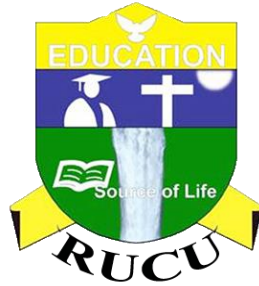


RUAHA CATHOLIC UNIVERSITY



FACULTY OF LAW

**A COMPARATIVE LEGAL ANALYSIS BETWEEN MAINLAND TANZANIA
AND SOUTH AFRICA ON PROTECTION OF PROBATIONARY WORKERS**

**A Research Paper submitted to the Faculty of Law in Partial Fulfillment of the
Requirements for the Awards of the Bachelor of Law Degree (LL.B)
of Ruaha Catholic University, Iringa-Tanzania**

By

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RU/LLB/2020/028

Prepared Under the Supervision of

Madam Elizabeth Lukelelwa

At the faculty of law

July, 2024

CERTIFICATION

The below signed certify that she has read and hereby recommend for acceptance by Ruaha Catholic University Research titled: **A COMPARATIVE LEGAL ANALYSIS BETWEEN MAINLAND TANZANIA AND SOUTH AFRICA ON PROTECTION OF PROBATIONARY WORKERS** in partial fulfillment of the requirements for the degree of bachelor of laws of the Ruaha Catholic University.

Signed on day of, 2024

.....

Supervisor

Madam Elizabeth Lukelelwa

DECLARATION

I **Francis Frank Chingowe**, hereby declare that this research paper is my own work and is original. Other people's literary works and findings have been used in this research and have been acknowledged. This work has been not been submitted at any university or institution for a similar degree award or any other.

.....

Francis Frank Chingowe

Date

.....

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Great thanks to my Lecturers, to RUCU as its Library has been used much for library research, and to all my respondents who volunteered to respond.

DEDICATION

This research is dedicated to my family, especially to my mother Ester Nyoni and My brother Enock Chingowe who always supporting me all the time in my journey of academic studies.

TABLE OF LEGAL INSTRUMENTS

Domestic Laws of Tanzania

The Constitution of United Republic of Tanzania, CAP 2 of 1977 as amended time to time.

The Employment and Labour Relations Act, CAP 366 R.E 2019

Employment and Labour Relations (Code of Good Practice) G.N. NO.42 of 2007

Domestic Laws of South Africa

The Constitution of the Republic of South Africa, 1996

The Labour Relations Act No.66 of 1995, R.E 2014

REGIONAL LAWS

Protocol on the Establishment of the East African Community Common Market, 2010

INTERNATIONAL LAWS

The ILO Convention on Elimination of Discrimination in Respect of Employment and Occupation (N0.111) of 1958

The ILO Termination of Employment Convention (No.158), 1982

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976

LIST OF CASES

Francis Ndyanabo Ishengoma v. A. G [2001] 2 EAC 485

Fraser vs. Caxton Publishers (2005) 3BALR 323

Smith / Patient Focus Africa (Pty) Ltd (2009) 18 CCMA 7.20.1

Stella Temu vs. Tanzania Revenue Authority (TRA) (2005) TLR 178

Tharratt vs. Volume Injenction Products (pty) Ltd (2005) 6BALR 652

Tuffuor v. A.G [1980], GLR, 647

Yewens v Noakes (1880)

LIST OF ABBREVIATIONS

CV	Curriculum Vitae
ICCPR	The International Covenant on Civil and Political Right
RUCU	Ruaha Catholic University
UDHR	The Universal Declaration of Human Rights
WHO	World Health Organization

ABSTRACT

This research aims to make a comparative legal analysis between Tanzania and South Africa in protection of Probationary workers. In Tanzania the research has focused much on the labour laws of mainland Tanzania. It mainly focused in making legal analysis the extent to which the labour laws of mainland Tanzania and of South Africa promote the protection of probationary workers. The categories of workers who are targeted are the workers or employees with temporary employment and the probationary employees. The research has looked on how these workers are protected by their respective labour laws against unfair termination of employment.

After making a legal analysis of both laws of two states and after data analysis, the researcher has found that, the labour laws of the Republic of South Africa provide a comprehensive protection to the probationary employees and to the temporary employees against unfair termination of employment, contrary to the labour laws of Tanzania which are seen to provide a discriminatory protection of this category of workers for unfair termination.

Finally, the researcher has concluded that the labour laws of Tanzania by virtue of provision of section 35 of the Employment and Labour Relations Act, is discriminatory as the employees with less than 6-months employment are not protected against unfair termination of employment. He therefore recommended the respective authorities of Tanzania to make amendment of labour laws and take a lesson from South Africa.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE PROBLEM

During colonialism, before the current labour regime in Tanzania, there was no full protection of the employees as most laws were made in favor of the colonial masters. The laws did not uphold the interest of the laborers as most of them were harsh and stipulated penal sanctions. Failure to comply with these laws led to criminal liabilities.

Later on, these Laws were repealed and replaced by the Employment Ordinance, the ordinance among other things brought the contractual relation to life. Although it did uphold its criminal nature, the ordinance provides for the rights and obligation to both the employer and employees this was the mile stone as the previous legislations provided rights to employers only, instead this one went to provide criminal punishment to employers upon breach of their obligations. Provisions influence the development of a permanent labour force, still the employer's right to "hire and fire" employees was still maintained.

In Tanzania there are different types of employment contracts as provided under the employment and Labour Relation Act (Chapter 366, Revised Edition 2019 under section 14-(i) that¹ the contract with an employee shall be the following (a) a contract for unspecified period of time. (b) a contract for specified period of time for professionals

¹ The Employment and Labour Relations Act, CAP 366 R.E 2019.

and managerial cadre (c) a contract for specific task. Under a contract for unspecified period² of time as the name explains the duration of this contract is unspecified, meaning not provided for some call it is permanent contract.

Compared to south Africa also there is three types of employment contract which is first permanent contracts apply to employees who work regular hours and are paid salary or hourly rate and the contract are ongoing until terminated by either the employer or employee and may be for full or part time work also employees on these contracts are entitled to the full range of statutory employment rights.

Also, there is Fixed term contracts which gives a set end date for example six months³ or one year. You may want to consider this type of contracts if you are looking to cover maternity leave, staff a big project or take on interims. Fixed term employees are protected and have the same rights as permanent employees (including unfair dismissal and redundancy pay after two years' service. You can't offer them less favorable terms because they are fixed term.

Another type is Casual employment contracts this is suitable for scenarios where you want someone to commit to working for you but you are not sure how many hours of work you will be able to offer them each week and cannot guarantee a regular working pattern. In casual employment relationship there is an overarching contract of employment which is sometimes known as umbrella contract that continues even during

² <https://Myage.org/Tanzania.com>, accessed on 7th July, 2023 at 8:20 pm

³ <https://Citrusshr.com>, accessed on 7th July, 2023 at 9:00 am

periods when the employee is not working.⁴ This creates an employment relationship. Employees on these contracts will accrue holiday based on the number of hours worked and will be entitled to employment rights including statutory sick pay where eligible and statutory minimum notice period.

1.2 STATEMENT OF THE PROBLEM

The laws relating to employment and labour relations in Tanzania appear like they don't adequately cover the protection of probationary workers from unfair termination of employment as compared to South Africa whereby their Labour Laws appear to have adequate coverage in protection of all workers or employees from unfair termination without discrimination.

Thus, it appears that, in Tanzania workers/employees who work under probationary period of less than six (6) months are not protected by labour laws from unfair termination of employment contract against their employers,⁵ while workers who are under probation period of six months to twelve months or more are protected by the same labour law from unfair termination.⁶ This position of Labour law in Tanzania seems to be discriminatory contrary to the Constitution of United Republic of Tanzania.⁷

The situation in the Labour laws of South Africa appears to be different from that of Tanzania, as the labour laws of South Africa appears to provide the adequate coverage of protection to all category of workers against unfair termination, including workers with

⁴ [Htps://humanresources.columbia.education/casual-employment-contract](https://humanresources.columbia.education/casual-employment-contract), accessed on 27th March, 2024 at 9:00 pm

⁵ Section 35 of the Employment and Labour Relations Act, CAP 366 R.E 2019

⁶ *Idem*

⁷ Article 13 of the Constitution of United Republic of Tanzania of 1977 prohibits discrimination of all kind in Tanzania.

temporary employment as well as probationary employees with less than 6 months employment contract.⁸ And, this protection in South Africa appears to be provided equally without any kind of discrimination.

1.3 LITERATURE REVIEW

Alphonse M.A, Urio; the writer in his book he admits that the discrimination is prohibited by the law in the working place where he said that the law prohibits discrimination.⁹ That, the law requires an employer to ensure that he provides equal opportunity in employment and should eliminate discrimination in the working place.

Also, the author explains the types of contract under the Employment and Labour Relations Act which he provides both three types of contract are commonly used in Tanzania.¹⁰ It erroneous therefore for an employer to place an employee in a type not known to law. This is because payment of severance is subjected to the nature and type of contract in issue.

The author continue and he said that The High court of Tanzania has clearly stated that where employee under an oral contract for specific task under section 14 (1) (c) of the Employment and Labour Relations Act and the task ended at each working day they did not qualify for severance pay under section 42 of the Act in case an employee is expected to work outside the United Republic of Tanzania the contract should be in writing.

⁸ Section 185 of the Labour Relations Act, R.E 2014 Protects all workers including probationary workers from unfair termination and from subjected to unfair labour practice.

⁹M.A. Alphonse Urio & Janeth.F.A. Urio, *The law on employment and Labour Relations in Tanzania*, 2011.

¹⁰ *Idem*

However, the author has not exactly touched the legal problem which the researcher intended to do a research upon, thus a researcher gets a reason to continue doing a research so as to come up with the findings, conclusion and recommendation which will help to cure the existing legal problem in Tanzania regarding workers with less than 6 months employment like probationary employees.

Shivji¹¹, in his book titled “*Law state and the working class*” has spoken much on the workers as the working class since the colonial time and the laws dealt with the them as well as the changes of the law.

Example, regarding the law dealt with workers, Shivji contended that, Workmen’s Compensation Ordinance was enacted for the exploitation of labour and safeguards the interests of the capitalist “if the safeguarding of a workers of workers life and limb is weighed against the cost of production and rates of profits in capital book, so is the worth of its loss weighed in the scales of commodity exchange”. Shivji pointed out that the Workers’ Compensation Ordinance were borrowed from Britain and were enacted locally in the late 1940’s and 1950’s.

However, the author has not touched on the legal problem existing in Tanzania on unfair termination of employment especially to the probationary employees and those employees with less than 6 months employment contract. Therefore, it gives room to the researcher to do this research.

¹¹Issa G.S., *Law state and the working class*, THP, 1986, Dar es Salaam

Nkuhi,¹² in his literary work titled “*the free movement of workers and non-discrimination of Non-nationals: The East Africa and Tanzania stand point*” the author has written many things, although he based much in East Africa States and its Laws.

However, the author has spoken also the concept of non-discrimination in EAC¹³, non-discrimination in Free movement of workers¹⁴, the equal treatment under the EAC¹⁵, and labour laws of Tanzania in relation to Non-discrimination in EAC laws.

That, principle of *non-discrimination* and *equal treatment* are set as *conditional precedent* towards realization of the free movement of persons, workers and right to establishment.¹⁶ The author requires the East Africa States to allow workers from all East Africa States to move freely within these countries so as to get employed in any member state without discrimination on basis of nationality.

However, the author has not spoken on Legal challenges facing workers(employees) with less than 6 months employment contract, including the probationary employees in Tanzania as compared to those workers of South Africa.

Mtulia;¹⁷ has observed that in Tanzania, over the years since pre-independence workman compensation was being addressed by parliamentary ordinances. All of which culminated in the drafting and passing of the Workers’ Compensation Act of 2002. The Act and the

¹²M. S. Nkuhi; *The Free movement of Workers and Non-discrimination of Non-Nationals: The East Africa and Tanzania Stand point*, in the *Tanzania Lawyers Journal*, Vol.1, No.1, TLS, Dar es Salaam, 2015, 2 to 29

¹³ *Idem*

¹⁴ *Idem*

¹⁵ *Idem*

¹⁶ *Idem*

¹⁷ A, Mtulia, *Competition for occupational disease: Tanzania experience*, report, kribi, Cameroon march 2007 13-15

Ordinances would normally ask the employer at the time of the contingency, and this tends to hurt small enterprises with 1-15 employees most.

However, Mtulia did not touch in detail on the legal problem that a researcher intended to research for, he has dealt with the issue of workers' compensation. Therefore, leaving silent on the legal weakness existing in our labour law of Tanzania as compared to the labour laws of the Republic of South Africa.

Michele Tiraboschi¹⁸; in the book titled "*Labour Law and Industrial Relations in Recessionary Times*" has written several matters on Labour law and Industrial relations as the title itself reflects.

He has talked of; economic crisis and labour law reforms: models and scenarios¹⁹, youth employment: prospectives in school-to-work transition²⁰, new jobs and organisational models: the role of labour law and industrial relations²¹, bilateralism and employees' participation²², as well as the courage to reform²³

Under chapter one, the author has discussed on the Anti-crisis Labour Market Measures and their Effectiveness between Flexibility and Security.²⁴ Under this part of this chapter, his focus is on making analysis of Youth's Un employment to show how unemployment of Youths is a great crisis specially in the European Countries. He contends that, the main

¹⁸T. Michele, *Labour Law and Industrial Relations in Recessionary Times*, ADAPT University Press, online publication, 2012 available at www.adapt.it

¹⁹ *Idem*

²⁰ *Idem*

²¹ *Idem*

²² *Idem*

²³ *Idem*

²⁴ *Idem*

determinants of the youth's unemployment are; education systems, School-to-work transition, Labour Market Institutions, Industrial Relations Systems etc.²⁵

He contends that, “The existence of a sound dual system of apprenticeship cannot be the only reason for low levels of youth unemployment in countries such as Germany, Switzerland, and Austria, and in more general terms, nor the cause of what has been defined as the “German labour market miracle during the great recession”²⁶

He adds also that, Without assuming a direct causal relationship between labour market institutions and the policies in place in the different countries, it seems however possible to identify a number of specific determinants of youth unemployment that show how limited and partial an intervention of a purely regulatory nature would be in tackling the problem of youth employment, all the more so if an institutional approach would probably be more effective.²⁷

According to several comparative analyses, youth unemployment trends are not only – or not much – affected by labour market rules with regard to hiring and dismissing, but rather by a series of factors including the quality of the education system, an effective school-to-work transition, the integration between school and work-based training, the quality of the industrial relations system, and the functioning of labour market institutions.²⁸

²⁵T. Michele, Supra note 18, 14

²⁶ M. C. Burda, & J. Hunt, *What Explains the German Labor Market Miracle in the Great Recession?* IZA Discussion Paper, 2011, n. 5800

²⁷ T. Michele, supra note 18, 15

²⁸ *Idem*

The main economic studies on the subject agree that a central role in terms of youth employment promotion policies is played by aggregate demand. It remains crucial, therefore, in the fight against unemployment in general, and youth unemployment in particular, to adopt sound (tax and monetary) macro-economic and sectoral policies.²⁹

Author through the table he shows statistics from some European countries and the United States considering the unemployment rate for youth aged 15-24 years old, providing an overview of the determinants of positive or negative youth employment outcomes on the basis of three factors: education and training, industrial relations and employment protection legislation. The comparative overview supplied in that table is based on a series of indicators collected from authoritative research and international studies and shows in particular that different priority issues must be taken into account to effectively tackle youth employment and that, labour market reform is not enough.³⁰

Particularly relevant, today and more so in the future, is the role of demography, both for the sustainability of retirement and welfare systems and for the effects on the labour market and business organisation models³¹

1.4 HYPOTHESIS

It appears that the laws of Mainland Tanzania do not provide adequate protection to the probationary workers as compared to the laws of Republic of South Africa.

²⁹ ILO, World of Work Report 2012. Better Jobs for a Better Economy,

³⁰T. Michele Supra note 18, 15

³¹ Ibid, 20

1.5 OBJECTIVES OF THE RESEARCH

1.5.1 General Objective

To make a comparative legal analysis between Tanzania and South Africa on the protection of probationary workers.

1.5.2 Specific Objectives

(i) To make legal analysis and the key labour laws of mainland Tanzania and of Republic of South Africa on the protection of probationary workers or employees.

(ii) To assess the extent to which the Labour laws of Tanzania and that of South Africa protect probationary workers against unfair termination, and the difference between these two states in protection of these probationary workers.

1.6 SIGNIFICANCE OF THE STUDY

(i) The study is significant in future. This is because it will be very beneficial in the future time to be used by different stake holders who will be in need with the contents of this research.

(ii) The study will act as the point of reference to other scholars. Meaning that, it will be available to any scholar to use it as the point reference for any academic and literary purposes, also as point of reference in making arguments in any field.

(iii) The study will help also the researcher to obtain his first degree of Bachelor of Law (his LL.B degree).

(iv) The study is helpful in Promoting the welfare of the probationary workers as it aimed at enhancing protection of probationary workers through identifying areas where labour laws can be strengthened.

1.7 RESEARCH METHODOLOGY

A researcher has used both primary data and secondary data in this research, as elaborated here in after;

1.7.1 Primary data

Field Research:

The primary data were obtained through the field research. Under this field research, the researcher used interview method only in order to get quick and more information as primary data, of which he used face to face interview and telephone interview. His respondents were advocates, LLB graduates with knowledge of labour law, probationary employees and permanent employed workers.

1.7.2 Secondary data

Library research:

The researcher collected secondary data from many sources including books, journals, and articles as well as online materials from different websites both soft copies and hard copies. The researcher visited Benjamin Mkapa Resources center which is library found at RUCU where he made a library research from there.

1.8 SCOPE AND LIMITATIONS OF THE STUDY

1.8.1 Scope

Geographical scope; the study based on the laws governing protection of probationary workers in mainland Tanzania and in Republic of South Africa

Legal Scope; the researcher used various laws of Tanzania and South Africa such as; The Constitution of United Republic of Tanzania of 1977, The Employment and Labour Relations Act (CAP 366 R.E 2019) and the Employment and Labour Relations (Code of Good Practice) for Tanzania laws. Whereby Laws of South Africa are like The Constitution of Republic of South Africa of 1996 and the Labour Relations Act R.E 2014

1.8.2 Limitations of the study

(a) The researcher was faced with poor response from some of respondents, where as some of them didn't provide a positive response to the researcher within the reasonable time when they were consulted by the researcher.

(b) The financial problem as the research requires the researcher to have enough money to help him collect enough data from the expected respondents, to buy literatures like books, journals as well as money for printing.

(c)The challenge of insufficient materials like books, journals and article about the topic.

CHAPTER TWO

CONCEPTUAL FRAMEWORK ON PROTECTION OF PROBATIONARY WORKERS

2.1 The Concept of employee, probationary employee and employer

(a) The concept of Employee

One of the interviewee was of the following view regarding who is an employee, he said in a literary meaning, the term employee means a person who enters into a contract of service to perform a certain work whether in a specified time or in unspecified time, and the work is done under the control and directions of the master for the payment of wages or salary.³² Also, the term employee has been defined as a person employed to work for wages or salary, especially at nonexecutive level.³³

Employee has been referred to as a worker hired by an employer to do specific job, employer's control how employees are paid, when employees work and how employees work³⁴. An employee is any individual employed by employer³⁵.

The term employee was clearly defined in the case of *Yewens v Noakes*³⁶ where he defined an employee as 'a person subject to the command of his master as to the manner in which he shall do his work'.

³² Respondent No.1, a telephone interview conducted with a probationary employee on 6th October, 2023 at 4:20 pm

³³ <http://oxforddictionaries.com/definition/distinction/discrimination>, accessed on 7th October 2023 at 2:00 pm

³⁴ <https://www.thebalancemoney.com>, accessed on 8th October, 2023 at 8:20 pm

³⁵ United States, Congress, Senate. Committee on Finance. *Subcommittee on Private Pension Plans, Private Pension Plans: Hearings*, U.S Government Printing Office, 2008, 12

³⁶ (1880)

(b) Probationary employee

According to Winnerleah, Probationary employees are those who are in a trial period of employment. In Tanzania, probationary employee is governed by the Employment and Labor Relations Act of 2004, which outlines the rights and responsibilities of both the employer and the employee during this trial period.³⁷

(c) The concept of Employer

The term Employer has been referred to as an individual or an organization in government, private, nonprofit, or business sector that hires and pays people for their work, as the authority within an organization, the employer defines the terms of employment for employees and provide the agreed-upon terms such as the salary³⁸.

An employer is the authority which employs and pays employee for their labour, it may be an individual person or it may be a company representing many people, an employer is also the party legally liable for work conditions, maintaining labour laws and handling any legal action an employee may pursue³⁹.

2.2 The concept of discrimination, non-discrimination and equal treatment

According to Nkuhi M.S, Non-discrimination can be well understood through a study of its opposite.⁴⁰ Non-discrimination entails the absence of discrimination. The immediate

³⁷A. Winnerleah, *Probationary Employees in Tanzania*, ABC Attorneys, available at www.abccattorneys.co.tz accessed on 7th October, 2023 at 10:00 am

³⁸ <https://www.indeed.com>, accessed on 8th October, 2023 at 9:49 pm

³⁹ <https://www.mightyrecruiter.com>, accessed on 8th October, 2023 at 9:58 pm

⁴⁰ Nkuhi M. S; *The Free movement of Workers and Non-discrimination of Non-Nationals: The East Africa and Tanzania Stand point*, in the *Tanzania Lawyers Journal*, Vol.1, No.1, TLS, Dar es Salaam, 2015, 12

question would be what the discrimination is. Notably, there is no universally accepted definition of the term.⁴¹

The Oxford Online Dictionary defines discrimination as the unjust or prejudicial treatment of different categories of people, especially on the ground of race, age, or sex. This dictionary defines the term also as treatment or consideration based on the class or category rather than individual merit, partially or prejudice.⁴²

The World Health Organization (WHO) defines discrimination to mean any distinction, exclusion, or restriction made on the basis of various grounds which have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedom⁴³.

2.3 Forms of Employment contract

Like any in the normal contract, there are main two forms in which the contract of employment may be formed. These are written contract of employment and oral contract of employment.

(a) Oral contract; are employment contracts that are not required to be in writing. They are formed just through oral agreement between the employer and the employee. the most condition required in Tanzania for this contract to be recognized is that, soon after the formation of the contract, then its performance must start as soon as possible. In most

⁴¹M. S. Nkuhi, Supra note 40, 12

⁴² <http://oxforddictionaries.com/definition/distinction/discrimination>, accessed on 7th October 2023 at 2:00 pm

⁴³ WHO, *The Right to Health: Human rights*, United Nations, Geneva, 2008, 7

time this oral contract of employment is as short as it does not exceed the period of one month.⁴⁴

(b) Written Contract of employment;⁴⁵ is a form of employment contract which is formed in the writing between an employer and an employee. Normally the longtime employment contract is in form of writing. Mostly, the contracts with the period starting from 6 months or exceeding 6 months are to be made in form of writing. Example of these contract are the foreign contract of service.

Therefore, the most important thing to not is that, in all these two forms of contract, the consent of both parties is necessary for the contract to be valid. If no consent, then such a contract of employment is invalid ab initio. And, as per the General rule in the Law of Contract, the consent of the minor is not a valid consent as the minor has no capacity to make a rational decision, unless when a minor enters such a contract under supervision of the parents or guardian or any other legally acceptable relative or person.

Thus, regarding the issue of consent, different from oral contract that does not require signature of the parties, in written employment contract the consent is proved through the signature of the parties which may be put either by signing or by a thumb.

2.4 Conclusive remarks

Therefore, it should be noted that this chapter is the basic to this research as it provides the general understanding regarding different concepts used in this research. Therefore,

⁴⁴ G.Lisa, *Types of Employment Contracts*, Berkeley School of Law, available at <https://www.nolo.com/legal-encyclopedia/types-employment-contracts.html>, accessed on 26th March, 2024 at 8:00 pm

⁴⁵ *Idem*

this chapter will help the reader of this research paper to get the basic concepts as guideline to next chapters.

CHAPTER THREE

LEGAL FRAMEWORK GOVERNING PROTECTION OF PROBATIONARY WORKERS IN BOTH TANZANIA AND SOUTH AFRICA

3.1 THE DOMESTIC LAWS OF TANZANIA

3.1.1 The Constitution of United Republic of Tanzania, 1977

The constitution is the supreme law,⁴⁶ is the fundamental law of the land⁴⁷; thus, it is the source of all laws in Tanzania⁴⁸. Professor Issa Shivji said that “all state power that is legislative, executive power and judicial power, is created by the constitution and must derive its authority from the constitution...”⁴⁹ This is proved whereas Article 63 (3) (d) and (e) respectively gives authority to the parliament to enact laws and to make ratification to all treaties and agreements to which Tanzania is a party respectively. Also, Article 64 has vested all Legislative powers to the Parliament.

Also, as per Article 97 (5) the constitution is source of all subsidiary legislations as it empowers the parliament through its enactments (Legislation) to *delegate legislative power* to other government agencies, departments, or persons to make regulations which are in conformity with this it and with Parent Act.

In that manner it is clear that the Constitution of Tanzania is the source of all Labour laws of Tanzania both Legislations and Subsidiary legislations which are elaborated herein

⁴⁶ Francis Ndyababo Ishengoma v. A. G [2001] 2 EAC 485

⁴⁷ Tuffuor v. A.G [1980], GLR, 647 in the Supreme court of Ghana

⁴⁸ M.N, Daudi, *Process & institutions of constitution-making with reference to Tanzania*, in the St. Augustine University Law Journal Vol. 1 NO.2, Mwanza Tanzania, Faculty of law St. Augustine University of Tanzania, 2011

⁴⁹ G.S. Issa, *Constitutional Limits on Parliamentary Powers, Special Edition of the Journal TANZANIA LAWYER*, 2003, 3

after. This is because the legitimacy of these Labour Laws is derived from the Constitution⁵⁰

Regarding workers and employees as well as their rights, have been provided under Articles 22 and 23 which provide for the “right to work” and “right to just remuneration” respectively. Example, Article 22(1) states that “*Every person has the right to work*”, and sub article (2) adds that “*every citizen is entitled to equal opportunity and right to equal terms to hold any office or discharge any function under the state authority*”.

Article 23(1) and (2) imposes right to just remuneration to every person who perform certain work, and this just remuneration must be given without any discrimination. And the remuneration must be given equivalent or equal to the kind and weight of the work done. The article states that “*Every person who work is entitled to just remuneration*”⁵¹. Sub article (1) of this constitution states that “*Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to their measures and qualifications for work*”⁵²

Moreover, Article 13(1) and (2) provides for ‘equality before the law’ and it prohibits the discrimination of all kinds. Example, article 13(1)⁵³ states clear that “*all persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law*”. And, Article 13(2) of the same Constitution provides inter alia that, “*No*

⁵⁰ The Constitution of United Republic of Tanzania, 1977 as amended time to time

⁵¹ Supra Note 42, article 23(2)

⁵² *Idem*

⁵³ *Idem*

law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect”.

Therefore, regarding all the above provisions, it is clear that the Constitution provides the clear direction to all other legislations and subsidiary legislation on how right to work is to be exercised and enjoyed in Tanzania without any discrimination. Thus, Constitution is the mother law of the Land.

3.1.2 The Employment and Labour Relations Act, CAP 366 R.E 2019

This is the main legislation regarding Workers, employees as well as rights and duties of workers and of employers. The law also provides for some prohibitions, example sections 5, 6, and 7 respectively provide for prohibition of child labour, prohibition of Forced labour, and prohibition of discrimination in workplace consecutively.

However, regarding this research paper, the most relevant part is Part III of this Act which provides for “Employment Standards”. From this part the main focus is ‘Sub-part E’ which is about “Unfair termination of Employment” which contains provisions of section 35 to section 40⁵⁴.

This sub-part E of part III prohibits unfair termination of employment, as it has been stated clearly under section 37(1) that *“It shall be unlawful for an employer to terminate the employment of an employee unfairly”*. However, regardless this protection to employees and workers, but unfortunately the all workers and employees (including probationers) with short term employment of less than 6 months have been excluded

⁵⁴ The Employment and Labour Relations Act, CAP 366 R.E 2019

from being covered by this Law for unfair termination of employment. This has been clearly stated under section 35 of this Act⁵⁵ which provides inter alia that

“The provisions of this Sub-Part shall not apply to an employee with less than 6 months’ employment with the same employer, whether under one or more contracts”⁵⁶

That is to say, this law protects a certain category of workers or employees from unfair termination of their employment while at the same time a certain category of employees or workers is not protected by this law as per section 35 of this Act. In this manner the law itself seems to be discriminatory of itself as it has made distinction regarding the protection of employees.

Therefore, even though this is the main legislation that deals with the rights of the employees in Tanzania, but still through the provision of section 35 it does not provide for the sufficient coverage to all employees since it exclude some employee from protection for unfair termination of employment.

3.1.3 The Employment and Labour Relations (Code of Good Practice) G.N.NO 42

According to rule 2 of these rules⁵⁷, these rules were made to be applicable to all employees as well as employers, trade unions, employers’ organizations, mediators, arbitrators, assessors, and judges, and shall include Government officials.

⁵⁵ Ibid,20

⁵⁶ *Idem*

⁵⁷ The Employment and Labour Relations (Code of Good Practice) G.N.NO 42

Part II (a)(i) of these rules provide for forms of termination of employment and procedures from rule 3 to rule 10. But, the most relevant provision of these rules is rule 10 which provides for the probationary employees.

Now, rule 10(1) of these rules⁵⁸ has also excluded the probationary employees with less than 6 months from being covered or protected by this rule 10 regarding unfair termination. This sub-rule has mentioned only probationary employees with not less than 6 months period as being the ones whose termination procedures are provided under the guideline. The sub-rule states inter alia that;

*“all employees who are under probationary periods of not less than 6 months, their termination procedures shall be provided under the guideline”*⁵⁹

This means that, the probationary employees with less than 6 months employment are not covered by these rules as the aforesaid procedures for termination of employment which have been mentioned by rule 10(1) that they will be provided in the guideline, do not include the procedures of probationary employees with less than 6 months employment. Thus, by virtue of rule 10(1), it seems that these rules have also made distinction between two categories of probationary employees regarding protection from unfair termination of employment.

⁵⁸ The Employment and Labour Relations (Code of Good Practice)

⁵⁹ *Idem*

3.2 THE DOMESTIC LAWS OF SOUTH AFRICA

3.2.1 The Constitution of the Republic of South Africa, 1996

In South Africa, as applies to other States, the Constitution of South Africa is the Supreme Law or the mother law of the Republic of South Africa. This supremacy of the Constitution has been declared under Article 2 of this Constitution of Republic of South Africa, as it states inter alia that;

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”⁶⁰

Thus, because the Constitution is the supreme law as provided in that provision, it is therefore clear that, no any law in South Africa that can be inconsistent with the any provision of South Africa. That is to say the Labour laws of South Africa must contain provisions which do not go against the provisions of this Constitution, since doing so those laws are invalid.

In connection to above supremacy of the constitution, also article 9 of this Constitution⁶¹ provides for the ‘right to equality’ and ‘nondiscrimination’. The article in its sub article (1) and (2) respective reads that; *“Everyone is equal before the law and has the right to equal protection and benefit of the law.”* And sub article (2) reads that; *“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of*

⁶⁰ Article 2 of the Constitution of the Republic of South Africa, 1996

⁶¹ The constitution of Republic of South Africa, 1996

equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”⁶²

Sub article (3) and (4) of this Article 9 respectively prevent the State, legislations as well as the persons not to discriminate any person whether directly or indirectly. The aforementioned sub articles read inter alia that;

Sub article (3) *“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”⁶³*

Sub article (4) *“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination”*

Thus, regarding Labour affairs, the Constitution under its Article 23 provides for the right to ‘Labour Relations’ of which under sub article (1) it provides the right to every fair labour practice to every person in South the Republic of South Africa. The sub article states inter alia that; *“Everyone has the right to fair labour practices”⁶⁴.*

This right to fair labour practice is a very broad right, as within it there are other rights which have been attached to it which the employees or workers and employer are entitled. Example, it includes the right not to unfair dismissal, right to be given equal

⁶² The Constitution of Republic of South Africa, 1996

⁶³ *Idem*

⁶⁴ Article 23(1) of the Constitution of the Republic of South Africa, 1996

opportunities in the workplace, the right of all workers to equal legal protection without distinction or discrimination on any basis like on basis of difference of length or period of employment contract.

Therefore, regarding the above analysis, the workers or employees in South Africa have been protected by the Constitution in different manners, that is to say, through right to equality before the law and nondiscrimination on any basis, and right to fair labour practice. But this protection has been made very strong through the Supremacy of the constitution which has declared to invalidate any action any other law that contradict with any provision of the Constitution in South Africa.

3.2.2 The Labour Relations Act of 1995, R.E 2014

This is the main legislation in South Africa regarding the Labour affair. This Act was enacted in 1995 as Act No.66, but the last amendment has been made in 2014 by the Act known as “Labour Relation Amendment Act, No.6 of 2014”.

Now, section 200A of this Act provides for the presumption as to who is an employee. It defines who is employee. According to this provision, an employee is any person who work or who renders services to⁶⁵ any other person while he or she is subject to the control and direction of that other person, or while his hour of work are controlled by that other person, or while he is supplied by tools of work by that other person, or while economically he depends to that other person, or while he work in organization and he forms part of that organization. The provision states inter alia that;

⁶⁵ The Labour Relation Act of 1995,R.E 2004

“A person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present

(a) The manner in which the person works is subject to the control or direction of another person;

(b) The person’s hours of work are subject to the control or direction of another person;

(c) In the case of a person who works for an organisation, the person forms part of that organisation;

(d) The person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) The person is economically dependent on the other person for whom he or she works or renders services;

(f) The person is provided with tools of trade or work equipment by the other person; or

(g) The person only works for or renders services to one person”

Section 198 provides for ‘the temporary employment service’ as it defines that *“temporary employment service means any person who, for reward, procures for or provides to a client other persons— (a) who perform work for the client; and (b) who are remunerated by the temporary employment service”*⁶⁶

⁶⁶ Section 198(1)(a) &(b) of the Labour Relations Act, R.E 2014

On other side section 198C (1)(a) defines the so called ‘part time employee’ as it says that *“a part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee”*

Thus, the most relevant part to this research is chapter Viii and Schedule 8 which provides for the ‘unfair dismissal and unfair labour practice’ as well as ‘Code of good practice’ Probationary employees respectively.

Example, under chapter Viii there is Section 185 of the Labour Relations Act that provides for the right to all employees not to be unfairly dismissed or subjected to unfair labour practice. The provision states in other words that; *“Every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice”*

The probation is dealt with in terms of Code of Good practice-dismissal that is contained in schedule 8 to ⁶⁷this Labour Relations Act. According to section 8 (1) of Schedule 8 of the Labour Relations Act, a newly hired employee may be placed on probation for a period that is reasonable given the circumstances of the job. The period should be determined by the nature of the job, and the time it takes to determine the employee’s suitability for continued employment.

According to section 8(2) of the schedule 8 of this Act, it is declared to be unfair for an employer to dismiss an employee for poor performance or after expiration of the probation period. Also, this sub section prohibits an employer not to dismiss such probationary employee on that basis of poor performance. This provision provides for

⁶⁷ Ibid,25

the two exceptions which can make an employer to be allowed to dismiss the probationer for such reason, the exceptions have been provided in quotation below.

Therefore, this sub section reads inter alia that;

“After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has— (a) given the employee appropriate evaluation, instruction, training, guidance or counseling; and (b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily”⁶⁸

The issue of procedures; in case an employer decides to dismiss a probationary employee, then subsection (3) and (4) of provide for procedures to be followed. Thus, Subsection (3) of this section 8 of schedule 8 says that “The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter”

And, subsection (4) adds that “In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee”.⁶⁹

On other hand, section 8(9) of schedule 8 of this Act provides for the ‘Guidelines in cases of dismissal for poor work performance’. The subsection provides the guidelines by stating that;

“Any person determining whether a dismissal for poor work performance is unfair should consider—

(a) Whether or not the employee failed to meet a performance standard; and

⁶⁸ Section 8(2)(a) & (b) of schedule 8 of the Labour Relations Act, R.E 2018

⁶⁹ *Idem*

(b) If the employee did not meet a required performance standard whether or not—

(i) The employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) The employee was given a fair opportunity to meet the required performance standard; and

(iii) Dismissal was an appropriate sanction for not meeting the required performance standard.”

3.3 REGIONAL LEGAL FRAMEWORK

The African Charter on Human and Peoples’ Right, 1981

3.3.2 Protocol on the Establishment of the East African Community Common Market, 2010

This protocol among other things provides for Free movement of labour withing East Africa Community (EAC) partner States. Under article 2(4) (c) it provides for the free movement of Labours as one of the areas of the Common market within the EAC⁷⁰. The article states inter alia that;

“In accordance with the provisions of Articles 76 and 104 of the Treaty, this Protocol provides for the following: (c) the free movement of labour.” Also, under Article 10 the

⁷⁰ Article 2(4) (c) of the Protocol on The Establishment of The East African Community Common Market, 2010

requires the partner States to guarantee the free movement of workers to the citizens of other partner States who are at their territories.⁷¹

However, the free movement of workers has been put under the control of the host partner state under three grounds namely; public policy, public security and public health. Meaning that, the host partner State has power to use its domestic Laws and administrative procedures to control the Free movement of Workers.

The article does not expressly talk on the probationary workers, rather it talks on workers in general. Meaning that the probationary workers are included in the meaning of free movement of workers under article 10, it's because the phrase Worker as defined under article ... of this protocol means the “a person who performs service for and under the direction of another person in return for the remunerations”⁷²

3.4 INTERNATIONAL LEGAL FRAMEWORK

3.4.1 The ILO Convention on Elimination of Discrimination in Respect of Employment and Occupation (N0.111) of 1958

This Convention deals with the prohibition of the Discrimination to the employees. Article 1 (a) and (b) of this Convention⁷³ defines what amount to Discrimination in the perspective of Employment. the term discrimination has been defined “to include any distinction, exclusion or preference made on the basis of race, colour, sex, religion,

⁷¹ Article 10(1) of the Protocol on The Establishment of The East African Community Common Market, 2010

⁷² *Idem*

⁷³ ILO Convention on Elimination of Discrimination in Respect of Employment and Occupation (No.111) of 1958

political opinion, national extraction or social region, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”⁷⁴

Sub article (2) of this Article adds inter alia that, the term “discrimination” includes such other distinction, exclusion or preference which has the impact of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organizations, where such exist, and with other appropriate bodies”⁷⁵

Thus, even though these two sub-articles do not expressly mention the probationary workers, but impliedly the probationary workers have been included in this definition from not being discriminated as other category of workers. Thus, any distinction or exclusion or preference made to the employees whether permanent or temporary employees that has effect of treating employees differently is deemed to be discrimination in the employment service.⁷⁶

Therefore, any law that treats permanent employees different from how it treats the probationary employees is deemed to be a discriminatory Law, as per the provision of this Convention.

⁷⁴Article 1(a) of the ILO Convention on Elimination of Discrimination in Respect of Employment and Occupation (No.111) of 1958

⁷⁵ *Idem*

⁷⁶ *Idem*

The provision of article 8(1) of this Convention⁷⁷ states clear that, the Convention is binding to those Member States of International Labour Organization (ILO) whose ratification has been registered by the Director-General of ILO.

3.4.2 The ILO Termination of Employment Convention (No.158), 1982

This Convention provides for the General international Standards (guideline) regarding the termination of the Employment Contract of the Employees. Are the standards or guidelines which are to be adopted by the member States of ILO in their domestic Laws, and they are to be implemented thereof.

Under Article 2 (2) the Convention applies to all branches of economic activities and to all employees.⁷⁸ However the Convention under Article 2(2) gives exclusive power to the members States to decide whether to exclude some category of employed persons from being covered under all or some provisions of this convention.⁷⁹ It mentions the three category of employees that the Member States can decide not to be covered by the all or some of provisions of this Convention. They are;

- (a) Workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) Workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

⁷⁷ ILO Convention, supra note 72, Article 8(1)

⁷⁸ Article 2 of the ILO Termination of Employment Convention (No.158), 1982

⁷⁹ *Idem*

(c) Workers engaged on a casual basis for a short period.⁸⁰

3.4.3 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976

This Article under article 6 and 7 provides for the Right to work.⁸¹ The Convention through these two articles does not expressly provides for the Probationary workers, rather it provides for the right to work in General to all workers withing the State parties. The provision of Article 6 requires the State parties to the Covenant to recognize the right to work, which includes the right to everyone to the opportunity to gain his living by work which he freely chooses or accepts.⁸²

The State parties are required also take the appropriate steps to safeguard this right to work within its territories.⁸³ Under article 7 (c) the State Parties are required to ensure that “equal opportunity to everyone is to be promoted in his employment to an appropriate higher Level, subject to no Considerations other than those of seniority and Competence”⁸⁴

The Convention is too General, it does not specific speak on probationary workers or the termination of Work of the workers or of the probationary workers within the State Parties to this Convention.

⁸⁰ Article 2(2) of the ILO Termination of Employment Convention (No.158), 1982

⁸¹ Article 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, 1976

⁸² *Idem*

⁸³ *Idem*

⁸⁴ *Idem*

3.5 CONCLUSIVE REMARKS

Therefore, in very brief, the analysis made in this chapter has shown that the laws of South Africa provide a sufficient coverage and protection to all employees even the probationary employees especially against unfair labour practice like unfair dismissal or termination of employment. Whereas on other hand, the laws of Tanzania provide less protection regarding unfair labour practice as the probationary employees with less than 6 months employment are not covered for protection.

CHAPTER FOUR

RESEARCH FINDINGS AND ANALYSIS

4.1 Field Research

In field research, the researcher has collected the field data from different respondents as well as from different areas. The data has been collected from Advocates, lawyers (holders of LL. B), probationary workers and permanent employed Workers. The data were collected through interview, mostly the telephone interview was used especially to those respondents who were located far from the researcher, whereas some Respondents the face to face interview was also used to collect data from some of respondents especially those who were located in Iringa Municipality near the research.

Some of the respondents to whom the researcher succeeded to make face to face interview were; Advocate 'Frank Francis Mwela and Advocate Erick Nyato, both from "MWAKABUNGU LAW CHAMBER" at Iringa,⁸⁵ Mr. Dominic I. Ruhitana who is a Lawyer located at Iringa by that time of interview.⁸⁶

Telephone interview with was conducted to several respondents, some of them being to "Advocate Machunda Nzumbe" (currently he practices as State Attorney from Office of Solicitor General at Morogoro)⁸⁷

⁸⁵ An interview with Respondents No. 2 and 3 from "Mwakabungu Law Chamber of P.O.Box 230 Iringa", Located at RETCO Building along Uhuru Road-Iringa, the interview conducted between 30th January 2024 to 19th March 2024

⁸⁶ The interview Conducted with Respondent No.5 (a Lawyer/ LL. B holder from RUCU), conducted several times between October 2023 and March 2024

⁸⁷ The telephone interview with advocate Machunda Nzumbe (the State Attorney from Office of Solicitor General at Morogoro), an Interview conducted on 4th October, 2023 at 7:20 pm to 7:52 pm

However, for some respondents the researcher used both kind of interview namely face to face and telephone interview, for instance, it was used to “Baraka Uswege (a Lawyer/legal officer) from Mwakabungu Law Chamber”⁸⁸

The most common question asked to many of the respondents was concerning the position of section 35 of the Employment and Labour Relation Act⁸⁹ in relation to its equality in treating probationary workers and permanent workers in Tanzania. Also, the researcher was asking on the position of that provision (section 35) in relation to the Constitution of Tanzania, as well as in relation to the position of Labour Laws of South Africa. The two mentions were some of most common questions asked to respondents among others.

Regarding those two questions, the general answers from most of respondents was like this, the provision of section 35 of the Employment and Labour Relation Act⁹⁰ does not comply with the provision of Article 13 of our Constitution⁹¹ as this Article prohibit any kind of discrimination even in the work environment.

Regarding Labour Laws of South Africa, the question that was responded much by the Advocates and Lawyers, they had the general comment that, Tanzania we have something to Learn from not only the labour laws of South Africa, but also from many Laws of South Africa starting from the Constitution itself.^{92 93}

⁸⁸ An Interview with respondent NO.4 (the Legal officer from Mwakabuku Law Chamber) of Iringa, the interview conducted several times between 4th February to 17th March, 2024 at 10:00 am to 4:00 pm

⁸⁹ CAP 366 R.E 2019

⁹⁰ *Idem*

⁹¹ The Constitution of United Republic of Tanzania, CAP 2 of 1977

⁹² Meaning, the Constitution of Republic of South Africa, 1996

4.2 The standard probation period in South Africa as varied to standard probation period in Tanzania

After data collection and analysis of data, the researcher has come up with difference existing between the Labour Laws of Republic of South Africa from that of United Republic of Tanzania regarding the probation period to employees. Thus, herein after is the brief analysis of the findings obtained by the researcher;

4.2.1 The standard probation period in South Africa

The researcher has observed that, the Labour Laws of Republic of South Africa provide expressly the probation period of workers or employees in South Africa. A researcher has observed this being provided under section 8(1)(d) of Schedule 8 of the Labour Relations Act,⁹⁴ where by the probation period is ‘reasonable period sufficient to the employer to make assessment of suitability of the probationary employee to the work.

The standard probationary period required in south Africa is the so called “reasonable period”⁹⁵. Means that, depending on the nature of the job, the probationary employment shall be made in the length of period which shall be reasonable for the employer to test the capability and suitability of such probationer in that position of employment which he is working for.

⁹³ Response from respondent No.1 (Advocate Machunda Nzumbe), and respondent No.3 (Advocate Erick Nyato),

⁹⁴ The Labour Relations Act R.E 2018

⁹⁵ <https://joinhorizons.com/countries-employee-probation-period-in-south-africa>, accessed on 7th October, 2023 at 9:40 am

“The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee’s suitability for continued employment”⁹⁶

Thus, depending on the different nature of works, the “reasonable” period for probation in South Africa as per law can be either two (2) weeks, one (1) month, two (2) months, three (3) months, or four months. It can also be length period of six (6) to twelve (12) months or more than that if the employer has not yet been capable of testing the capability of that probationer.

The Law in South Africa does not set a period as minimum length standard for which every probationary employment contract must start with, rather, the laws require only the reasonable period. This gives a freedom to the probationary employment to be either very short period, or short period or length period as far as the employer is able to test his new employee.

That is to say, even if the South Africa’s Government does not enforce a strict limit on the probationary period at the start of employment, however, employers cannot keep employees on probation indefinitely.⁹⁷

4.2.2 The standard Probation Period in Tanzania

While in South Africa the labour laws allows an employee to work on probationary period which is reasonable even for less than six (6) months like three months, the

⁹⁶ Section 8(1)(d) of Schedule 8 of the Labour Relations Act, R.E 2014

⁹⁷<https://remote.com/blog/south-africa-labor-laws>, accessed on 7th October, 2023 at 10:00 am

situation in Tanzania is different as the Laws relating to employment and labour relations do not allow a probation period of less than six (6) months.

Advocate Machunda when responding to the question asked by the researcher, among other things he was of the view that, the provision of section 35 of the Employment and Labour Relations Act is discriminatory because it denies the employees with less than 6 months employment the right to be protected for unfair termination while the same gives other employees such a right.⁹⁸ He also added that the provision of Article 13 of the Constitution of United Republic of Tanzania does not allow any discriminatory law or action, that, being so, such law is unconstitutional to the extent of its inconsistency.⁹⁹ Advocate directed the researcher to read further constitutionality of this provision of section 35 and the cases on constitutional supremacy.

Regardless the fact that there is no explicit provision in the Employment and Labour Relations Act¹⁰⁰ about probation period, however, this Act under its section 35¹⁰¹ implicitly requires a probationary period of not less than six (6) months, as it says that workers with less than 6 months of employment may not bring an unfair termination claim against the employer.

This means regardless the fact that there are kind of works whose nature require to test workers under short term probation period of 1 or 2 or 3 months, but technically all probationers are forced by this law to work on probation period of not less than six

⁹⁸ The response from Respondent No.1 (an advocate and State Attorney from the Office of Solicitor General at Morogoro), the telephone interview conducted on 4th October, 2023 at 7:20 pm to 7:52

⁹⁹ *Idem*

¹⁰⁰ The Employment and Labour Relations Act, CAP 366 R.E 2019

¹⁰¹ *Idem*

months in order to have legal security and legal right of filing claim on unfair termination upon happening such circumstances of unfair termination.

In addition to that, the labour laws of Tanzania set limit of probationary period, in particular rule 10 (4) of the Employment and Labour Relations (Code of Good Practice) Rules¹⁰² provides that the probation should not exceed a period of twelve (12) months, during which the employer can evaluate the performance and suitability of the employee to the institution or office or company.

Also, rule 10 (5) of the same Code,¹⁰³ allows an employer after consultation with the employee to extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess if the employee is competent to do the job or suitable for employment.

4.3 Protection and security of Probationary employees and temporary employees in South Africa and in Tanzania

Under this part of this chapter, the main focus of the researcher was to see how the probationary employees are protected in South Africa as well as in Tanzania. He aimed those probationers with long probation contract period of 6 to above months, as well as those probationers with short contract of probation period of less than 6 months like 1, 2, 3, 4 to five months.

¹⁰² G.N No.42

¹⁰³ *Idem*

4.3.1 Protection and security of probationary employees and temporary employees in South Africa

The researcher in his findings has observed that, the temporary and probationary employees in South Africa are strongly protected by labour laws of South Africa. They are protected against unfair termination or dismissal of their temporary or probationary employment contract.

Indeed, this protection has been done by the same laws and rules used to protect permanent employees.¹⁰⁴ The labour laws in South Africa¹⁰⁵ give equal treatment and protection to all probationary employees against unfair termination without distinguishing them basing on the length of employment contract. They are treated and are protected equally against unfair termination without discrimination.

A researcher has found that section 185 of the Labour Relations Act provides for the right to all employees not to be unfairly dismissed or subjected to unfair labour practice. The provision states in effect that; *“Every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice”*¹⁰⁶

Section 198B of the same Act prohibits the temporary employees with less than 6 months not to be terminated unfairly. The provision states that; *“a person of temporary employees who has placed with a client for a period exceeding three months cannot be*

¹⁰⁴<https://labourguide.co.za/general/probation33#:~:text=-employees-on-probation-not-dismissed,> accessed on 10th October, 2023 at 05:50 am

¹⁰⁵ Starting from the constitution and Legislations as well

¹⁰⁶ Section 185 of the Labour Relations Act, No.6 R.E 2014

dismissed unless there is a justifiable reason for the dismissal related to the employees conduct or capacity of the operational requirement of the client”¹⁰⁷

The protection goes far to the extent that, the employees on probation in South Africa may not be dismissed at the end of the period for probation for poor performance, unless the employer was counseled during the probation period and an opportunity was given to an employee to defend himself against the allegations of poor performance before a dismissal is decided upon.¹⁰⁸ In other words, there must be an incapacity inquiry before dismissing the employee on probation for poor performance and the employee must be given a chance.¹⁰⁹ This position has been provided under Section 8(2) (a) & (b) of schedule 8 of the Labour Relations Act which states that;

“After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has— (a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and (b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily”¹¹⁰

The relevance of aforementioned protection of probationers against unfair termination has clearly been proved in several cases of South Africa where the CCMA decided in favour of the dismissed employees (probationers) and the employers were ordered to pay compensation to those probationers for such unfair dismissal. The cases are as provided herein after;

¹⁰⁷ Section 198B the Labour Relations Act, No.6 R.E 2014

¹⁰⁸ *Idem*

¹⁰⁹ *Idem*

¹¹⁰ Section 8(2)(a) & (b) of schedule 8 of the Labour Relations Act, R.E 2018

In the case of *Fraser vs. Caxton Publishers*¹¹¹ whereby the employee was fired for falsifying her CV and for incompatibility. She took the matter to the CCMA where the arbitrator agreed that she was indeed guilty of the conduct for which she had been fired. The arbitrator agreed also that this misconduct was serious enough to merit dismissal.

Despite this, the arbitrator found the dismissal to be unfair because the employer had not given the employee a chance to defend herself against the charges. The employer was therefore ordered to pay the employee compensation equal to four months' remuneration.

In the case of *Tharratt vs. Volume Injention Products (pty) Ltd*¹¹², the employee was dismissed during his probation period for poor performance. As the employer has failed to investigate the cause of the poor performance, the CCMA found the dismissal to be unfair.

The employer was therefore ordered to pay the employee compensation equal to three months' remuneration.

In another case of *Smith / Patient Focus Africa (Pty) Ltd*¹¹³, the employee's initial probation period was extended due to her poor performance. The employer did initially address the poor performance but failed to do so during the last two months of her employment. The commissioner stated that the employee should have been counselled on her poor performance and she had to be given the opportunity to make representations to employer prior to deciding whether to dismiss or not.

¹¹¹ (2005) 3BALR 323

¹¹² (2005) 6BALR 652

¹¹³ (2009) 18 CCMA 7.20.1

Thus, the employee was therefore awarded one (1) month of salary as compensation for that unfair dismissal by her employer.

Therefore, all these cases highlight the fact that probationary employees are strongly protected by labour laws in South Africa.

4.3.2 Protection and security of probationary employees and temporary employees in Tanzania

In his findings, a researcher has found that employees under probation in Tanzania are not treated equally by the labour laws. Some of them have been given right to file claims against their employers for unfair termination or dismissal from employment, while others have been denied that right.

This position has been clearly identified by the researcher being provided under several legislations of the provision of labour laws of Tanzania and in the Case, laws decided in Tanzania's courts. And, the proof for this statement has been provided herein.

Sub-part E of Part III of the Employment and Labour Relations Act¹¹⁴ deals with unfair termination of employment, of which section 37(1) prohibits and declares unlawful to any employer who terminate employment unfairly. The section states that "*It shall be unlawful for an employer to terminate the employment of an employee unfairly*"

However, section 35 of this Act¹¹⁵ has excluded the category of workers whose employment contract is less than six (6) months while the same provision allows this part to apply to workers with six months of employment and above. Meaning that, workers

¹¹⁴ CAP 366 R.E 2019

¹¹⁵ *Idem*

including probationers with less than six months employment are not covered and are not protected by this Act in case of unfair termination of employment. The provision states inter alia that;

“The provisions of this Sub-Part shall not apply to an employee with less than 6 months’ employment with the same employer, whether under one or more contracts”¹¹⁶

Also, rule 10 of the Employment and Labour Relations (Code of Good Practice)¹¹⁷ deals with probationary employees in Tanzania. Now, rule 10(1) of these rules¹¹⁸ provides for the same position as provided under section 35 of the Act.¹¹⁹ This sub-rule (1) also has excluded the probationary employees with less than 6 months from being covered by this rule 10 regarding unfair termination. This sub-rule has mentioned only probationary employees with not less than 6 months period as being the ones whose termination procedures are provided under the guideline. The sub-rule reads inter alia that;

“all employees who are under probationary periods of not less than 6 months, their termination procedures shall be provided under the guideline”

This sub-rule is supporting section 35¹²⁰ in the sense that the procedures for termination of employment have been made only for the employees with 6 to above months of probationary period.

Therefore, the above provisions of the two labour laws of Tanzania prove that there is no legal security to the employees who under probationary period of less than 6 months

¹¹⁶ Section 35 of the Employment and Labour Relations Act, CAP 366 R.E 2019

¹¹⁷ G.N. NO.42 of 2007

¹¹⁸ *Idem*

¹¹⁹ CAP 366 R.E 2019

¹²⁰ *Idem*

from unfair termination. Meaning that, all employees have been employed in a short contract of less than 6 months are not protected from unfair termination. Likewise, all probationary employees who are employed in the kind of jobs whose nature require the probationary period of short time less than 6 months for making assessment of their capability and suitability are not protected from unfair termination, since they have been denied the right to claim for unfair termination as per section 35¹²¹ and rule 10(1)¹²²

According to Winneleah amid of A.B.C Attorneys in her article she provides that, “the employer has the right to terminate the employment of probationary employees with less than 6 months employment with or without cause”¹²³. The author also proves how the labour laws of Tanzania do not sufficiently cover all employees.

This has been proved also in the case of *Stella Temu vs. Tanzania Revenue Authority (TRA)*¹²⁴ where the court held that while under probation period, the Appellant was under a ‘practical interview.’ More over the Court also concluded that “*since the Appellant was a probationer, he is therefore not covered under the unfair termination provisions. Section 35 of the Employment and Labour Relations Act does not apply to an employee with less than 6 months employment with the same employer, whether under one or more contract and hence constructive termination does not apply to employee on probation*”

Thus, the position of the labour laws of Tanzania leaves the loophole to the employers which might be used by employer(s) to fire the probationary employees or any

¹²¹ The Employment and Labour Relations Act, CAP 366 R.E 2019

¹²² Employment and Labour Relations (Code of Good Practice) G.N. NO.42 of 2007

¹²³ W. Amiel, *Probationary employees in Tanzania*, A.B.C Attorneys, available at www.abcattorneys.co.tz

¹²⁴ (2005) TLR 178

employees with less than 6 months employment at any time so long as the employers knows that Labour laws do not protect such kind of employees with less than 6 months' employment. This is because the employer real knows that the if that employees files the claim on unfair termination, then that claim of the fired employees won't be successful received by the Commission for Mediation and Arbitration as the law denies such employee right to file a claim for unfair termination.

4.4 The Constitutionality of Labour Law in Tanzania regarding probationary employees

The constitution of United Republic of Tanzania¹²⁵ under its Article 13(1) and (2) provides for 'equality before the law' and it prohibits the discrimination of all kinds. Example, article 13(1)¹²⁶ states clear that "*all persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law*". This sub-article requires all people to be protected by the law equally without any discrimination. In that sense all employees are entitled to the right to equal protection by the labour laws of Tanzania without discrimination of any kind even on the basis of length of employment period.

Also, article 13(2) of the same Constitution provides inter alia that, "*No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect*". This sub article prohibits any law of Tanzania from containing any provision that has effect of discrimination of any kind.

¹²⁵ CAP 2 of 1977 as amended time to time

¹²⁶ *Idem*

Thus, the word ‘discrimination’ has been defined by WHO to mean “*any distinction, exclusion, or restriction made on the basis of various grounds which have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedom*”¹²⁷.

In the light of the above definition, it is therefore clear that the provision of section 35 of ELRA¹²⁸ and rule 10(1) of the ELRA (Code of Good Practice)¹²⁹ have the effect of discriminating the probationary employees and other workers with less than 6 months employment. This is because these provisions have made ‘distinction, between employees with less than 6 months employment and those employees with 6 to above months’ employment. Also, the provisions have made ‘exclusion’ as they have excluded the employees with less than 6 months employment from being protected for unfair termination, and finally the said provisions of section 35 has made ‘restriction’ to that category of employees by restricting them from filling claim on unfair termination.

Therefore, that is to say the aforesaid provisions of Labour Law is discriminatory in nature contrary to the requirement of Article 13(1) and (2) of the Constitution of United Republic of Tanzania on that basis of giving one category of employees the right to claim while denying another category of employees the right to claim for unfair termination. These provisions contradict also with Article 7 and 2 of the UDHR¹³⁰ which provides for equality before the law and protection against discrimination respectively. Also, they are

¹²⁷ WHO, *The Right to Health: Human rights*, United Nations, Geneva, 2008, 7

¹²⁸ The Employment and Labour Relations Act, CAP 366 R.E 2019

¹²⁹ G.N.NO.42 of 2007

¹³⁰ Universal Declaration of Human Right, 1948

contrary to Article 2 and 26 of the ICCPR¹³¹ which also provides for 'equality before the law' and nondiscrimination.

4.5 Conclusive remarks

Therefore, the findings of the research provided there on have shown the reality of the statement of the problem as the analysis shows how the labour laws of South Africa are more comprehensive than that of Tanzania regarding the protection of workers or employees with short period of employment and those with temporary employment contract as well as probationary employees from unfair termination of employment.

¹³¹ International Covenant on Civil and Political Rights, 1966

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Generally, a researcher in this research has found and had become aware of several things in both two countries of Tanzania and South Africa regarding the workers and probationary employees.

In both two counties the labour laws promote rights of workers and of probationary employees. That is to say the right to equality and nondiscrimination to every person has been incorporated as the constitutional right in both two Constitution of Tanzania and in that of Republic of South Africa. But the difference existing is that, in South Africa 'the right to fair labour practice' has been set as the constitutional right in the Constitution of the Republic of South Africa under Article 23(1) while in Tanzania this is just a right and not a constitutional right. Therefore, in that, the south Africa Labour laws seems to be more comprehensive and stronger in protecting labours than Tanzania as the constitutional right is inalienable and cannot be deprived easily.

On the issue of probationary employees and unfair termination of employment, there is difference in these two countries in their labour laws. the labour laws of the Republic of South Africa promote equal protection to all probationary employees from being unfairly dismissed. This protection is promoted without any kind of discrimination and without regarding on the length of probation period which the employees have. Means that, all probationer with short term period of one or two or three or six months are protected

equally from unfair dismissal with those probationary employees with length employment period of more than 6 months. In Tanzania there is difference as the employees (including probationer) with less than 6 months employment period are not protected from unfair termination of the employment as they have been denied the right to claim for unfair termination while those Employees with 6 to above employment period have been protected from unfair termination.

Even though, the provision of Article 13 of the Constitution of United Republic of Tanzania promotes the equality before the law while also prohibits discrimination, but the labour law seems to be discriminatory of itself contrary to the constitution.

Moreover, on probationary period, the laws of South Africa are also more comprehensive as they don't contain technical minimum legal limit of probationary period, the standard period set is the so called 'the reasonable period sufficient to test the suitability and competence of the employee in regard to the work he is expected to be employed.' Where as in Tanzania, the labour laws contains the technical provision that set minimum limit of probation period as the set condition to the effect that only the employees with probationary period of 6 months to 12 months shall be eligible for protection against unfair termination of their employment.

Therefore, generally according to the study done in this research, it is clear that the labour laws of the Republic of South Africa are more comprehensive than the Law of Tanzania in all dimensions provided there on.

5.2 Recommendations

5.2.1 Legal Recommendations

Basing on the research objectives both general and specific, and regarding all matters as afore stated there on, the researcher recommends now as follows;

The researcher recommends that the responsible authorities of Tanzania namely the government and the Parliament should take all necessary steps to amend the labour laws of Tanzania especially section 35 of the Employment and Labour Relation Act as well as rule 10(1) of the Employment and Labour Relations (Code of Good Practice) so as to ensure that these probationary employees and other workers or employees with less than 6 months employment are covered in the protection against unfair termination of employment.

The researcher recommends also to the state authority to take reference and lesson from South Africa Laws, and to make the labour relations as the constitutional right in Tanzania by imposing it in the Constitution of United Republic of Tanzania. doing so it will increase the protection to these labour rights because the Constitutional rights are unique rights from normal rights and cannot be easily deprived by any one, different from other normal rights contained in the Legislations.

The researcher recommends also to the government to review all the national policies dealing with the Labour relations and employment affairs, and to take lesson from Labour Laws of South Africa regarding all matters which Tanzania seems to have less coverage than South Africa, so as to discover even other areas which can be improved in our Labour laws apart from these areas covered by this research paper.

5.2.2 Extra Legal Recommendations

In order to achieve all mentioned above, the researcher recommends the government to use this research paper to get data or information which will help to know all areas which needs to be amended so as to make a comprehensive coverage of protection of all categories of workers and employees in Tanzania without further discrimination.

Finally, the researcher recommends to use the experts of labour laws and of the human rights and constitutional rights as well as the use of community's stake holders so as to get their knowledge and to combine all their ideas so as to come up with the good coverage of amendment of Labour laws of Tanzania.

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