

TANZANIA / JUDGMENT

edwin kikwasi vs westgate girls secondary school another 2022 tzhcld 675 15 july 2022

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM REVISION
APPLICATION NO. 277 OF 2021 (Arising from Arbitral Award issued on 7/6/2021 by Hon.
Mwaiongo A, arbitrator in Labour Complaint No. CMA/PWN/KBH/240/2020 at Kibaha) BETWEEN
EDWIN KIKWASI..... APPLICANT AND WEST GATE GIRLS SECONDARY
SCHOOL..... 1st RESPONDENT KIBAHA HOLDINGS LIMITED..... 2nd RESPONDENT

JUDGMENT

Date of last order: 29/06/2022 Date of Judgment: 15/07/2022 B. E. K. Mqanqa, J. On 30th December 2019, Applicant entered a two years fixed term contract of employment with the respondent to teach Chemistry, Mathematics and Physics with effect from 1st January 2020 to December

2021. In the said fixed term contract, the parties agreed that applicant will be under probation for six (6) months. On 13th January 2020, by a letter, respondents notified the applicant that he was appointed as head of department with effect from 1st January 2020 and that the position will attract duty allowance of 15% of applicant's gross salary. On 17th January 2020, applicant signed the said letter to acknowledge appointment, but this appointment did not change other terms of the said fixed term contract. After expiration of the six months of probation, respondents served the applicant with a three months' Notice of extension of probation period setting out reasons as inter-alia to cover the period of covid-19 pandemic in which applicant was not assessed because schools were closed. On 27th November 2020, respondents terminated employment of the applicant on ground that he was not successful during probation period. Applicant was aggrieved with the said termination of his employment, as a result, he filed labour complaint No. CMA/PWN/KBH/240/2020 before the Commission for Mediation and Arbitration henceforth CMA at Kibaha claiming to be paid TZS. 25,000,000/= being compensation for 13 months' salary for the remaining period of the contract, general damages for breach of contract and accrued leave. On 7th June 2021, Hon. Mwalongo, Arbitrator, having heard evidence of both parties, issued an award that applicant was under probation, hence he does not deserve compensation of 13 months' salary being the remaining period of the contract because he

was not confirmed. 2 Applicant was further aggrieved by the said award hence this application for revision. In the affidavit in support of the application, applicant raised six grounds to wit: -

1. That the Arbitrator erred in law and fact in holding that the complainant/Applicant was terminated while he was under probation period.
2. That the Arbitrator erred in law and fact in holding that the complainant/Applicant was not performing well wmtte there is no exhibited assessment(s) made by the respondents.
3. That the Arbitrator erred in law and fact in relying on exhibit S-2 and holding that the extension of complainant's /Applicant's probation period was communicated to him.
4. That the Arbitrator erred in law and fact in holding that the Applicant was given chance to improve without any proof.
5. That the Arbitrator wrongly applied the provision of section 37 of the Employment and Labour Relations Act in the breach of contract dispute.
6. That the Arbitrator has failed to evaluate the evidence on record, hence occasioned injustice to the complainant/Applicant. In opposing the application, respondents filed the counter affidavit of Yusuph Luwuba, their counsel. By counsel, the application was disposed by way of written submissions whereas the applicant enjoyed the service of Herry Paradise Kauki, learned counsel while respondents enjoyed the service of Yusuph Luwumba, also learned counsel. In his written submissions, Mr. Kauki, learned counsel for the applicant abandoned the 1st and 3rd grounds. Submitting on the 2nd, 4th, 3 and 5th grounds, counsel for the applicant argued that respondents did not comply with the provisions of Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 at the time of terminating employment of the applicant. He submitted further that, applicant had a right to fair procedure and hearing and cited the case of Agnes B. Ruhere v. UTT Microfinance PLC, Revision No. 459 of 2015 HC and Saekyung Construction Company Limited v. Hussein Sheshe Juma, Revision No. 26 of 2020 to bolster his submission. He submitted further that the complaint of the applicant was that both substantive and procedural fairness of termination provided for under Rule 10 of GN. No. 42 of 2007 (supra) were not adhered to by the respondents during termination of applicant's employment hence breach of contract. Counsel for the applicant submitted further that, applicant was terminated without being informed by the respondents' concerns; was not afforded right to respondent to the concern; was not given reasonable time to improve performance or correct behaviour and not proof that applicant failed to do so. Mr. Kauki also submitted that, the Arbitrator did not make findings as to whether respondents complied with the provision of Rule 10(7) and (9) of GN. No. 42 of 2007 (supra). 4 On the 6th ground relating to evaluation of evidence, Mr. Kauki, learned counsel for the applicant, cited the case of Materu Leison & J. Foya v. R. Sospeter [1988] TLR 102 that this court has power to re- evaluate evidence. He submitted further that, in the CMA record, respondents did not prove how applicant was assessed and his performance found not to meet their standards. He added that respondents

witness testified while under cross examination that applicant was neither evaluated, assessed, instructed, trained, counselled nor given an opportunity to be assisted by the respondent or fellow employees. On his part, Mr. Luwumba, learned counsel for the respondents, responded on the 2nd, 4th, and 5th grounds by submitting that fair procedure of terminating a probationer as provided for under Rule 10(1) and (7) of GN. No. 42 of 2007 (supra) were complied with because applicant was served with extension of probation period (exh. S-2) highlighting areas he was required to improve. Responding to the 6th ground, Mr. Luwumba, counsel for the respondent submitted that arbitrator evaluated evidence. He went on that applicant admitted that he was not confirmed and further that he was terminated while under probation and cited the case of David Nzaiigo v. National Microfinance Bank PLC, Civil Appeal No. 61 of 5 2016, CAT (unreported) to support his submission that confirmation is not automatic upon expiry of probation period. In rejoinder, Mr. Kauki learned counsel for the applicant reiterated his submissions in chief that respondents did not comply with the provisions of Rule 10 of GN. 42 of 2007 (supra). I have carefully examined evidence of the parties in the CMA record and considered submissions of counsel in this application and find that it is undisputed fact that the parties had a two years fixed term contract that commenced on 1st January 2020 and was expected to expire on 30th December 2021. It is also undisputed fact that, in the said fixed term contract, applicant was under probation for the period of six

- (6) month. It is further undisputed that applicant was not issued with a confirmation letter and that his employment was terminated on 27th November 2020. Initially the applicant filed a ground that the arbitrator erred to hold that applicant was terminated while under probation and further that the arbitrator erred to hold that extension of probation was communicated to the applicant as reflected in the 1st and 3rd grounds of revision quoted hereinabove. But upon reflection, counsel for the applicant abandoned these two grounds. Therefore, it is not disputed that applicant was terminated while under probation and that extension 6 of probation for three (3) months after expiry of six (6) months was communicated to the applicant. In fact, this is reflected in evidence of both sides. It was submitted by Mr. Kauki, learned counsel for the applicants that complaint of the applicant at CMA was that the provision of Rule 10. of GN. No. 42 of 2007(supra) relating to fairness of termination of a probationer was not complied with. Counsel for the applicant submitted that applicant was neither evaluated, assessed, instructed, trained, counselled nor given an opportunity to be assisted by the respondent or fellow employees and that he was not given reasonable time to improve performance or correct behaviour. With due respect to counsel for the applicant, I have carefully read evidence of the applicant (PW1) and find that he said nothing relating to non-compliance with the aforementioned Rule. In the CMA Fl, applicant's complaint was that he was unfairly terminated. In fact, he was claiming inter-alia, twelve (12) months' salary compensation for unlawful termination. In CMA Fl, applicant filled Part B, that relates to termination of employment only. The complaint was therefore not relating to unfair labour practices relating to probation, rather, was on unfair termination and there is nothing in the CMA Fl suggesting that the complaint was based on

unfair labour practices relating to probation. That being the position, Ruhere's case 7 (supra) cannot apply in the circumstances of this application. Since applicant indicated in the CMA F1 that his complaint was against breach of contract, he is bound by those pleadings and cannot be allowed to change at this stage and submit that the complaint was against unfair labour practices relating to probation. Applicant was supposed to tick the box relating to "other" and show that the dispute is on unfair labour practice relating to probation. In the submissions before me, it appears that counsel for the applicant is abandoning or moving away from his pleadings at CMA. It has been constantly held several times by the Court of Appeal that parties are bound by their own pleadings. See the case of George Shambwe v. AG and Another [1996] TLR 334, The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic), Civil Appeal No. 2 of 2020, CAT (unreported) and Astepro Investment Co. Ltd v. Jawinga Company Limited, Civil Appeal No. 8 of 2015, CAT (unreported) to mention but a few. In his evidence, Johnson Kariuki (DW1) testified that applicant was not performing, which is why, he was not confirmed. He testified further that applicant was issued with extension of probation that was ending on 30th November 2020, but he was terminated on 27th November 2020 while on probation. In his evidence, applicant (PW1) testified that he was claiming salary for 13 months period remaining on the said fixed term contract and not unfair practices relating to probation. Since applicant was not confirmed and was terminated during probation period, he was terminated while on practical interview as it was Stella Temu v. Tanzania Revenue Authority, [2005] TLR 178 Nza/igo's case (supra). In other words, applicant failed the practical interview. Since applicant was terminated while under probation, he was not entitled to the reliefs relating to unfair termination. The arbitrator cannot be faulted for not awarding the applicant. For the foregoing, I hereby uphold the CMA award and dismiss this application for lack of merit. Dated at Dar es Salaam this 15th July 2022. B. E. K. Mganga JUDGE
Judgment delivered on this 15th July 2022 in the presence of Edwin Kikwasi, the applicant and Benedict Magoto Mayani, Advocate for the respondents. B. E. K. Mganga JUDGE 9

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