

TANZANIA / JUDGMENT

MODESTA JERIMIA MALIMA V

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1 January 2024

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM CONSOLIDATED REVISION APPLICATION NO. 26346 AND 29567 OF 2024 (Arising from an Award issued on 15/10/2024 by Hon. Lucia Chrisantus Chacha, Arbitrator in Labour Dispute No. CMA/DSM/KIN/253/2023/159/2023 and CMA/DSM/KIN/22/2023/76/2023 at Kinondoni) MODESTA JEREMIA MALIMA 1ST APPLICANT SALOME JAMES ALLADIN 2ND APPLICANT VERSUS Y9 MICROFINANCE BANK LIMITED..... RESPONDENT

JUDGMENT

Date of last Order: 03/02/2025 Date of Judgment: 5/03/2025 B. E. K. Mganga, J. Modesta Jeremia Malima and Salome James Alladin, the herein applicants (hereinafter referred to as the employees) were employees of Y9 Microfinance Bank Limited (hereinafter referred to as the employer) the abovenamed respondent. On 2nd August 2022 and 1st September 2022 Modesta Jeremia Malima, the 1st applicant and Salome James Alladin, the 2nd respondent, respectively, entered two years fixed period contract of employment with Y9 Microfinance Bank Limited, the abovenamed respondent. The said two years fixed period contract of 1 employment had six months' probation period. In the said two years fixed period contract, the employees were employed as Key Account manager. On 15th November 2022, while the employees were still under probation, respondent terminated their employment contracts on ground that their performance was not up to the standard required. Aggrieved with termination, the employees filed the dispute before the Commission for Mediation and Arbitration (CMA) at Kinondoni complaining that there was unfair labour practice. On 15th October 2022, Hon. Lucia Chrisantus Chacha, Arbitrator, having heard evidence of both sides issued an award that termination of employment contracts of the applicants violated Rule 17(1), 18(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 relating to termination of employment based on poor performance. The arbitrator further held that the employer did not comply with the provisions of Rule 10(8) of GN. No. 42 of 2007(supra) relating to termination of probationer employee. In short, the arbitrator found that there were unfair labour practices. With those findings, the arbitrator awarded Modesta Jeremia Malima and Salome James Alladin, to be paid TZS 8,100,000/= and TZS 7,752,000/= being 3 months salaries of the remaining probation period. 2 Aggrieved with the said award, the employees filed revision Application No. 26346 of 2024. In the affidavit in support of the Notice of Application, applicants raised one ground namely, that, the Arbitrator erred when she awarded only 3 months compensation to the

applicants instead of the remaining months, part of the contract, while she found and held that termination of the contract was unfair both substantively and procedurally. On the other hand, the employer was also aggrieved with the said award as a result, she filed Revision Application No.29567 of 2024. In the affidavit of Martin Nyairo Openda, her principal officer in support of the Notice of Application, the employer raised three grounds namely: -

1. That the Arbitrator erred materially when she held that there was no information of poor performance by the Respondents and reason for termination was not established.
2. That, the Arbitrator occasioned material irregularity when he held that the Applicant gave no time for the Respondents to improve their performance.
3. That, the Arbitrator further occasioned material irregularities in awarding three months' salaries to both Respondents as compensation without proper basis. Since the two Revision applications emanates from the same CMA proceedings and award, I issued consolidation order hence this consolidated judgment. I should point out that, by consent of the parties, the application was argued by way of written submissions. 3 Arguing in support of Revision Application No. 26346 on behalf of the employees, Mr. Joseph Mirumbe, advocate submitted that, the award of three months salaries is very small considering that the employer had no valid reason for termination and did not abide by the procedures thereof. He added that the employees were entitled to be awarded the remaining period of their contract or 12 months' salary compensation. To bolster his submissions, he cited the case of Good Samaritan v. Joseph Robert Savari Munthu, Revision No. 165 of 2011, HC (unreported) and Agness B. Ruhere v. UTT Microfinance PLC, Revision No.459 of 2015, HC(Unreported). In his submissions, counsel for the employees pointed out that Labour Laws are silent on the award entitled to probationary employees where there is violation of provisions relating to termination of employment. Counsel strongly submitted that awarding the employees the remaining probation period defeats the spirit of rule 10 of GN. No. 42 of 2007(supra) and the purpose of probationary period because employers will be left free to terminate probationary employees as they wish. Counsel further submitted that, inapplicability of part E of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 to the probationer employees does not condone any unfair labour practices. He added that, the employees had a right to enjoy good labour practices. 4 He maintained that the award of three months was very small and prayed the court to award them the remaining period of their contract but as an alternative, the employees be awarded 12 months' salary compensation. Resisting Revision application No. 26346 of 2024, Ms. Ashura Mansoor Salum, advocate for the employer submitted that, the employees being probationers, whatever they were doing was under assessment of the employer as to whether, they were competent to perform the job. She also submitted that the employees failed to meet targets hence they were not suitable for the job which is why they were terminated while under probation. She further submitted that the employer complied with the provisions of rule 10 of GN. No. 42 of 2007(supra) in terminating the employees because, prior to termination they had meetings requiring them to improve performance, but they failed. Counsel for the employer submitted that Good

Samaritan's case (supra) is distinguishable because in the said case, the employee was not a probationer. He further submitted that the prayer to award the employees the remaining period of their fixed period contract of employment will prejudice the whole notion and purpose of probation. He added that, awarding a probationer employee the remaining period 5 of the contract would amount to treating a probationer employee like a confirmed employee hence contravening the principle laid down under section 35 of Sub Part E of cap. 366 R.E. 2019(supra) which excludes employees under probation to enjoy the fruits of a confirmed employees. To support her submissions that a probationer cannot enjoy the benefits of a confirmed employee, she cited the case of Essau Amon Tenga and 4 Others v. Azania Poly bag Industries Ltd, Revision No. 10819 of 2024, HC (unreported). She went on that, Ruhere's case (supra) is distinguishable because in the said case termination of the probationer did not adhere to procedures unlike to the application at hand. Counsel cited the case of Adinani Ally Sipiru & Others v. Resort World T/A Palm Beach Casino, Revision No. 341 of 2022, HC (unreported) imploring the court to follow that decision because in the said case, there was breach of contract of employment while under probation only one month remaining while procedures were never followed as a result, the court awarded the employee one month. She further submitted that, the employer complied with the provisions of rule 10(8) of GN. No. 42 of 2007(supra) and that the arbitrator overlooked exhibits D2, D5 and D6 which are email correspondences and weekly meeting minutes as a result reached erroneous conclusion. 6 Counsel concluded that the employees were not supposed to be compensated. In arguing support of the 1st, 2nd and 3rd grounds of revision No. 29567 of 2024 counsel for the employer reiterated what she submitted while resisting Revision Application No. 26346 of 2024 that was filed by the employees. He added that, the employees were terminated while under practical interview as they failed to meet standards of work provided by the employer. Resisting Revision Application No. 29567 of 2024, counsel for the employees submitted that, minutes (exhibit D3) that was tendered by DW2 to show that meetings were held prior termination of employment of the employees is not authentic and does not suffice to be minutes because they have no name of the person who prepared it and was neither signed by the employees nor the chairperson of the meeting. He added that, in the said exhibit D3, it was suggested that the employees be given a warning. He went on that the employees were terminated without due regard to the provisions of rule 10 of GN. No. 42 of 2007(supra). Counsel for the employees cited the provisions of rule 10(3) of GN. No. 42 of 2007 (supra) and conceded that the employees were terminated at the time the employer was making assessment and or 7 observations of their competence to perform the job. He was quick to add that the employees were not afforded opportunity to be assessed their competency and suitability to the positions. He further submitted that the employer was supposed to wait until completion of the six months of probation and assess their competency but to the contrary, she terminated their employment after three months prior to completion of probation period. He went of that, in terminating employment of the employees before expiry of probation period, the employer was supposed to comply with the provisions of rule 10(7) of GN. No. 42 of 2007 (supra) that is to say, to notify the employees the concern and give them an opportunity to respond or to improve. Counsel for

the employees further submitted that the employees were not given targets because exhibit D5 collectively are not targets rather were monthly evaluations done to the entire department and not an individual employee. He further submitted that exhibit D6 does not show targets of the employees rather it is a documentary on the project. He maintained that, prior to termination, the employer did not comply with the provisions of rule 10(6)(b) of GN. No. 42 of 2007(supra). In his submissions, counsel for the employees reiterated most of what he submitted in revision No. 26346 of 2024. 8 In rejoinder, counsel for the employer submitted that, reiterated her submissions in chief and further that exhibits D2, D5 and D6 shows monthly targets to all employees and that rule 10(7) and (8) of GN. No. 42 of 2007(supra) was complied with. She strongly submitted that the employer could terminate employment of a probationer employee at any period within the probation period. I have examined evidence of the parties in the CMA record and considered their rival submissions in this application. It is undisputed by the parties that, the employees were terminated while under probation. It is also undisputed by the parties that the reason for termination that was advanced by the employer in terminating the employees is their poor performance. I should point out, albeit briefly that, rule 10 of GN. No. 42 of 2007(supra) provides (i) purpose of probation, (ii) duties of the employer to assist a probationer employee to perform the job, (iii) procedure in extending probationary period or where the employer is of the view that the probationer is not performing and or for termination. The said rule is reproduced hereunder though to the detriment of making this judgment unnecessary long but for better clarification and understanding. 9 “10-(1) All employees who are under probationary periods of not less than 6 months, their termination procedures shall be provided under the guideline.

- (2) Terms of probation shall be made known to the employee before the employee commences employment.
- (3) The purpose of probation is normally to enable the employer to make an info11cd(sic) assessment of whether the employee is competent to do the job and suitable for employment.
- (4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standards required, the custom and practice in the sector.
- (5) An employer may, after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment.
- (6) During the period of probation, the employer shall-
 - (a) monitor and evaluate the employee's performance and suitability from time to time;

- (b) meet with the employee at regular intervals in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction(sic). Training and counselling to the employee during probation.
- (7) Where at any stage during the probation period the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.
- (8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-
 - (a) the employee has been informed of the employer's concern; 10
 - (b) the employee has been given an opportunity to respond to those concerns;
 - (c) the employee has been given a reasonable time to improve performance or correct behaviour and has failed to do so.
- (9) A probationary employee shall be entitled to be represented in the process referred to in sub-rule (7) by a fellow employee or union representative." It is clear from the above quoted rule that, reason for termination of a probationary employee may be due to (i) competence or incapacity or poor work performance and or (ii) suitability that includes incompatible behaviour of a probationary employee. I should point out albeit briefly that, though rule 10(1) of GN. No. 42 of 2007 (supra) quoted above provides that procedures for termination of a probationary employee is provided under the guideline namely, Guideline for Disciplinary, Incapacity and Incompatibility Policy and Procedures, that is a schedule to GN. No. 42 of 2007(supra), I have read the said guideline and find that, it does not provide those procedures. In my view, drafters inadvertently, forgot to draft those procedures. I therefore, call upon the responsible persons to remedy that situation. As pointed out hereinabove, the employees were terminated allegedly due to poor work performance. In their evidence, Modester Jeremia Malima (PW1) and Salome James Alladin (PW2) testified that, they were terminated allegedly due to poor performance. In fact, evidence of 11 Ashok Kalinathamai Krishnamoorthy (DW2) and Nicholas Kizenga (DW3) shows that the employees were terminated based on poor performance. It was correctly submitted on behalf of the employer and conceded by counsel for the employees that, the employer terminated the employees at the time she was assessing whether, they are competent or suitable to do the job as they were under probation. In fact, rule 10(3) of GN. No. 42 of 2007(supra) provides that, the purpose of probation is normally to enable the employer to make an informed assessment of whether, the employee is competent to do the job and suitable for employment. It is my considered opinion that, to properly assess that the employee is competent or suitable to do the job, rule 10(6) of GN. No.42 of 2007(supra) has placed a duty to the employer hence the latter, cannot, over the sudden, come up with a conclusion that a probationary employee is not competent or is not suitable for the job without adhering to the provisions of rule 10(6) of GN. No. 42 of 2007(supra). The duties of the employer under rule 10(6) of GN. No. 42 of 2007(supra) are (i) to monitor and evaluate the employee's

performance and suitability from time to time and (ii) to meet with the employee at regular intervals in order to discuss the employee's evaluation and provide guidance, if necessary, the guidance 12 which may include instruction, training and counselling to the employee during probation. As pointed out herein above, the employer alleged that she terminated the employee due to poor performance. It is a settled position of the law in our jurisdiction that, he who alleges must prove. See the case of Registered Trustees of Joy in The Harvest vs Hamza K. Sungura (Civil Appeal 149 of 2017) [2021] TZCA 139 (28 April 2021), Ikizu Secondary School vs Sarawe Village Council (Civil Appeal No.163 of 2016) [2018] TZCA 387 (14 December 2018), Dar es Salaam Water & Sewerage Authority vs Didas Kameka & Others (Civil Appeal No. 233 of 2019) [2021] TZCA 596 (18 October

2021) to mention but a few. Therefore, the employer had a duty to prove by evidence, poor performance of the employees. Now, the issue in the application at hand is whether, there is evidence to justify the decision by the employer that the employees performed poorly and whether, the employer complied with rule 10(6) of GN. No. 42 of 2007(supra). It was evidence of DW2 that, the employees underperformed. In his evidence, DW2 tendered activation proposal and B2C (exhibit D5), employee performance indicator (exhibit D6) and minutes dated 14th October 2022 (exhibit D3) all admitted without objection to prove that 13 the employees underperformed. He also testified that, the employees were given targets, but they failed to meet those targets. He further testified that, the employer held weekly meetings with the employees referring to exhibit D3. I should point out that, DW2 was employed after termination of the employees hence he is unaware of what happened prior to be employed by the employer. In facts, DW2 testified that, his evidence is based on what he read in the file. I have examined the minutes of the meeting (exhibit D3) and find that, the said meeting was attended by Nicholaus Kizenga (DW3), Edgar Amon, Amina Abdul, Salome Alladin, Modester Malima and Faith Pella. In my scrutiny, I have noted that, the said exhibit D3 is unsigned by the attendees. On the other hand, in my examination of evidence of the employer, I noted that, in his evidence, Kizega (DW3 said nothing in relation to presence of the alleged meeting and minutes thereof though exhibit D3 shows that he was amongst the attendees. It is clear therefore that, the said minutes (exhibit D3) was mentioned and tendered by DW2 who was not present hence a stranger to the meeting. I should also point out that, the whereabouts of Edgar and Amina, who are shown in exhibit D3 to be amongst the attendees was not disclosed. In the award, the arbitrator cited the case of Finca Microfinance Bank Ltd v Jalala Hussein (Labour Revision No. 28234 of 2023) 14

[2024] TZHC 1086 (26 March 2024) and Richard Mchau vs Shabir F. Abdulhussein (Civil Application 87 of 2008) [2008] TZCA 77 (15 June

2008) and disregarded exhibit D3 for lack of authenticity as the same was unsigned. In the strength of the cited cases and what I have pointed out shortly a while hereinabove, entirely agree with the arbitrator that, exhibit D3 was not worth to be considered. I have also examined Teyota activation (exhibit D4) that was relied on by the employer to

terminate employment of the employees based on poor work performance and find that, it has nothing to do with the employees as it does not bear their names. More so, exhibit D4's use was not clarified, and it is unknown. I have also examined activation proposal and B2C (exhibit D5) and employee performance indicator (exhibit D6) and find that, the same have neither the name of the author nor signature. It is also unknown as to whether, the said exhibits were communicated to the employees because, there is no acknowledgment thereof. I am therefore of the view that, those documents were prepared just to serve the purpose after the employees have filed the dispute at CMA. My afore conclusion is supported by evidence of Nicholas Kizenga (D3) who, while under cross examination, stated that, the employees including himself, were given targets verbally. In short, according to DW3, there were no written targets as 15 the said targets were communicated to the employees verbally. In other words, DW3 in one way or the other, doubted existence of exhibit D6. That being evidence of the employer, the latter cannot come again and state that employees were served with exhibit D6. I therefore hold that, employees were not served with the alleged targets (exhibit(D6)). For the foregoing, it is my considered opinion that, the employer did not comply with the provisions of rule(10(6)(a) and (b) of GN. No. 42 of 2007(supra) because, there is no evidence proving that she monitored or evaluated the employee or showing that she met and gave guidance, instruction, counselling and or training to the employees. There is also no evidence proving that the employer complied with the provisions of rule 10(7), 10(8)(a), (b), (c) and 10(9) of GN. No. 42 of 2007(supra) that requires a probationary employee to be notified concerns by the employer in presence of a fellow employee or union representative and be given an opportunity to respond to those concerns or to improve or to be given reasonable time to improve. I therefore, uphold the CMA award that, there was unfair labour practices and dismiss the 1st and 2nd ground of revision raised by the employer. Both the employees and the employer challenged the relief of three months' salary compensation. In their application, the employees faulted the arbitrator that the said award is too small praying to be awarded the 16 remaining period of their contract or be paid 12 months' salary compensation. In the 3rd ground of the employer's application for revision, the employer contends that, employees were not supposed to be compensated the said three months of the remaining period of probation period because they were under practical interview. I should admit that, arguments by the parties in this ground have exercised my mind a little bit. That is because, as it was correctly submitted by counsel for the employees, our Labour Laws are silent on the award to be awarded to probationary employees whenever it is proved that there was violation of provisions relating to termination of employment. I am alive that, the remedies available under section 40, 41, 42, 43 and 44 of Cap. 366 R.E. 2019(supra) does not cover probationary employees because, a probationary employee cannot file the dispute relating to unfair termination as it was held in the case of David Nzaligo vs National Microfinance Bank Plc (Civil Appeal 61 of 2016) [2019] TZCA 287 (9 September 2019). In short, the remedies under the above cited provisions do not cover unfair labour practices. It was submitted on behalf of the employer that; the employees failed practical interview. Those submissions, though counsel for the employer did not specifically submit, are based on

what was held by the Court of Appeal in the case of Stella Temu vs Tanzania Revenue 17 Authority (Civil Appeal 72 of 2002) [2004] TZCA 55 (27 October 2004)

[2005] TLR 178 CAT and David Nzaligo vs National Microfinance Bank Plc (Civil Appeal 61 of 2016) [2019] TZCA 287 (9 September

2019) that a probationary employee is under practical training. The issue that has exercised my mind is what relief a probationer employee should be awarded if proven that there were unfair labour practices. This the issue that counsel for the parties locked horns. Counsel for the employees were of the view that the employees are entitled to be awarded the remaining period of the contract. With due respect, that cannot be a correct position of the law because the employees were under practical training. More so, that will defeat the purpose of probation period and as it was correctly submitted by counsel for the employer, that would amount to treating a probationer employee like a confirmed employee hence contravening the principle laid down under section 35 of Sub Part E of cap. 366 R.E. 2019(supra) which excludes employees. It was equally correctly, in my view, submitted on behalf of the employees that, failure to award the probationary employee on the ground that he /she was terminated while under practical interview and that she failed the interview, will create a room for the employers to unlawfully terminate probationary employees as they wish as they will be aware that they nothing to pay. In my view, 18 that will defeat the purpose of having disputes relating to unfair labour practices under probation. This is an area, as the law stands, where the court needs to strike a balance until when the legislature makes good the lacuna in our labour statutes. In my view, as a balancing situation, a probationary employee is entitled to be paid the remaining period of probation and not the remaining period of the contract of employment. In that balancing the situation, I subscribed to the holding by learned brother Mlyambina J in the case of Essau Amon Tegga & 4 Others vs Azania Poly Bag Industries Ltd (Application for Revision No. 10819 of 2024) [2024] TZHCLD 133 (16 August 2024) and Vivo Energy Tanzania Limited vs Omar Shareef (Revision Application No. 20964 of 2024) [2024] TZHCLD 185 (16 October 2024) that, a probationer employee when proves that there were unfair labour practices, he/she is entitled to be paid the remaining probationary period and not the remaining period of the contract. It is my considered opinion that, the arbitrator was justified to award the employees the remaining period of the probationary period. For the fore going, I uphold the CMA award and dismiss revision application No. 26346 of 2024 filed by the employees for want of merit. Further to that, I dismiss revision application No. 29567 of 2024 filed by the employer for want of merit. 19 Dated at Dar es Salaam on this 5th March 2025. B. E. K. Mganga JUDGE Judgment delivered on this 5th March 2025 in Chambers in the presence of Ashura Mansoor Salum, Advocate for Y 9 Microfinance bank Limited, the employer but in the absence of Modesta Jeremia Malima, the employee. B. E. K. Mganga JUDGE 20

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Prepared on 14 October 2026 · Esheria