

TANZANIA / JUDGMENT

LABOUR REVISION MATONGO GOLD MINES

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION MUSOMA SUB REGISTRY AT MUSOMA
LABOUR REVISION NO. 23091 OF 2024 REFERENCE NUMBER 202409171000023091 {Arising from
the Award of the Commission for Mediation and Arbitration for Mara at Musoma in Labour
Dispute No. CMA/MAR/MUS/22/2024) MATONGO GOLD MINES
LIMITED.....APPLICANT VERSUS SAMWEL SHILINDE
CHEYO..... RESPONDENT

JUDGMENT

07d & 17 December, 2024 M. L. KOMBA, J.: The applicant herein is seeking for the following orders;

1. This Honourable Court be pleased to examine the record, proceedings and Award made in the Labour dispute No. CMA/MAR/ MUS/22/2024 dated 16/08/2024 before the Commission of Mediation and Arbitration of Musoma, Soieka H. Arbitrator between the abovenamed parties and be pleased to revise and quash the proceedings and the award and set aside the above said award or make such orders as it deem fit andjust. Page 1 of 18
2. Any other relief(s) that this court deems fit andjust to grant The application is preferred under sections 91(1)(a), 91(2)(a), (b), (c) and S. 94 (1) (b) (i), of the Employment and Labour Relations Act, No. 6 of 2004, read together with Rules 24(1), (2)(a), (b), (c), (d), (e) and (f) and
- (3) (a), (b), (c), and (d), and Rule 28(1) (b), (c), (d) and (e) of the Labour Court Rules of 2007 GN No. 106 of 2007 and any other enabling provision and is supported by affidavit of Aziz Abdulrahman Ramadhan Rashidi. In his affidavit specifically at paragraph 10 applicant deponed as follows;
10. That the Applicant is aggrieved by the award issued by the CMA, and now challenges the same in this honourable Court on the ground that the award is unlawful, illogical, and irrational as per grounds stated below; -

- a) That, the honourable arbitrator erred in law by leaving behind the main and crucial issue (issue no. 1) that form the foundation respondent's claim of "unfair labour practices", instead he went to resolve issue No. 2 to justify and answer issue No.1.
- b) The honourable arbitrator erred in law by failure to resolve separately the framed issues so as to reach the just and fair decision. Page 2 of 18
- c) The CMA's award does not conform with the minimal standard and requirements of the law, hence it is impugned award.
- d) That, the honorable arbitrator erred in law in his award by upholding the claims and reliefs sought the respondent while the respondent did not establish the prima facie case against the applicant despite of the facts that at page 8 of the award the Hon. arbitrator in his reasoning confirmed that the respondent when he was giving testimonies, he didn't state as to whether he was under probationary employment or not, and for which term/period.
- e) The honorable arbitrator erred in law by shifting burden of proof to the applicant in absence of prima facie case established by the respondent.
- f) The honorable arbitrator erred in law and facts by shifting burden of proof to the applicant by relying only on the weakness of applicant, that is failure to tender the written employment contract to rebut respondent's claims, while knowingly that the respondent didn't establish the prima facie case against the applicant. Furthermore, the arbitrator also failed to take into consideration that the terms or nature of employment contract can be proved or be entered orally
- g) The honorable arbitrator erred in law and facts by failure to evaluate evidence and testimony presented before him so that he can reach at a just decision.
- h) That honorable arbitrator erred in law and fact by not taking Page 3 of 18 into account the fact that the complaint before CMA was premature. On the other side, the respondent herein filed counter affidavit challenging what was deposed by the applicant. Respondent was engaged by applicant to perform some duties after a long telephone conversation with General Manager of the applicant in which they arrived to terms and the bus fare was sent on account that respondent has to report to applicant company so that he can start the job. On 08/6/2023 he started to perform his duties and was paid un deducted salary via Bank. He had no contract of employment although he was the head of survey department. On 29/01/2024 he was orally informed by Human Resource Officer that applicant company has terminates his employment. He filed labour dispute to Commission for Mediation and Arbitration (CMA) where it was decided that respondent was under probation and applicant did not adhere to termination procedures under his category. He proceeded to award 12 months' salary and other entitlements. Applicant was dissatisfied by the award hence this application. Page 4 of 18 When the matter was called on for hearing, the applicant had the legal service of Mr. William Muyumbu, an advocate while Mr. Gervas Geneya learned advocate represented the respondent. Mr. Muyumbu prayed notice of application and

affidavit to form part of his submission and proceeded that while at the CMA three issues were framed. However, in his award Arbitrator started with issue number two instead of issue number one which was about nature of employment which he said was contentious. He went on submitting that at the CMA form number 1 complainant complained on unfair labour practice which led to unfair termination. To him, it was important for arbitrator to determine the 1st issue so as to establish the nature of employment which existed between the parties before resort to the second issue. He refers this court to *Mwiba Holdings Ltd vs Raymond Wankyo Mniko*, Revision No 26 of 2022 HC Labour Division at Arusha page 15 where it was decided that nature of employment was to be determined first. He insisted that it was important for Arbitrator to determine the type of employment or relationship existed between the parties. Counsel then combined paragraph 10 (b) and (c) and submitted that, for better resolution, an arbitrator was supposed to resolve issues separately Page 5 of 18 instead of combining the 1st and 2nd issue collectively as seen in an award. He complained that findings of the second issue were used to connect and analyse the 1st issues as seen at page 7 and 8 of the award. He insisted that it is necessary for the trial court to make specific finding on each and every issue framed in a case even where some of the issue cover the same aspect as was in *Sheikh Ahmed Said vs Registered trustees of Manyema Masjid TLR 2005 at 61*. Mr. Muyumbu said lack of specific finding on each framed issue render the award to meet minimal standard and requirement of the law as provided under guideline No. 27 of GN 67 of 2007 Labour Institutions Guidelines. Paragraph (d) and (g) were combined and counsel refer to CMA form No.1 where respondent claimed there was unfair labour practice which cause unfair labour termination while he was under probation. However, he submitted that the proceedings show complainant did not give evidence to prove that he was under probation and is under record. That means, he insisted the 1st issue was not resolved as there was no evidence to establish probation. Regardless of the testimony of respondent, Mr. Muyungu complained that arbitrator shift the burden to applicant to prove that respondent, then complainant was working under specific tasks while Page 6 of 18 the position of the law is the party which start to give testimony had burden of proving his claim as was in *Mwiba holding (supra)*. He also supplied this court with *Jason Samsom Rwekiza vs Norvatus Rwechungura Mkwama Civil Appeal 305 of 2020* that burden of prove never shift neither diluted on weakness of opposite parties. Counsel further complained of unfair labour practice established by the Arbitrator during analysis and evaluation of evidence which was contrary to what has been said in *Bright Choice Ltd vs Ramadhan All Abedi Labour Rev 245 of 2021* that there must be a breach on the side of employer. During hearing, he said complainant did not state legal responsibility in which respondent breached or what kind of procedure that were not followed. He further lamented that Arbitrator misdirected himself by establishing that applicant did not tender any evidence to prove there was contract for specific duty with the respondent herein and he did not deny that complainant was under probation period, but even respondent fail to prove that. Honorable arbitrator cited section 15 (6) of ELRA in his analysis however counsel insisted that there was oral contract and section 15 (6) was inapplicable and refer me to *Freiz Adam Mwangwale vs the Arch dioses of Mbeya and Pandahil Secondary School*, Revision No Page 7 of 18 1944 of 2024

where it was held that there must be foundation of the existing contract. On the application of Rule 10 of code of good practice to claim that applicant did not follow the procedure laid to terminate the complainant, he paused that since there was no prove of probation, it was wrong for Arbitrator to rely on that rule. It is also unfair to award 12 months' salary and other prayers to respondent as probation was not proved. He submitted that *In Vivo Energy Tanzania Ltd vs Omary Sharif Rev Appl 20964 of 2024* at page 11 and 12 if it was about unfair labour practice for an employee who was under probation period. In the case at hand, he said respondent was working under six months contract and was left with one month only and therefore was wrong for the arbitrator to award 12 months' salary and other remedies. Submitting on pre maturity of the application as it appears in para (h), it was his submission that Rule 10(1) of GN 42 of 2007 set condition that a complainant must be under probation of not less than a period of 6 months. Reading CMA form 1, respondent claim was unfair termination while under probation. According to complainant he started working to applicant on 8 August, 2023 and was ended in 29 January 2024 that is five Page 8 of 18 months while the guideline need not less than 6 months for complainant to benefit under rule 10(1) and therefore, he finds it was wrong for CMA to entertain the said matter. He prayed the award by CMA to be set aside. Mr. Geneya grouped complains of applicant into three parts and submitted that there is no point from applicant counsel to show that what was done by CMA was contrary to rule 28 (1) of the Labour Court Rules in order for the award to be revised. He was of the position that the award conforms to the requirement of rule TJ of the Mediation Guideline Rules of

2007. Analysing the affidavit of the applicant he said we discovered a legal flaw on verification when deponent said all information was true to the best of the deponent knowledge while as per proceedings it is apparent that the said affidavit contain hearsay from disclosed source. He went on submitting that there was issue of oral contract which was made between the two and no other person had knowledge of it and therefore a deponent had hearsay information as was not party to oral contract and prayed me to ignore the affidavit and supplied the decision in *Jacline Ntuyabaliwe Mengi and Others vs Reginald Mengi and others Civil Application 332 of 2021 (2022) TZCA 748* at page 26 while insisting that the application is supported by defective affidavit which Page 9 of 18 cannot be amended as was in *Salim Vuai Fomu vs Registrar of Cooperative 1995 TLR 75* and therefore application has defective verification which render application incompetent and pray me to struck out. In alternative, applicant affidavit at para 10 has legal issues. In altenative Mr. Geneya submitted under paragraph (a) that arbitrator determine issued separately however, he said the main issue for determination was if there was unfair labour practice. He proceeded that Arbitrator justified why he started with the 2nd issue although he was aware of the 1st issue as he was looking for connectivity. Guideline for framing and determining issue is rule TJ of the Mediation and Arbitration GN 67 of 2007 and that rule, he submitted does not preclude determination of issue serially or otherwise and therefore he was of the position that the combing procedure adopted did not cause miscarriage of justice as framed issues, however, were resolved separately as seen at page 7, 9 and 10-15 respectively. With regard

to the second issue counsel had a short submission that the standard of proof is on balance of probability as was in *Brian Selestine and Others vs Salvation Army Tanzania Territory* (Civil Appeal 372 Page 10 of 18 of 2020) 2023 TZCA at page 8 and respondent was not bound to establish prima facie case against the applicant during trial. On the third issue he submitted that the Arbitrator evaluated evidence properly as seen at page 5 and page 10 where there was analysis of the evidence tendered and reason for the decision. It was observed in that decision that employer failed to prove if the complainant was not in probation while insisting that applicant evidence is hearsay. He went on submitting that the issue that application was premature is after thought because it was filed as objection to CMA but later on, it withdrawn and because it was not analysed at CMA then applicant is barred to raise it at this stage. On the authorities supplied, he submitted that the case of *Mwiba* holding is distinguishable because in that case there was a written contract but the current application has no written contract neither statement of particular. The case of *Sheikh Said and the other of Rwekiza* he said is inapplicable in the case at hand. In *David Nzaligo vs National Micro Finance Bank Civil Appel 61 of 2016* he said it was decided that employee may remain under probation unless and until he gets confirmation. So, the probation is unlimited till confirmed. He finally Page 11 of 18 registered his position that the award was proper based on the determination on CMA third issued as evidence was analysed properly. When given time for rejoinder, Mr. Muyumba clarified that the applicant is legal entity registered under that capacity and that a person swear is authorized officer to do so and is not individual who lacks knowledge. Case of *Jadine Ntuyabaliwe Mengi and Others vs Reginald Mengi and Others* is distinguishable. He went on with clarification that the issue of pre maturity is legal issue which goes to the jurisdiction of the CMA and prayed that to be analysed by this court as it was the duty of CMA to determine whether the matter was proper before it. After careful consideration of the parties' competing submissions, reading CMA decisions and Court records as well as relevant law, I find the Court is called upon to determine only one issue; whether the CMA Award was proper or otherwise basing on legal issues as listed in affidavit of Applicant. Grievances of the applicant is listed at paragraph 10 of the affidavit in sub paragraphs. Before analyzing them, counsel for the respondent has an issue that affidavit has defective verification clause as some of information were hearsay. His submission was based on the fact that there was an oral contract and the Officer of the applicant is not in office, his analysis drives Page 12 of 18 him to believe the deponent had no knowledge. The deponent is officer of the applicant as the latter is a legal person. Any authorized officer may depone on behalf of the applicant and what was stated in the affidavit is the knowledge of the applicant. I join hand to submission done by Mr. Muyumba that deponent had knowledge of what is in affidavit. I now turn to issues as submitted by both sides. As stated, the complaints of the applicant are found in sub paragraphs and I shall analyse by combining the similar once. I shall combine Sub paragraph (a), (b) and (c) on the issues framed and how they were analysed. Mr. Muyungu Complained that Arbitrator errored by starting with the second issue instead of the first issue and further complained that it was not good practice to combine issues in analysis. When deciding to start with the second issue, Arbitrator provide reasons for his

option, that he wanted connection of argument. However, what was important was to make sure all raised issues are answered and the chronology of attending them has never been legislated nor directed. I subscribe to principle in Sheikh Ahmed Said vs Registered trustees of Manyema Masjid (supra). However, reading the CMA record and the award which is subject to this revision I find the 2nd issue was answered at page 7 when Arbitrator Page 13 of 18 rule that there was unfair labour practice as respondent herein was terminated without following procedure, the 1st issue was answered at page 8 that respondent was on probation period and the third issue about reliefs was concluded at page 15. That is what has been preceded that all issued has to be answered. See. Sheikh Ahmed Said vs Registered Trustees of Manyema Masjid (supra) and Alnoor Shariff Jamal vs Bahadur Ebrahim Shamji, Civil Appeal No. 25 of 2006 (unreported). At sub paragraph (d) and (g) applicant complained that respondent herein did not prove what he alleges in CMA Form 1 that he was terminated while under probation period and that it was not for the applicant to prove as burden lies to a party who allege. On the other side, counsel for respondent argue that the standard is to the balance of probability which was met. While noting the cited decision in Jason Samsom Rwekiza vs Norvatus Rwechungura Mkwama(supra), I have time to read the award and find Arbitrator analysis based on decided case of Lucy Selemani Not! vs Billion Dollars Co. Ltd Rev Appl No 10 of 2023 with the principle that in employment dispute the burden to prove nature of employment lies to employer as it is provided under section 15(6) of Employment and Labour Relations Act provides that; Page 14 of 18 '15(6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer.' Mr. Muyungu insisted that section 15 (6) was inapplicable as the applicant had an oral contract with the respondent. With due respect, the provision which allow an employer to have a contract with employee on specific task is the same provision which necessitated the contract to be in writing. Section 14 provides; '14.-(1) A contract with an employee shall be of the following types-

- (a) a contract for an unspecified period of time;
 - (b) a contract for a specified period of time for professionals and managerial cadre;
 - (c) a contract for a specific task.
- (2) A contract with an employee shall be in writing if the contract provides that the employee is to work within or outside the United Republic of Tanzania.' From the provisions of the law, it is applicant who was supposed to prove the nature of the employment of the respondent where, at the CMA no proof was tendered and therefore it was proper for Arbitrator to consider Page 15 of 18 what was written in CMA Form 1. Failure of the applicant to prove the status of the respondent, then the claim by respondent it considered to be the position unless employer provide a contract to rebate the complains. In the case at hand, as complained by applicant's counsel, applicant failed to tender contract on how the respondent was engage in his company and therefore the CMA Form 1 was relevant. In that

form respondent indicate that he was under probation and so for as applicant had no other position on what type of employment was that, I find the reason to fault arbitrator when he ruled that he was terminated while under probation. So far as the position of the Arbitrator was that the respondent was under probation period which I support, procedure for his termination is outlined under Regulation 10 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007. Mr. Mayungu complained of the immaturity of the application during Mediation on account that evidence of respondent show he was under probation for five months and therefore the dispute referred was premature. The base of his submission was rule 10(1). That rule direct that terminal procedures for those with more than six months' probation period to be provided in guideline. Applicant had an Page 16 of 18 oral contract with unknown terms of employment including unknown period of probation. Rule 10(2) provides that; 10 (2) Terms of probation shall be made known to the employee before the employee commences employment. So far as applicant failed to honor section 15(6) of ELRA it follows therefore other terms to be not clear as oral contract has no specific terms when it comes to employment that's why legislatures insisted under section 14 of ELRA and under rule 10(2) on specific terms. Basing on the decision of David Nzaligo vs National Micro Finance Bank (supra), the probation is in continuity till when the confirmation letter is issued unless there are clear terms between the two, employer and employee, the probation is concluded by confirmation. I find the matter was not premature and the CMA had jurisdiction to entertain it. From the revision done, I find the award was proper and I hereby uphold the same and the application is dismissed. Dated at MUSOMA this 17 Day of December, 2024.

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