

TANZANIA / JUDGMENT

kigemu security services vs josephine leo mlowe 2024 tzhc 264 9 february 2024

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UNITED REPUBLIC OF TANZANIA JUDICIARY HIGH COURT OF TANZANIA MOROGORO
DISTRICT REGISTRY AT MOROGORO LABOUR REVISION NO.9 OF 2023 (Originating from CMA/
MOR/53/2022 of Commission for Mediation and Arbitration for Morogoro) KIGEMU SECURITY
SERVICES,,... APPLICANT VERSUS JOSEPHINE LEO MLOWE..... RESPONDENT

JUDGEMENT

Date,of last Order: 24/11/2023 Date of Judgement on: 9/2/2024 BEFORE: G. P MALATA,³ The applicant, KIGEMU SECURITY SERVICES and JOSEPHINE LEO MLOWE appeared before this court through the present Labour Revision arising from CMA/MOR/53/2022 of Commission for Mediation and Arbitration Page 1 of 15 for Morogoro. The respondent was the complainant against the applicant herein. The respondent stated that she was engaged by the applicant on oral contract for a period of twelve months from 01/01/2021 working as security guard at consideration of TZS 100,000/= per month. That on 01/06/2022 her employment was unfairly terminated contrary to the labour laws including section 37 which of the Employment and labour relations Act, Cap 366 R.E. 2019 which reads; (1)It shall be unlawful for an employer to terminate the employment of an employee unfairly.

- (2) A termination of employment by an employer is unfair if the employer fails to prove- (a)that the reason for the termination is valid; (b)that the reason is a fair reason-
- (i) related to the employee's conduct, capacity or compatibility; or (ii)based on the operational requirements of the employer, and
- (c) that the employment was terminated in accordance with a fair procedure. Page 2 of 15 (3)It shall not be a fair reason to terminate the employment of an employee - (a)for the reason that the employee - (!) discloses information that the employee is entitled or required to disclose to another person under this Act or any other law; (H) fails or refuses to do anything that an employer may not lawfully permit or require the employee to do; ^ (Hi) exercises any right conferred by agreement, this Act or any other law; Also, section 44 (1)(a) to (f) of the Employment and Labour Relations Act, § t Cap.366 R.E.2019. Additional notice of termination was given orally. The respondent tabled before the CMA various documents to prove that, she worked with the applicant. Among documents tendered were NMB Bank

Statement from 01/01/2021 up to 20/05/2022 and letter from applicant dated 28/02/2022 to prove that there was employer and employee relationship. The respondent prayer before the CMA was that; the applicant be ordered to pay terminal benefits in accordance with the law. Page 3 of 15 The applicant was also given right to enter a reply on the claims raised. The applicant herein stated that, he does not have any contractual relationship with the respondent as they never concluded any employment contract. However, he stated that the respondent applied to be engaged as security guard and upon being asked to bring certificate she failed to do so. As result the applicant did not engage her. As such, the applicant claims that the respondent has no genuine right arising from any contractual relationship. After the CMA heard the complaint before it, it found that there was employment contract between the parties entered orally which continued for more than a year commencing 01/01/2021 to 30/05/2022. That the same was proved by payment of salaries for the entire period as evidenced by bank statement among other documents. As there was oral contract, then at the time of termination of employment procedure was to be adhered to including payment of terminal benefits. Finally, CMA ordered the applicant herein to pay the respondent a total of TZS 700,000/=. Aggrieved thereof, the applicant has preferred the present labour revision challenging the CMA decision raising issues that; Page 4 of 15

1. Whether breach of contract was prpved by the respondent
2. Whether the arbitrator correctly held that the applicant had no justification to terminate the contract and that there was none compliance of termination procedure,
3. Whether failure to follow procedure for terminating a probatlional employee amount to breach of employment contract,
4. Whether Is proper for the arbitrator to award compensation of remaining period of the contract of employment, that Is six months' salary to probationary employee. At the hearing, the Applicant appeared represented by Mr. Abdul Bwanga learned counsel. In support of the application, he submitted that, the parties herein entered Into probatlional oral contract for a period of six months subject to meeting of condition stipulated In the contract that. Is, the respondent to submit certificate of attendance of JKJ or Mgambo training. That, the respondent failed to submit It thus termination. That during the probatlional period the respondent was being paid TZS 100,000/= as salary per month. That the applicant terminated the contract orally on 01/06/2022. That the respondent was not entitled to any terminal dues. Page 5 of 15 .He submitted that; the respondent made a.referral to CMA on 17/06/2022 complaining of unfair termination. That CMA erroneously entertained the dispute on unfair termination in the circumstances. He referred this court to the case of Evergreen Mumba Vs New Bantu Morogoro Security Guard Ltd, Revision No. 15 of 2018, that the remedy for breach of contract is different unfair termination. That unfair termination applies only on permanent employee not with fixed contract. In the present case, the reason for termination was failure to submit JKT/Mgambo certificate of attendance training. If the contract was fixed one then she could have been only paid the remaining salary, repatriation costs,

payment for notice. He decided to withdraw issue no. 4.2, 4.3 and 4.4 of the statement of issues as reflected in paragraph 4 of the affidavit in support of the application on the reasons that it has been covered in ground no. 4.1 of the same paragraph. He thus prayed that, the application be granted and the CMA decision be reversed. Page 6 of 15 ,In reply thereof, the respondent who appeared unrepresented resisted the application by stating that, she was invited by the respondent and given employment for two years commencing on 01/01/2021. That she was engaged as watchman/security guard on oral contract at a salary of TZS 100,000/= per month. The contract was to end on 30/12/2022, however it was terminated on 01/06/2022 for no reasons. It is not true that the contract was for six months. Upon termination, the respondent was not given reasons for termination, notice of termination, not paid gratuity, no leave pays, no repatriation cost was paid. That she was not engaged on probation period. She thus prayed the court to dismiss the application. By way of rejoinder Mr. Bwanga learned counsel insisted on the contract was for six months and that the reason for termination was failure to submit JKT/Mgambo Certificate of training. To start with, the applicant's first version of defence at the CMA was that, he had no employment contract with the respondent. This was well determined by CMA, having gone through the evidence concluded that, there Page 7 of 15 was oral contract entered between the parties. This is no longer an issue by the applicant save for the above issues. However, having the applicant withdrew issued no. 4.2, 4.3 and 4.4, maintained that, there was probational contract with a fixed period of six months and not otherwise. The court finds indebted to start with the issue. It is evident, at the hearing of the case at the CMA various documents, in particular respondent's NMB bank statement shows that, the first monthly salary from the applicant was deposited with respondent's account on 30/01/2021 and continued in every month and the last salary was 06/05/2022. The Bank statement was issued by NMB Branch Manager, Morogoro Business center on 12/09/2022. This confirms that, the respondent had a deal with the applicant from January, 2021 to the date of termination that is, 01/06/2022 which is a period of eighteen (18)clear months. Therefore, the story by the applicant herein that there was a contract for six months is total lies and untrue, thus incredible and unreliable. Page 8 of 15 In the event therefore, this court rule that, the parties concluded a contract of two years, which relationship lasted for eighteen (18)clear months instead of two years. The next issue is on whether there was breach of contract Since there is no dispute on existence of contract, then the next question is; one, who ended the contract, two, on which grounds, three, was the respondent given notice of termination, four, was the procedure for termination complied with, five, was the respondent legally entitled to any terminal dues and six, was the respondent paid terminal dues in accordance with the labour laws. As to the first question, it is undisputed that the applicant brought the contract to an end. This is evidenced by the testimonies from both sides before CMA. Second, on whether the respondent was given reasons for termination, there is no proof if at all applicant did issue such notice. The applicant was placed in a better position as he is the one who issued it but in vain. In the absence thereof, the respondent's claim that she was not given notice of termination stands. The applicant's act therefore was in Page 9 of 15 CQntravention of section 37(2) of the Employment and Labour Relations Act, which provides that; (2)A

termination of employment by an employer is unfair if the employer fails to prove- (a) that the reason for the termination is valid; (b) that the reason is a fair reason-

- (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer, and ©
- (c) that the employment was terminated in accordance with a fair procedure. (3) It shall not be a fair reason to terminate the employment of an employee - (a) for the reason that the employee -
- (i) discloses information that the employee is entitled or required to disclose to another person under this Act or any other law; Page 10 of 15 (ii) fails or refuses to do anything that an employer may not lawfully permit or require the employee to do; (III) exercises any right conferred by agreement, this Act or any other law; The third question is on whether there was notice of termination, the evidence on record shows that, there was no notice of termination issued by the applicant. The applicant was placed in a better position to assist the CMA that he really issued notice of termination as required by section 41 of the Employment and Labour Relations Act which in law is as well required to have reasons for termination. Thus, the applicant contravened the position of section 41 of the Act, supra. * (• Mr. Bwanga learned counsel submitted that, only employees with permanent contract are required to be given notice of termination, the scenario does not apply to present case, as the contract was terminated before the contractual period. Therefore, whether it applies or not, is not an issue in this case. The fourth question, is on whether the procedure for termination was complied with, based on the answer to question nos. 1, 2 and 3 herein above, the answer to the fourth question is that, the procedure for termination was Page 11 of 15 not followed. Therefore, there is unfair termination of contract of employment by the applicant thus in contravention of section 37 of the Employment and Labour Relations Act. The fifth question on whether the respondent was legally entitled to any terminal dues following the termination by the applicant, the answer is found in section 44(1) and (2) of the Employment and Labour Relations Act which provides that, (1) On termination of employment, an employer shall pay an employee (a) any remuneration for work done before the termination; (b) any annual leave pay due to an employee under section 31 * «■ for leave that the employee has not taken;
- (c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31(1);
- (d) any notice pay due under section 41(5); and
- (e) any severance pay due under section 42;
- (f) any transport allowance that may be due under section 43.
- (2) On termination, the employer shall issue to an employee a prescribed certificate of service. Page 12 of 15 As to the sixth question, on whether the respondent was paid terminal dues in accordance with the labour laws, based on the evidence on record from both sides, it is

evident that, the respondent was not paid terminal dues thence the complaint with reference no. CMA/MOR/53/2022 of Commission for Mediation and Arbitration for Morogoro which result into the present Labour Revision No. 9 of 2023. The CMA has decided that, the respondent is entitled to a total of TZS 700,000/= as the respondent's terminal dues. Moreover, the applicant was in deliberate violation of other labour laws including the NSSF Act and Workers Compensation Act and the Tanzania Revenue laws by failure to comply with all the requirement provided therein. That applicant's act has led to denial of the respondent rights and duties provided under the said laws. The applicant has as well failed discharge his legal obligations of contributing to NSSF and Workers Compensation Fund for the entire period of contract. Acting as Government agent for collecting pay as earn from the respondent, the applicant has legally denied the Government rights to have revenues generated therefrom which is a criminal offence under the said laws. Page 13 of 15 All said and done, I hereby find Labour Revision (Mo. 9 of 2023 with no merits as such, it stands dismissed. In the event I confirm decretal sum of TZS 700,000 ordered by CMA. Further, in the exercise of powers vested to this court under Rule 28 (2) of the Labour Court Rules, 2007 which provides that, (2)Any order or direction given by the court to the responsible person or body from which the proceedings being revised originated shall be complied with. I hereby order, the applicant to pay the respondent, the decretal sum within sixty(60)days from the date of this Judgement. IT IS SO ORDERED DATED at MOROGORO this 09th February 2024. G. P. MALATA JUDGE 09/02/2024 Page 14 of 15 JUDGEMENT delivered at MOROGORO in chambers this 09th February 2024 in the presence of and in the presence of Ramadhani Uwesu (the applicant supervisor) and in the absence of the Respondent. S. P. HAWA mi flmi ^ REGISTRAR 09/02/2024 Page 15 of 15

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