3 and all the due documents were tendered before CMA. That applicant was still under probation hence cannot be protected by the issues of unfair termination, citing Section 35 of the Employment and Labour Relations Act, Cap 366 RE 2019 and the case of **Jane Chabruma v National Microfinance Bank**, Rev.No.159/2010. He thus prayed for dismissal of the application.

In determining the Preliminary objection, I have gone through the Notice of application and found that the application is supported by the impugned award, termination letter, contract of employment and CMA F1. The respondent did not state which documents are material than the attached ones, Since the same are attached in the notice of application I find that absence of a list is not fatal, hence the objection has no merit I overrule the same.

Having gone through the submissions of the parties, records and relevant laws, here are the issues for determination;

1. Whether the respondents is covered under section 37 (2) of the Act?
2. What are reliefs to the parties?

Before addressing the first issue I have noted from records that there was a dispute in regard to the duration of probation. The applicant claims that it was three months period whereas the respondent stated that it was six months period. In this aspect I fully agree with the arbitrator that the probation period was of six months on the ground that the applicant's the three months indicated in the employment contract was edited by a pen while the employment contract tendered by the respondent indicated six months period and it was supported by the declaration of intent (exhibit D1) signed by the applicant showing six months as probation period.

Having found that probation period was for six months, it is from records that the applicant was employed by the respondent on 27th May, 2015 and he worked until 12th September 2015 when he was terminated. It is apparent that the applicant only worked for about 4 months which are below six months. The law is very clear that the employees under six month's period are not covered by the provision of unfair termination as per Section 35 of Cap 366 RE 2019.

Sub – Part E Unfair termination of employment

35. The provisions of this sub-part shall not apply to an employee with less than six (6) months' employment with the same employer whether under one or more contracts."

This was also the position in a number of including the case of recent decision of the Court of Appeal in the case of **David Nzaligo V National Microfinance Bank PLC, Civil Appeal No. 61 of 2016 CAT**, Korosso, J.A , She 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."

Therefore, basing on that position the applicant is not covered under the provision of Section 37 (2), hence cannot claim for unfair termination. Since the applicant claimed for unfair termination which he is not covered with, I find that the arbitrator was right to dismiss the application for want of merit. The application is hereby dismissed. It is so ordered.



Z. G. Muruke

JUDGE

28/08/2020

Judgment delivered in the absence of all the parties.



Z. G. Muruke

JUDGE

28/08/2020