

**RUAHA CATHOLIC UNIVERSITY**



**(RUCU)**

**FACULTY OF LAW**

**A COMPARATIVE LEGAL ANALYSIS BETWEEN TANZANIA AND KENYA IN RIGHTY OF  
PROBATIONARY EMPLOYEES**

**A Research Paper Submitted in Partial Fulfillment of the Requirement for the Degree of  
Bachelor of Law of the Ruaha Catholic University.**

**By**

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**JUNE 2025**

**CERTIFICATION**

The under designed certifies that she has read and recommend for acceptance by Ruaha Catholic University, a research paper by Dafroza W. Kunzugala research paper titled: A Comparative Legal Analysis Between Tanzania and Kenya In Righty's Of Probationary Employees, in partial fulfillment of the requirements for award of Bachelor of Laws (LL.B) degree Ruaha Catholic University.

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DATE.....

**DECLARATION**

I, DAFROZA W. KUNZUGALA, declare that the contents of this research are the result of my own work and to the best of my knowledge, as it has never submitted for similar or in any other university.

Signed on .....

.....

Dafroza W. Kunzugala

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To all I owe my gratitude for this research paper responsibility for any error remaining mine

## DEDICATION

I dedicate this research entirely to my family who have been there for encouragement and prayers, may our Almighty God bless you all, and also to my supervisor Catherine John.

## **LIST OF LEGAL INSTRUMENTS**

### **INTERNATIONAL INSTRUMENTS**

The Universal Declaration of Human Rights 1948

The International Labour Organization (ILO), 1919

The ILO Philadelphia Declaration, 1944

### **REGIONAL INSTRUMENTS**

Employment and labour relations court act 2012

The Constitution of Kenya, 2010

The Employment Act, 2007

### **DOMESTIC LEGISLATIONS**

Employment and Labor Relations (Code of Good Practice) Rules 2007

Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

Employment and Labor Relations Act R.E 2019.

## LIST OF CASES

Macmillan Aidan limited v. Brandina Luca Mchamed, Revision No. 292 of 2008, 10-15

WS Insight Ltd (Formerly known as Warrior Security Ltd) v. Dennis Nguaro, Revision No.90 of 2019, in the High Court of Tanzania at Dar es Salaam

Gulf Badr Group (T) Ltd v. Fredrick Massawe Revision No.481 of 2019

David Nzaligo v. National Microfinance Bank PLC, Civil Appeal No.61 of 2016

Agnes B. Buhere v. UTT Microfinance PLC, The High Court of Tanzania at Dar es Salaam  
Revision No. 459 of 2005

## LIST OF ABBREVIATIONS

UDHR-The Universal Declaration of Human Rights 1948

ILO-The International Labour Organization (ILO), 1919

ILOPD-The ILO Philadelphia Declaration, 1944

ELRCA-The Employment and labour relations court act 2012

CK-The Constitution of Kenya, 2010

ELRCGP-Employment and Labor Relations (Code of Good Practice) Rules 2007

CURT- The Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

ELRA- The Employment and Labor Relations Act R.E 2019.

## ABSTRACT

This study explores the A Comparative Legal Analysis between Tanzania and Kenya In Righty's of Probationary Employees and it has formed in five chapters;

Chapter one, explores the legal and practical challenges facing Probationary Employees in Tanzania. The study aims to analyze the current Probationary Employees, as well as the legal framework governing the treatment of Probationary Employees in the country. The significance of the study lies in the need to ensure the protection of Probationary Employees rights and the promotion of fair and just legal processes.

Chapter two, theoretical Frameworks the theoretical framework of this study is grounded in human rights principles and international standards governing the treatment of Probationary Employees. Chapter three explores the legal provisions of Tanzania's Constitution and Kenya Constitution law.

Chapter four, Research Findings which reveal the harsh conditions faced by Probationary Employees in Tanzania, including right to fair termination, and delayed court processes. These challenges often lead to violations of Probationary Employees ' rights, including the right to a fair trial and protection from inhumane treatment. Chapter five, it explores Conclusion and Recommendations in conclusion, this study highlights the urgent need for reforms in Tanzania's employee to address the legal and practical challenges faced by Probationary Employees. Recommendations include improving employee conditions, ensuring timely access to legal aid, and enhancing judicial processes to uphold Probationary Employees ' rights. These reforms are crucial for upholding the rule of law and promoting justice in Tanzania's criminal justice system.

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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Background to the Problem

In the desire to accumulate maximum production profit employers for a long time in history have been attracted to exercise long working hours policy to employees, harassment, use of bondage labourers, child labourers, discrimination at workplace, sex, age or disability discrimination, unlawful termination even practicing unlawful work-related illegal practices<sup>1</sup>. This the stage points where often where the misconception surrounding probation employees arises. Many employers believed and some still believe today that once the probation period is over or nearing its end, that they can simply inform the employee that their performance is less than satisfactory and terminate their employees<sup>2</sup>.

The historical development of employment laws in both Tanzania and Kenya has been uniform, in the sense that, they have both passed through discriminatory and exploitative legislations where employees were discriminated and some denied most employment rights. Employment relation in Tanganyika prior to 1956 was made compulsory (criminal in nature) until when the Employment Ordinance was passed in 1956 and allowed some

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<sup>1</sup> Basson et al., "*Essential Labor Law*" Edition, labor law publications, Vol. 2<sup>nd</sup> (2000).

<sup>2</sup> D. Toit et al., "*The labor Relation : A Comprehensive Guide*", 2<sup>nd</sup> Edition, Butterworths, (1998).

voluntary negotiations between employer and Employee. The ordinance was passed to give a way for the ILO Conventions passed to protect working people<sup>3</sup>.

Labor Relations become more of a contractual than criminal in nature as the Ordinance provided for rights and obligations of both employers and employees. Under the former colonial legislations employers had only rights while the employees had no rights but obligations only.<sup>8</sup> Employment relationship existed on the notion of hire and fire wherein the environment to have any right to a probationary employee was not possible<sup>4</sup>. Employees security of employment was improved after independence of Tanzania whereby some laws were passed to enhance job security for workers. The new law tempered with the employers' Common Law right to "hire and fire" by limiting the employers' right to discipline. The Act established one Conciliation Board in each District, constituted by a chairman and two other members, to oversee compliance with its provisions, hear grievances and grant appropriate remedies. Likewise, another new law imposed a duty on every employer to pay Severance Allowance to an employee who had been in continuous employment with the employer for at least three months when the employment contract expires/terminated<sup>5</sup>. Since independence the first laws governing labour law in Tanzania is the employment and labour relation Act of 2004 and the Labour institution Act of 2004 but now law was last revised in 2019 to insure the basic employment standards, prevention and settlement of disputes under employment

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<sup>3</sup> B.Rutinwa et al., "*Employment and Labor Relations in Tanzania*". Law African publishing, (2005).

<sup>4</sup> ibid

<sup>5</sup> idem

relationship. Therefore until to date the laws of Tanzania on the issue of labor steal has the problem because is silence on the matter of protection of probationary employees thus Make it a core of a researcher to conduct this research

## **1.2 Statement of the problem**

The Labor laws of mainland Tanzania appear to be discriminatory and provide inadequate coverage on protection of probationary workers from unfair termination of employment as compared to the labor laws of Republic of Kenya which appear to have adequate coverage in protection of all employees from unfair termination without discrimination basing on the nature of employment contract.

According to the Labor laws of Tanzania, the workers who work under probationary period of less than six (6) months are not protected by labor laws from rights to challenge unfair termination of employment contract like other workers, rights to written reasons for termination, right to fair hearing before termination and access to legal remedies,<sup>6</sup> while workers who are under probation period of six months and more are protected by the same labor law from rights to challenge unfair termination and other rights.<sup>7</sup> This position of Labor law in Tanzania seems to be discriminatory contrary to the Constitution of United Republic of Tanzania.<sup>8</sup> in Kenya an employee under probation has the right to fair termination like any other employer with permanent employment contract. Article 47 of the Constitution of Republic of Kenya confers on every person the

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<sup>6</sup> The Employment and Labour Relations Act, CAP 366 R.E 2019

<sup>7</sup> Ibid, section 35

<sup>8</sup> The Constitution of United Republic of Tanzania of 1977 as amended time to times

right to administrative action which includes reasonability and procedurally fairness..., the spirit of article 47 was incorporate in section 45 That, “the statute does not distinguish a person employed under a probationary contract from the general definition of employees and that, it was illog 41 of the Employment Act”

ical to accord an apprentice or indentured learner who are included in the definition of an employee the procedural benefits of section 41 but deny these to employee simply because they hold a probationary contract” section 42(1)<sup>9</sup> in so far as it excludes an employee holding a probationary contract from the provision of unfair termination is inconsistent with the right to fair labor practice and fair administrative action under article 41 and 47 of the Constitution of Republic of Kenya<sup>10</sup>” since all workers have the same constitutional right from unfair termination and unfair labor practice.

### **1.3 Literature review**

Different scholars have made a critical analysis of the probationary period and rights of probationary employees. Their analysis is divided into two groups, namely; those who consider probationary employees as applicants of work and they are not entitled any rights, and those who consider them as employees and they are entitled to some rights. The analysis is hereby provided hereunder.

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<sup>9</sup> The Employment and Labour Relations Act, CAP 366 R.E 2019

<sup>10</sup> The Constitution of Republic of Kenya of 2010

**Katherine**<sup>11</sup>, on his book titled “workers rights” Tanzania, an employer may only terminate an employment contract for valid reasons. These include serious misconduct, such as gross negligence or dishonesty, incapacity due to poor performance or ill-health, and operational requirements like economic, technological, or structural changes within the business. Also continue to argue that Notice Requirements, upon termination of an employment contract, the employer is required to provide the employee with written notice. The duration of this notice is dependent on the length of service: For the first month of employment, a minimum of 7 days' notice is required. For daily or weekly employment, a minimum of 4 days' notice is required. For monthly employment, a minimum of 28 days' notice is required. It's important to note that the employer and employee can mutually agree to a longer notice period, as long as the duration is equal for both parties.

**Clyde and Collp**<sup>12</sup> on his journal named “Employment Law overview” argued that several issue and starting to explain the probationary employee is an employee who is employed by an employer and placed in a trial period for purposes of being observed, to ascertain if he is a good fit for the employer in question and to ascertain if the said employee is competent to do the job he has been hired to do. Rights of probationary

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<sup>11</sup> P. Katherine “*Workers Rights*”: Rights of probationary employees under international instruments, New York Franklin Watts, 1997

<sup>12</sup> P. Katherine “*Workers Rights*”: Rights of probationary employees under international instruments, New York Franklin Watts, 1997

employees in Tanzania are provided both under the Employment and Labour Relations Act 2 as well as the Employment and Labour Relations (Code of Good Practice) Rules<sup>13</sup>.

Also continue by stating that, According to the Employment and Labour Relations Act, as well as the Employment and Labour Relations (Code of Good Practice) Rules, employees who have worked with the same employer for a period of six months or less, are not protected by the two Laws; and provisions of the said two laws when it comes to unfair termination are not applicable to such employees<sup>14</sup>. Sub Part E of the Employment and Labour Relations Act provides essentially for procedures that an employer ought to follow before terminating the employment of an employee.

**Daryl<sup>15</sup>**, has tried to show how the issue of probationary employees and period is not certain. He has stated that many authors have different opposing views concerning the probationary period as well as probationary employees. Some do consider probationary period as nothing else but a test period, and that there should have been employed counseling process to the probationary employees, the task which could have improved the working ability of these probationary employees. Therefore, they blame the employers who ran to terminate the probationary employees, instead of counseling and teaching them on how to perform the work better. For others do consider that probationary period is important and is required so as to complete the hiring process, so the managements is vested with responsibility to provide the new recruit with training

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<sup>13</sup> The Employment and Labour Relations (Code of Good Practice) Rules CAP 366 R.E 2019

<sup>14</sup> Ibid, CAP 366 R.E 2019

<sup>15</sup> P.R. Daryl, "*Employment and Labour laws*": Global Legal insights, 1<sup>st</sup> Ed, 2001

and appropriate work assignments. That the authors felt that training in evaluation, counseling, positive discipline, the legalities of the probationary employment, and the role of the probationary period in the overall selection process should be mandatory if the probationary period is to be effective. A gap on the need to reform the existing laws in Tanzania and Kenya still exist

**Alan**<sup>16</sup>, stated that the probation periods have no legal standing and if the concept is not built into the contract of employment, the employer cannot rely on it. That is to say if the employment contract does not contain the clause of how probationary period shall be and for how long therein, it is not mandatory for the employer to consider it to the employees who have worked few months after employment. He proceeded to say that during a probation period, an employer should not assume that the employee does not have any employment rights. To him the employees in their probationary period have statutory day-one-rights and it is not the case that the individual is not a 'proper' employee until they have passed their probationary period, or until they have been given their contract of employment<sup>17</sup>. A study on employment rights covered in Tanzania and Kenya was still mandatory after reading this paper.

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<sup>16</sup> P. Alan., "*Employment and labor Relation in Tanzania*": the Right of Employee during their probationary period, (1975).

<sup>17</sup> Ibid

## **1.4 Hypothesis**

It appears that the labor laws of Tanzania mainland are discriminatory in nature by not providing adequate protection to the probationary employees from unfair termination as compared to the Labor laws of Republic of Kenya.

## **1.5 Objectives of the study**

The research has divided into two categories which are general objective and specific objectives.

### **1.5.1 General objective**

The general objective of this research is to analyses the labor laws toward the protection of probationary employee against unfair termination in Tanzania by making comparison to Kenya

### **1.5.2 The specific objectives**

The following are specific objective of the study;

1. What is the legal framework governing right of probationers in Tanzania and Kenya legal systems?
2. what are the required standards to be taken into consideration to decide the suitability of the employee during probationary period by the employers?
3. what are possible provisions of the laws that have to be adopted by employment laws of Tanzania to mitigate existing gaps?

4. Are there any international instrument that guarantees rights to probationers which can be adopted to improve the existing legal gaps in Tanzania and Kenya?

### **1.6 Significance of the study.**

The research is to help the government of Tanzania and the parliament as well to know the legal problem existing and to make amendment of the law so as to ensure there is protection of probationary employee against unfair termination and discrimination hence to cover the existing legal problem.

The research is help to recognize the weakness of the Tanzania labor laws especially in probationary employee protection matter which the law should give them partial protection on probationary workers so as to ensure equality between employment which are in contract employees and probationary employees

### **1.7 Research methodology**

This study is qualitative type of research as it tries to look on the legal and technical constraints affecting the probationary employees in Tanzania. Thus, the study shall provide for analysis of The Employment and Labour Relation Act [Cap.366 R.E 2019] and The Employment and Labour Relations [Code of Good Practice] G.N No.42 of 2007, so as to identify any possible gaps, and propose any measure viable for addressing those barriers.

### **1.7.1 Research design or kind of research.**

The design of research or kind of research that a researcher intends to conduct is doctrinal and non-doctrinal legal research, whereas doctrinal will base in examining the laws regarding the protection of probationary employees our nation by analysis case law, statutes, gaps and its weakness on our law especially Tanzania labor laws compared to Kenya whereas non-doctrinal will base in examining the impact resulting from the legal problem of that laws

### **1.7.2 data collection method**

The researcher will use both two sources of data which are primary data and secondary data. Primary data; This method will include key information interview, observation and focus group information. To attain this purpose the researcher will use interview with workers in their offices or working place so as to help the researcher to get direct and easy accessed information. In this method the researcher will, where necessary use signs to get information even from those who are dumb or deaf. The interview is expected to be unstructured to allow convenience of the researcher in accessing data<sup>18</sup>.

Again the focus group discussion will help the researcher to interact with both employers and probationary employees which can help to face the challenges affecting the implementation of probationary workers in Tanzania.

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<sup>18</sup>L. Baker "*Data Collection*" lee Baker publisher, (2017)

Secondary data; These are second hand information which a researcher intends to collect from other sources of literary works. They include; books, journals, articles, papers, newspapers, dissertation, and online sources like website. The researcher intends to visit the library like Benjamin Willium Mkapa Resource Centre which is Library of Ruaha Catholic University. But also reports the purpose is to base knowledge on the practice in other common law countries like Kenya<sup>19</sup>

### **1.7.3 Field research**

In field research the researcher intends to collect first hand data from various areas and various respondents. He will collect data within Tanzania especially in Dodoma region, and Iringa from Advocate, from lawyers, Normal citizen and human Rights volunteers especially those who deal with conducting campaign on protection of human Rights in our country<sup>20</sup>.

## **1.8 Scope and limitations of the study**

The research will be conducted basing in laws of mainland Tanzania governing the legal issues analysis on right of probationary employee and the law and how to ensure there is protection of the probationary worker in Tanzania comparative study with Kenya.

### **1.8.1 Geographical scope**

Geographically this research will be conducted basing on Mainland Tanzania specific in Dodoma region and Iringa.

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<sup>19</sup> A.E. Berndt, "*Common Type of Sampling Methods*", (2022)

<sup>20</sup> A.E. Berndt, "*Common Type of Sampling Methods*", (2022)

### **1.8.2 Limitations of the study**

Most problems which I have faced were due to the nature of the title as it included a lot of materials which it required much cost for bus and Bodaboda fee because I used to travel every day from my village to Mpinga, Bahi and Kigwe village as it was where I used to collect primary data through interview and questionnaires methods also internet which I must buy internet bundle so as to access so online materials so this is very expensive also according to the nature of this title I use a lot of time on collecting data from various materials so it had demand a lot of time in library and in other judicial activities also sometimes it requires me to attend court sessions to get more data. Due to those limitations the researcher tries to manage time by searching those materials through online system which contribute to get more information regarding to the research paper.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK

#### 2.1 AN EMPLOYEE

Is someone who works for a company or organisation, performing specific tasks in exchange for compensation, typically in the form of salary or wages. Under section 4 of employment and labour relations Act<sup>21</sup> state that means an individual who has entered into any other contract under which the individual undertake to work personally for the other party to the contract. Also an employee is a person who is appointed for a limited or definite period of time.<sup>22</sup> Under common law An employee is any one who performs service for you is your employee if you can control what will be done and how it will be done.

#### 2.2 AN EMPLOYER

An employer is an individual (a person, company, or organisation) that hires another individual (an employee), pays the employee a salary or wages, and has the power to control the employees work duties. Under section 4 of employment and labour relations Act state as any person, including the government and an executive agency, who employs an employee<sup>23</sup>

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<sup>21</sup> The Employment and Labour Relations Act, [CAP.366 R.E.2019]

<sup>22</sup> <http://www.tpsgo.com>

<sup>23</sup> Ibid

## 2.3 PROBATIONARY PERIOD

Is a trial period at the start of employment where an employer evaluates a new employee performance and suitability before confirming permanent employment. Also under section 8 of the code of good practice: dismissal deals with probation. An employer may require a newly hired employee to serve a period of probation before the confirmation of the employee's appointment<sup>24</sup>. The purpose of probation is to establish whether or not the appointee's performance is of an acceptable standard before permanently employing the employee. Probation is for newly appointed employees only<sup>25</sup>. The probation period may be extended, within reason, where the employer is not convinced that the employee is performing to the required standard. If the period is extended it should be done in writing.

### 2.3.2 Major Types of Probationary Period

Rule 10 of the ELRA (Code of Good Practice)<sup>26</sup> G.N No.42 of 2007. There are two typically common types of probationary periods of employment.

#### 2.3.2.1 Probationary Period for a New Employee

This is the common type of probationary period where the employers do subject their newly recruited employees. This is obvious the case because, it might happen that technical or interpersonal skills of a new employee will not fit the needs of the organization, in other words, an employee failed to render services as required.

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<sup>24</sup> Employment and labour relations Act (code of good practice) Rules, [CAP.366 R.E.2019]

<sup>25</sup> [www.ccma.org.za](http://www.ccma.org.za)

<sup>26</sup> the ELRA (Code of Good Practice) G.N No.42, [CAP.366 R.E.2019]

Therefore, in order to ensure prudence on the part of employer as the way to protect themselves from legal issues and unqualified employees, organisation or companies imposes probationary period in the contract of employment of the reasonable length depends on the agreement of the parties, to allow adequate time for the employer to assess and evaluate the performance of the employee with the respect to the post recruited for.<sup>27</sup> From an employee's perspective, a probationary period is a helpful way to try out a company or an organisation to see if it supports their goals and plans. If a new employee finds that they are not happy with the company or the position posted is not what they expected, knowing they have a probationary period in which it is appropriate to leave the company without any ramifications can offer peace of mind<sup>28</sup>

### **2.3.2.2 Probationary Period to Prevent Termination**

The second type of probationary period is not as pleasant, since it is typically implemented in response to a serious error, inappropriate action, or breaking of a company policy. When a person has violated a rule or policy, some companies will extend a probationary period for the employee to make amends and adjust their performance to match expectations. A probationary period is often the final step before

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<sup>27</sup> K. Mtaki., *The New Labour Law in Tanzania: Implication for Employees and Economy Paper Presented at A Policy Diology Seminar on Labour Relation in Tanzania at the Conference Hall of the Economy and Social Research Foundation; University of Dar es Salaam, (2005*

<sup>28</sup> Ibid

an employee is fired, with the objective being to support the employee's efforts to salvage their job.<sup>29</sup>

## **2.4 Probationary Employee (Probationer)**

Probationary employee is generally an employee serving a probationary or a trial period in a job or position to which they are newly appointed pending total confirmation to that post which is probably determined by the employer who assess and evaluate the performance, capacity and compatibility of an employee with regard to the nature of the job.<sup>30</sup> The confirmation of probationary employees usually depends on fulfillment of the certain terms and conditions stipulated under the contract of employment. It has been the position adopted by the Courts that expiration of probationary period does not automatically change the status of probationer to a confirmed employee; it is upon receiving of confirmation letter that the probationer is to continue with employment. The essence of not allowing automatic confirmation is to maintain stability and certainty in law, because if disregarded, and allowing automatic confirmation to probationer, the practice will render instability in the working environment.<sup>31</sup>

### **2.4.1 Probationary Employee under section 35 of the ELRA**

There has been the general presumption that section 35 of the ELRA governs probationary employees only though said provision does not state that. However, this is not necessarily a case because going through this section; it provides that this sub-part

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<sup>29</sup> Baker & MC. Kenzie, *World Wide Guide to Termination, Employment Discrimination and Work Place Harassment Law*, (2009), 56

<sup>30</sup> Rule 10(3) of G.N No.42 of 2007 73 Civil Appeal

<sup>31</sup> The Employment and Labour Relations Act, [Cap. 366 R.E 2019]

shall not apply to employees with less than six months' of employment with the same employer, whether under one or more contracts'. The essence here is that probationary employees with less than six months of employment are not protected under these provisions.<sup>32</sup> There is also an argument that probationary employees with less than six months' of employment can be hired and fired at any moment in time without affording them an opportunity. Provisions relating to unfair termination are covered by Part III Sub Part E of the Employment and Labour Relations Act<sup>33</sup>, which generally excludes probationary employees from challenging unfair termination of employment. Representation though this absolute discretion has in several occasions being declared to be not part of labour laws in Tanzania.<sup>34</sup> This is because one of the most basic universal labour rights of any employee in most area of the modern world is to be treated fairly and to have ones' legal right adhered to. That, the conceptual and legal limitations against termination at-will are contained in the ELRA together with the Code of Good Practice. The Labour Court also interprets section 3f of the ELRA to the effect that it requires termination to comply with the constitutional provisions in as far as they relate to employment and labor relations and conditions of work.<sup>35</sup>

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<sup>32</sup> [Cap. 366 R.E 2019]

<sup>33</sup> Ibid

<sup>34</sup> Macmillan Aidan limited v. Brandina Luca Mchamed, Revision No. 292 of 2008, 10-15

<sup>35</sup> [Cap. 366 R.E 2019]

## **2.6 Policy aspects in the ELRA and rights of probationary employee.**

The ELRA's long title provides that the Act is intended to provide for, among other things, core labour rights and to establish basic employment standards.<sup>36</sup> Arguably, one may say that a probationer has equal rights and protections like any other employee. This is because the ELRA itself requires every employer to promote equal opportunity in employment and eliminate any sign of discrimination in the working place environment. All employers are required by the law to implement employment policy and practice relating to acceptable terms and conditions of employment, decent working environment, providing facilities, training, putting in place appropriate performance evaluation systems before imposing a termination or disciplinary measures.<sup>37</sup> The implication here is that, a probationer has rights which among other things include the right of working under decent environment, to be supplied with training facilities, right not to be discriminated, a right of fair performance evaluation system, the right of fair disciplinary and termination procedures which are in line with the provisions of the ELRA aiming at maintaining fair labour practices.<sup>38</sup>

## **2.7 Conclusion**

This chapter has elaborated various basic concepts and principles cutting across rights of probationary employees. The chapter has provided the highlight on how the whole concept of probation and probationary employee is and the way these concepts relate

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<sup>36</sup> Labour Revision No. 292 of 2008(n 6), p.13 79

<sup>37</sup> Section 41(7) (a) of the ELRA, [Cap.366 R.E 2019]

<sup>38</sup> [Cap.366 R.E 2019]

to the research topic. <sup>39</sup>In the next chapter the focus will be on Legal Frameworks with the comparative mind between Tanzania and Kenya for the purpose of disclosing the legislative gap between the two jurisdictions.

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<sup>39</sup> <https://ssrn.com/abstract=4373375>

## CHAPTER THREE

### A COMPARATIVE ANALYSIS: LEGAL FRAMEWORK ON RIGHTS OF PROBATIONARY EMPLOYEES IN TANZANIA AND KENYA.

#### 3.1 Introduction

This chapter devotes on discussing rights of probationary employees with regard to Tanzanian and Kenyan legal framework. The chapter highlights the way legal systems of Tanzania and Kenya have dealt with the rights of a person serving probationary period before total confirmation to the employment. The essence of making this comparative study by pointing out Tanzania and Kenya jurisdictions is to the fact that, these two jurisdictions adheres to the International Labour Standards settled by the ILO, also, there are specific laws as well as sound judicial pronouncements which particularly governing probationary rights of which is the essence of this study.

#### 3.2 Legal Framework on Rights of Probationary Employees in Tanzania and Kenya

Under this part a thorough analysis has been made on rights of probationary employees under various legal instruments. The discussion went further to see their strength and weaknesses to the effect that, if at all rights of probationary employees recognized by the said instruments are protected. So, under this part the focus is on International as well as domestic frameworks.

### 3.2.1 International Legal Framework governing Rights of Probationary Employees

Under International Perspectives, there are sets of legal and human rights relating to labour relations governing the relationship between employers and employees and in objective sense, these rights ensures decent working environment in an employment setting.<sup>40</sup> Employment rights and standards have been for long time stipulated and guaranteed by some of the International Instruments and UN member states includes Tanzania and Kenya hence obliged and bound by such international standards.<sup>41</sup> One of the UN Instrument inserted for the purpose of protecting workers rights was the UN Declarations of Human Rights of 1948 which is the basis of accepted universal fundamental human rights.<sup>42</sup>

#### 3.2.1.1 The universal declaration of human righty 1988

The horrors created by the Second World War lead to the creation and adoption of the UDHR. The UDHR articulates fundamental rights and freedoms for all. The General Assembly of the UN adopted the Declaration on 10 December 1948.<sup>43</sup> It was motivated by the experiences of the preceding world wars and therefore, the countries agreed on a comprehensive statement of inalienable human rights. The declarations provides for the common standards for all people and all nations, that every individual person shall bear this declaration constantly in mind by teaching, educating and promoting these rights and

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<sup>40</sup> Preamble of the Universal Declarations of Human Rights, 1948

<sup>41</sup> W.S. Clyde *The contract of employment and the rights of individual employees: Fair representation and employment at will*. Fordham Law Review, (1984)

<sup>42</sup> Australian Human Rights Commission, *What is the Universal Declaration of Human Rights?*. Retrieved from [www.humanrights.gov.au](http://www.humanrights.gov.au) (Accessed on 8<sup>th</sup> December, 2021 at 09:08 AM)

<sup>43</sup> Australian Human Rights Commission, *What is the Universal Declaration of Human Rights?*. Retrieved from [www.humanrights.gov.au](http://www.humanrights.gov.au) (Accessed on 8<sup>th</sup> December, 2021 at 09:08 AM)

freedoms using progressive measures in both national and international level, securing their universal and effective recognition and observance, both among people of the member states themselves as well as among individuals in their territorial jurisdiction.<sup>44</sup>

The UDHR begins by recognizing the inherent dignity of all members of the human family being a foundation of freedom, justice and peace in the world.<sup>45</sup> It declares that, all human being are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.<sup>46</sup>

### **3.2.1.2 The International Labour Organisation (ILO), 1919**

The International Labour Organisation (ILO) which belongs to U.N is the only international agency which works with governments, employers and employees representatives worldwide, to develop international labour standards and establish decent working environment for all employees throughout the world.<sup>47</sup> The basic aim of the ILO is to ensure employees right at work and thereby to enhance legal and social protections that guarantee workers not to be abused by their employers.<sup>48</sup> Employment protection and promotion of employment security as an essential aspect of the right to

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<sup>44</sup> The Preamble of the Universal Declaration of Human Rights, 1948

<sup>45</sup> Ibid, Universal Declaration of Human Rights, 1948.

<sup>46</sup>Article 1 of the Universal Declaration of Human Rights, 1948

<sup>47</sup> A.D. Joseph, *The IMLI Treatise on Global Ocean Governance: UN Specialized Agencies and Global Ocean Governance*. Oxford: Oxford University Press, (2018), 102

<sup>48</sup> W.S. Clyde., *The contract of employment and the rights of individual employees: Fair representation and employment at will*. Fordham Law Review, (1984)

work have been a major concern of the International Labour Organization (ILO) throughout its history.<sup>49</sup>

### 3.2.1.3 The ILO Philadelphia Declaration, 1944

The Declaration of Philadelphia is one of the international instruments which guarantee probationary employee necessary protections like that of a confirmed employees offered by the employers.<sup>50</sup>The Declaration first reaffirmed the fundamental principles on which the ILO is based, particularly the principle that labour is not a commodity; that freedom of expression and association are essential to sustain progress, and presence of poverty anywhere throughout the world constitutes a danger to prosperity.<sup>51</sup>

With this declaration, it is undisputed that all the states have to comply with fundamental principles when dealing with employees welfare bearing in mind that, they are the ones with low bargaining power comparing to employers, also the statement that labour should not be made as commodity arguably implies that all employees whether probationary or confirmed one have to receive equal treatment.<sup>52</sup>

### 3.2.2 Legal framework governing rights of Probationary Employees in Tanzania

Tanzania is one among common law countries which codified in its labour law provisions relating to rights of employees serving probationary period including

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<sup>49</sup> ILC, 59<sup>th</sup> Session, Record of Proceedings, (1974), 527.

<sup>50</sup> J.T. Grobler, *International Perspectives on the Termination of Employment during Probation Period*. Pretoria: University of Pretoria, (2018). Retrieved from [www.repository.up.ac.za](http://www.repository.up.ac.za) (Accessed on 9<sup>th</sup> December, 2021 at 12:26pm)

<sup>51</sup> Principle 1 (a), (b) & (c) of the Declaration Philadelphia, 1944

<sup>52</sup> O.A. Ismail., *Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends*, (2019). Retrieved from [www.ojs.lib.unideb.hu](http://www.ojs.lib.unideb.hu) (Accessed on 9<sup>th</sup> December, 2021 at 08:53 AM)

reasonable length for probationary employees as well as rights and procedures in terminating contract during probationary period.<sup>53</sup> Under this part the focus will be on assessment and analysis of the Tanzanian legal framework which directly governing and provides for rights of a person serving probationary employees.

### **3.2.2.1 The Constitution of the United Republic of Tanzania, 1977**

The Constitution of the United Republic of Tanzania (CURT) is the mother law in the country whereby all laws enacted in Tanzania must be in conformity and consistency with, in an event any other law in the country conflicts the provisions of the Constitution such law will be declared null and void.<sup>54</sup> The Constitution provides protection to all people by making them equal before the law and entitled them, without discrimination, to protection and equality before the law that no one is above the law.<sup>55</sup>

With regard to employment rights and employment protection, the CURT provides that, every person has a right to work.<sup>56</sup>It also further provides that in the course of doing work every individual is entitled to equal opportunity and the right to equally hold the office and discharge any function under the state authority.<sup>57</sup>Also, the Constitution provides that, every person without discrimination of any kind entitled to remuneration equal with his work, but also, all persons working according to their liability to be

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<sup>53</sup> The Employment and Labour Relations (Code of Good Practices) [Cap.366 R.E 2019]

<sup>54</sup> The Constitution of United Republic of Tanzania of 1977 as amended time to time.

<sup>55</sup> Ibid, Article 13(1).

<sup>56</sup> The Constitution of United Republic of Tanzania of 1977 as amended time to time.

<sup>57</sup> Ibid, Article 22

remunerated according to the measure and qualification to the work,<sup>58</sup> the essence here is that every individual is entitled to just and fair remuneration.

### **3.2.2.2 The Employment and Labour Relations Act, 2019**

The Employment and Labour Relations Act is the Principal Act governing labour matters in Tanzania.<sup>59</sup>It is the Act which makes the provisions for core labour rights, to establish basic employment standards, to provide a framework for collective bargaining, to provide for prevention and settlement of disputes, and to provide for other related matters.<sup>60</sup>The Act applies to all employees including those in the public service for the government of Tanzania.<sup>61</sup>Among of the objectives of the ELRA includes to promote economic development through economic efficiency, productivity and social justice<sup>62</sup>but also, to provide the legal framework for effective and fair employment relations and minimum standards regarding condition of work.

Although the ELRA is the Principal Act governing labour matter in Tanzania, it does not even mention the word probation or probationary employee anywhere throughout the act,<sup>63</sup> though, there is general assumption that section 35 of the ELRA governs probationary employee.<sup>64</sup> The use of words probation and probationary period are only found in the Code of Good Practice<sup>65</sup> which is a mere subsidiary legislation established

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<sup>58</sup> Ibid, Article 23

<sup>59</sup> [Cap.366 R.E 2019]

<sup>60</sup> The Long title of the Employment and Labour Relations Act, [Cap.366 R.E 2019]

<sup>61</sup> Ibid, Section 2(1).

<sup>62</sup> The Employment and Labour Relations Act, [Cap.366 R.E 2019]

<sup>63</sup> [Cap.366 R.E 2019]

<sup>64</sup> The Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2007

<sup>65</sup> Ibid, G.N No.42 of 2007

under the provisions of the ELRA. Section 99(3) of the ELRA requires that any person interpreting or applying the ELRA, has to read it together with the Code of Good Practice but this provision bears the exception that a person may depart from that code only if he assign good reason for doing so.<sup>66</sup> This discretionary term implies that, the bindingness of the Code of Good Practice is not to the extent as that of the ELRA; rather it is considered as the subsidiary means aiding interpretation of the ELRA.

### **3.2.2 The Employment and Labour Relations (Code of Good Practice) Rules, 2007**

The Employment and Labour Relations (Code of Good Practice)<sup>67</sup> has been made under the provisions of Section 99(1) of the ELRA which confers power upon a Minister in consultation with Labour, Economic and Social Council (LESCO) which is established under the Labour Institution Act<sup>68</sup> to issue Codes of Good Practice to be read together with provisions of the ELRA.<sup>69</sup> Its rules applies to all employees, employers, trade unions, employers organization, mediators, assessors, judges as well as Government officials.<sup>70</sup> It saves as subsidiary means aiding interpretation of the provisions of ELRA. As we have said that, under normal practice an employer should subject an employee to a probationary period. During the period on probation, the employees, skills, abilities and compatibility are assessed and tested.<sup>71</sup> The probation provides for an opportunity to test one another and to find out whether they can continue working with each other for a

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<sup>66</sup> Section 99(3), of the ELRA, [Cap.366 R.E 2019]

<sup>67</sup> G.N. No.42 of 2007

<sup>68</sup> [Cap.300 R.E 2019]

<sup>69</sup> Ibid, [Cap.366 R.E 2019]

<sup>70</sup> Rule 2, G.N No.42 of 2007

<sup>71</sup> *WS Insight Ltd (Formerly known as Warrior Security Ltd) v. Dennis Nguaro*, Revision No.90 of 2019, in the High Court of Tanzania at Dar es Salaam

long period of time in a healthy employment relationship.<sup>72</sup> The ELRA does not have explicit provision which provides for either probationer or probationary employees; though there is general assumption under section 35 excludes probationary employees from claiming unfair termination of employment.<sup>73</sup>The same Act also, has not sufficiently provided the procedures on how to deal with probationary employees.

### **3.2.3 Legal framework governing rights of Probationary Employees in Kenya**

As we have seen in Tanzania, the provisions relating to probationary rights are also included and codified in Kenyan jurisdiction. Lucky enough the principal legislation governing labour matter which is Employment Act<sup>74</sup>expressly provides for probationary contracts comparing to Tanzania legal framework where you find nowhere in the principal legislation which is ELRA provides for such provisions, leave along the implication under section 35. Therefore, under this part the focus will be on analysing Kenyan legal framework with regards to probationary rights as well as procedures in terminating contract during probationary period.

#### **3.2.3.1 The Constitution of Kenya, 2010**

The Constitution of the Republic of Kenya is the supreme law of the Republic and it binds all persons and all the state organs at both levels of government.<sup>75</sup> The Constitution provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the

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<sup>72</sup> *Gulf Badr Group (T) Ltd v. Fredrick Massawe* Revision No.481 of 2019

<sup>73</sup> *David Nzaligo v. National Microfinance Bank PLC*, Civil Appeal No.61 of 2016

<sup>74</sup> *Ibid*, [Cap.226 R.E 2012]

<sup>75</sup> The Constitution of Kenya, 2010

Constitution is invalid.<sup>76</sup>The Constitution further stipulates that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.<sup>77</sup>

The Constitution also provides that, a right or fundamental freedom in the Bill of Rights shall not be limited except by the express wording of the statute, and if that is the case then only to the extent or parameters that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>78</sup> In justifying the reasonableness of the parameters or extent of the limitation, the factors to be taken into account includes; the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.<sup>79</sup>

The Constitution further provides that, the state may not directly or indirectly discriminate any person on ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. That no one may unfairly discriminate a person either directly or indirectly on those afore mentioned categories or grounds.<sup>80</sup> The implication here is that

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<sup>76</sup> Ibid, Article 2(4)

<sup>77</sup> Ibid, Article 2(6).

<sup>78</sup> Ibid, Article 24(1).

<sup>79</sup> Ibid, Article 24(1), (a), (b), (c), (d) & (e).

<sup>80</sup> The Constitution of Kenya, 2010

the discrimination in one or more grounds listed above is unfair unless it is established that the discrimination is fair. The most notable issue under the Constitution with regard to protection of probationary employees is that, every individual person has the right to fair labour practices. The Constitution proceeds by saying every worker has the right to fair remuneration, reasonable working conditions as well as the right to form, join or participate in the activities and programmes of a trade union.<sup>81</sup>

### **3.2.3.2 The Employment Act, 2007**

The Employment Act is a Principal Act regulating probationary employees and probationary rights in Kenya.<sup>82</sup> The object of the enactment of this Act is to repeal the Employment Act, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.<sup>83</sup> The Act defines employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner.<sup>84</sup> The Court interpret this provision by saying although the Act defines a probation contract in relation to the duration of the contract it does not segregate or isolate a person employed under a probationary contract from the general definition of an employee since because it does not make sense to accord an apprentice and indentured learner who are included in the definition of an employee the procedural

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<sup>81</sup> Ibid, Article 41.

<sup>82</sup> [Cap226 R.E 2012]

<sup>83</sup> The Preamble of the Employment Act, 2007 which provides for object and reason for enactment of the Employment Act, 2007

<sup>84</sup> Section 2, The Employment Act, 2007

benefits envisaged under the Act but deny the same to probationary employees simply because they hold a probationary contract.<sup>85</sup>

Following recent decision of the Employment and Labour Relations Court in the famous case of **Monica Munira Kibuchi & others v. Mount Kenya University**,<sup>198</sup> it is now to the effect that employers are required to comply with two pronged test for fair or lawful termination during probationary period as per section 41 of the Employment Act.<sup>86</sup>

The said section provides that an employer is required before terminating the employment of an employee (including probationer) on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee will be entitled to have another employee or a shop floor union representative of his choice present during this explanation.<sup>87</sup> This is what one of the famous Advocate in Kenya termed as Substantive justification which requires the employers to give valid reasons for termination of the probationary contracts.<sup>88</sup>

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<sup>85</sup> (2021) eKLR

<sup>86</sup> Section 41, Employment Act [Cap.226 R.E 2012]

<sup>87</sup> Section 41(1), *ibid*

<sup>88</sup> M. Muthama, & G. Kashindi, *Legal Alert : Analysis of a recent decision by the Employment and Labour Relation Court on termination of Probationary Contracts*, (2021). Retrieved from [www.mmkadv.co.ke](http://www.mmkadv.co.ke) (Accessed on 24<sup>th</sup> December, 2021).

### 3.3 Judicial Pronouncements on Rights of Probationary Employees in Tanzania and Kenya

Probationary rights have been determined and re-determined by the Courts of law while interpreting provisions relating to probationary employees in Employment laws and Kenya through their Courts of law have declared the rights to be entitled to probationers, those which do not entitled to them, scope and parameters of their rights as we are going to see in each jurisdiction.

#### 3.3.1 Tanzanian Judiciary

In Tanzania it is a judiciary which is vested by the Constitution with a final decision in dispensation of justice and this is by making interpretation of the provisions of the law.<sup>89</sup>It is the body which has given power to protect and determine civil rights, duties as well as interests of every person and the community at large.<sup>90</sup>Due to this Constitutional duty, the judiciary of Tanzania has in several occasions interpreted various provisions governing probationary employees through cases lodged before it.

In the case of **David Nzaligo v. National Microfinance Bank PLC**,<sup>91</sup> Korrosso, J.A while observing whether an employee who has worked beyond his probationary period in his employment without being confirmed is entitled to reliefs falling under Part III Sub-Part E of the ELRA.<sup>92</sup> He took a firm opinion that the status of employment for an employee under probation who continues working after expiration of probation period without

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<sup>89</sup> The Constitution of the United Republic of Tanzania of 1977 as amende from time to time

<sup>90</sup> Ibid, Article 13(3),

<sup>91</sup> Civil Appeal No.61 of 2016

<sup>92</sup> [Cap.366 R.E 2019]

the employer having made a decision to confirm or not to confirm does not amount to confirmation and that confirmation is not automatic upon expiry of the probation period.<sup>93</sup>

The Court further averred that, confirmation of an employee on probation is subject to fulfillment of established conditions and expiration of set period of probation does not automatically lead to change of status from a probationer to a confirmed employee. He further pointed out that, completion of probationary period only render such employee eligible for confirmation and nothing else. He further declared that employee on probation is not covered under the unfair termination provisions Part E of ELRA and that fair termination principles extend to employees who have been forced to resign and that (constructive termination) it does not apply to employees on probation.

### **3.3.2 Kenyan Judiciary**

Kenyan Courts of law have been severally determined rights and protection guaranteed to the probationary employees under the provisions of Employment Act.<sup>94</sup> Most of the decisions by the court are to interpret the Employment Act of Kenya as to whether the same grants substantive and procedural fairness to all employee including probationary employee and if in all circumstances an employee under probation can claim for unfair

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<sup>93</sup> (1971) HCD 247

<sup>94</sup> [Cap.266 R.E 2019]

termination of employment if it happen that employers do unfairly terminate probationer.<sup>95</sup>

Another recent decision of the ELRC in the case of **Happiness Nyabonyi Maingo v Shreeji Chemicals Limited**<sup>96</sup>, decided by Makau, J. the court declared probationary contract to be a “testing waters” engagement, where the rights of the employee are not sacrifice and the employees remain entitled to the protection of the law from arbitrary and whimsical terminations by the employers regardless of the fact that they are employed under a probationary contract. Also the court said that employer must have a valid and fair reason for terminating a probationary contract prematurely this is because of fact that section 42 does not bar a probationary employee from challenging fairness or lawfulness of termination and that such an employee still enjoys protection from unfair termination. The obligation to justify the reasons for terminating contract of confirmed employees applies equally to termination of probationary contract.<sup>97</sup> And that, the mere fact that the employee is on probation does not waives the legal requirement for substantive justification of a termination on the part of the employer so that he can terminate a probationary contract without valid and fair reason.

Also the court stated that probationary employee is entitled not to be discriminated, denial of rights and freedoms provided for under the Constitution, statute and contract

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<sup>95</sup> M. Muthama, & G. Kashindi., *Legal Alert : Analysis of a recent decision by the Employment and Labour Relation Court on termination of Probationary Contracts* (2021). Retrieved from [www.mmkadv.co.ke](http://www.mmkadv.co.ke) (Accessed on 25<sup>th</sup> December, 2021)

<sup>96</sup> (2020) KLR

<sup>97</sup> The Employment Act, [Cap.226 R.E 2012]

of service for reasons connected to pregnancy, going on leave, membership to trade union, holding or seeking office in a trade union, refusal to join or withdrawal from trade union; employees race, color, tribe, sex, religion, opinion or affiliation, national extraction, nationality, social origin, marital status, HIV Status or any kind of disability; employee instituting suit or complaint against the employer; and finally, the employee right in participating in a lawful strike as so directed and met requirement of the law.

### **3.4 Conclusion**

This Chapter has made a comparative study in two jurisdictions on rights and protections guaranteed to probationary employee in an employment environment. The Chapter has highlighted International Instruments as well as legal frameworks in Tanzania and Kenya governing rights of probationary employees. As we have seen, probationary employees in both Tanzania and Kenya enjoy a number of legal protections. But, despite some of the challenges, the system in Kenya especially through judicial pronouncements appears to be more advanced compared to Tanzania. Its legal framework offers more protections to probationary employees comparing to Tanzania legal framework. The next chapter will be focusing on data presentation, its analysis and discussion of findings.

## CHAPTER FOUR

### DATA PRESENTATION, ANALYSIS AND PRESENTATION OF FINDINGS

#### 4.1 Introduction

This chapter presents and discusses data which were collected and founded from the documentaries review in order to respond to the research questions settled in the first chapter. As we have said, the study ventures on the comparative analysis of the rights enjoyed by probationary employee during probationary period in Tanzania and Kenya. The research questions that governing the study are; what is the legal framework governing right of probationers in Tanzania and Kenya legal systems? Another question is what are the required standards to be taken into consideration to decide the suitability of the employee during probationary period by the employers? Also the question that what are possible provisions of the laws that have to be adopted by employment laws of Tanzania to mitigate existing gaps? And lastly the question that, Are there any international instrument that guarantees rights to probationers which can be adopted to improve the existing legal gaps in Tanzania and Kenya? In responding to the above questions, comparative study was made on the legal framework of both Tanzania and Kenya jurisdictions.

#### 4.2 Research findings

The data and information collected from various literatures suggests that it has been a usual process by the employer to subject their newly hired employee to probationary period to establish whether their performance is of an acceptable standard before

permanently engaging the employee. Similarly, an ordinary employee may be subjected to probation period when his employer is of the view that he needs some evaluation, training and guidance in order to stabilize his declining performance. On the other hand, an employee may be subjected to probation period when he is about to assume new job title after promotion. Also, the study reveals that, probationary period is a practical interview where suitability of an employee is tested for a particular job over a reasonable, mutually agreed period of time before being confirmed to a new post or former post which was deprived due to unsatisfactorily performance. The findings on an attempt to respond to the research questions above are presented and discussed under respective headings hereunder.

#### **4.2.1 The Legal framework governing rights of Probationers in Tanzania and Kenya**

##### **4.2.1.1 Finding from Tanzanian Legal System**

It has been found that, the Employment and Labour Relations Act of 2004 which is the Principal Act on labour matters in Tanzania does not contains provisions which openly guarantees rights to persons falling under the category of probationary employee and throughout the Act it does not even mention the word probationary employee or probationary period.<sup>98</sup> However, it has been judiciously interpreted that probationary employees have been implied mentioned under section 35 of the ELRA, which by itself recognizes probationary period of six months. The said provision provides that employee

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<sup>98</sup> [Cap.366 R.E 2019]

with less than six months with the same employer, whether under one or more contracts may not bring unfair terminations claims against the employer.

The implication of the above findings is to the effect that, the probationary employee whose probationary period is beyond six months may exercise the rights envisaged under Part III Sub- Part E of the ELRA. However, the experience through case laws shows that the said protection holds no water before the court of law and most of those allegations have in several occasions decided to have no merit in the eyes of law. It has also been found that, been a probationer no matter of the length of the probationary period possessed, he or she cannot bring unfair termination claim and stand, and it has been found that, what does the court emphasis is that probationary employee may wish to sue or file a suit on unfair labour practices relating or concerning to probation.<sup>99</sup> This means the said protection is not expressly provided under the law and interpretation of this provision it will depend on the discretion of the court. is supposed to be subjected to the probationary period of twelve months.<sup>100</sup> But for the public servant who is undergoing a course of instruction of six months or more in duration, the question of his confirmation will be considered after completion of his instruction course. This implies that his probationary period will be extended to cover the period where the public servant was conducting a course of instruction.<sup>101</sup>

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<sup>99</sup>*Agnes B. Buhere v. UTT Microfinance PLC*, The High Court of Tanzania at Dar es Salaam Revision No. 459 of 2005

<sup>100</sup> Ibid, Section, 41(1)

<sup>101</sup> Ibid, Section 41 (2).

#### 4.2.1.2 Findings from Kenyan Legal System

The study conducted has found that in Kenya, probationary employees are governed by the Employment Act (EA), 2007<sup>102</sup> which is the Principal Act comparing to Tanzania where the ELRA does not have direct provision which openly guarantees rights of employees serving their probation period rather legal protection of probationary employees are inserted in the Code of Good Practice is merely a subsidiary legislation.<sup>103</sup>

Also, following the imports made in employment jurisprudence brought by the notable case of **Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another**<sup>104</sup> which now predominate in dealing with probationary employee, the employers are required to abide with the prolonged test of fair or lawful termination during probation as required by Section 41 of EA. This is to mean employers must firstly, have valid reasons for termination of the probationary contracts (commonly referred to as substantive justification) and secondly, they must ensure procedural fairness by affording the employee the right to be heard and to be accompanied by a fellow employee or a union representative of their choice during the hearing. This jurisprudential development is to the effect that, been a probationer does not bar you from challenging fairness or lawfulness of termination and that such an employee still enjoys protection from unfair termination.<sup>105</sup>

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<sup>102</sup> Employment Act, [Cap.226 R.E 2012]

<sup>103</sup> The Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2007.

<sup>104</sup> [2021] eKLR

<sup>105</sup> [2020] eKLR

It has also been found that, Kenyan jurisprudence does not treat probationary rights like a sacrifice and therefore employees remain entitled to the protection of the law from arbitrary and whimsical terminations by the employers regardless of the fact that they are employed under a probationary contract. This entails that Kenyan position on probationary rights and how to deal with probationary employees is greatly advanced comparing to Tanzania legal setup.

#### **4.2.2 Standards to be taken into consideration to decide the suitability of the employee during probationary period by the employers**

It has been found that, both Kenya and Tanzania legal framework does not stipulates the standards to be taken into account to decide suitability of the employee during probationary period in the evaluation processes. The only thing Code of Good Practice of Tanzania tried to do is to say that it is the obligation of the employer to monitor and evaluate the employee's performance and suitability from time to time, and in doing that the employer is supposed to meet the employee at regular intervals in order to discuss the employee's evaluation and to provides guidance if necessary but it does not provides for the standards to be followed in the process of evaluation.<sup>106</sup>

It has also been noted that, in Columbia there are four requirements which has to been taken into consideration in determining suitability of a probationary employee by the employer. **Firstly**, the employer must set suitability requirements in advance and prove that the employee was aware of such requirements, that is, the probationary employee

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<sup>106</sup> The Employment and Labour Relations (Code of Good Practice) G.N No.42, 2007.

must be aware of the basis for the employer's assessment of suitability before, or at the commencement of employment; **Secondly**, in the course of making such an assessment, the employer must act fairly and with reasonable diligence; **Thirdly**, the employer must prove that the employee was given a reasonable opportunity to demonstrate his suitability for the position; and **Fourthly**, to test whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but also character, judgment, compatibility, and reliability as in the case of **Ly v. Interior Health Authority**.<sup>107</sup>

#### **4.2. Possible provisions of the laws that have to be adopted by Employment Laws of Tanzania to mitigate existing gaps**

The study conducted is focused on comparing and measuring differences in labour standards enjoyed and accorded to probationary employees in Tanzania and Kenya. The methodology applied under this study has used to disclose and identify the existing legal gap between these two countries on the extent on which labour standards can be enjoyed by probationary employees. It has been noted that unlike Tanzania, Kenya has a clear statutory provisions under the Employment Act which governing probationary employees.<sup>108</sup>

It has also been noted that, in Tanzania the Code of Good Practice greatly discretion is left in the hands of the employer who appears to have high bargaining power in that

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<sup>107</sup> [2017] BCSC 42

<sup>108</sup> [Cap.226 R.E 2012]

relationship, in this situation, the possibility of abusing this broad discretion accorded to them by the law is so high because sometimes they will use this trend as an opportunity to gain from the labour force offered by probationary employee during probation, so the disclosure of reasonability of probationary period will minimize risks which probationers may, in one way or another sustain.

Also, in both Tanzanian and Kenya jurisdictions there is no explicit provisions of the law which directly indicate the required standards to be taken into account in determining the suitability of an employee under probationary period. The Code of Good Practice only provides that during probation is the employer who required by the law to monitor and evaluate the employee's performance and suitability.<sup>109</sup>

#### **4.2.4 International Instrument that guarantees rights to Probationers that can be adopted to improve the existing legal gaps in Tanzania and Kenya**

International law forms an important benchmark for complementing and evaluating domestic legislations.<sup>110</sup>Tanzania and Kenya have been members of ILO for a long time and continue to perform its obligations their obligations as member states. A probationary period is a set period which provides more leeway to the employers in dealing with newly recruited employees. In this period employee's performance is monitored closely in order to assess their capability and compatibility before being permanently confirmed in the position. The spirit of the ILO through its Conventions and

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<sup>109</sup>Rule 10(6), G.N No.42, 2007

<sup>110</sup> LO 2011 International Trading Centre, Use of International Law by Domestic Courts, Compendium of Court Decisions 3.

Recommendations has been always to direct the governments of the member states to take initiatives to make sure that both probationary and confirmed employees are afforded full protection as provided by the ILO. For the purpose of guaranteeing rights to probationary employees, the ILO has provided judgments and recommendations on the status of probationary employees as well as how to deal with the said category of employees.

The ILO proceeds by indicating circumstances where the decision will be set aside for instance if the decision was taken without authority of the law or in breach of a rule of form or of procedure, or if based on the mistake of fact or law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority.<sup>111</sup> The tribunal will always ascertain whether the decision was taken in breach of applicable rules on competence, form or procedure<sup>112</sup> in order for it to form basis of intervening through judicial review, this broad protection guarantees that probationary rights will not be violated by employers or organisation bearing in mind that their decision will be challenged by the tribunal in review.

### **4.3 Conclusion**

This Chapter has presented and discussed research findings of the study. The above findings has revealed that rights of probationary employees in Kenya are directly provided in the Act of Parliament, but in Tanzania findings have revealed that rights of

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<sup>111</sup> Consideration No.2 & 3, Judgments of the Administrative Tribunal of the League of Nations, Judgement No.4282

<sup>112</sup> Ibid, Consideration 2, Judgment No.3913

probationary employees are not directly provided in the Act of Parliament (Employment and Labour Relations Act, 2004) though the same are provided in the Code of Good Practice which is merely a subsidiary legislation where the principal act has itself declared that one may opt to abandon taking into account the provisions of the Code of Good Practice if assigns reasons for doing so, in that sense enjoyment of these rights to probationers depends on the wise discretion of the Court to take into account provisions of the Code of Good Practice, or when they make reference to the Constitution, related regulations and policies on employment. The next Chapter will provide conclusion and recommendations with regard to the study

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

This Chapter marks conclusion and recommendations in respect of the study and findings of the study. If the recommendations provided herein below are worked effectively by appropriate authority, it will consequently results into development of Tanzania labour jurisprudence but also probationary rights will be properly granted and protected simply because, it has observed that the same is less protected by the presence labour regime.

#### 5.2 General Conclusion

The study employed comparative analysis approach to examine the legal framework governing probationary rights in Tanzania and Kenya in order to be in a position of measuring differences in labour standards that exist when it comes on the matter of dealing with probationary employees. It is undisputed that one of the core objectives of the ILO throughout the history is to deal with employment protection and promotion of employment security, by setting labour standards to be taken into account by member states in construing its domestic laws.

The legal setup of labour law in Kenya is always on the position that the Constitution guarantees employment and labour rights to all, in that regards, these rights may only be limited to the extent permitted by the Constitution and not more than that, because of that fact, to limit enjoyment of a right to probationary employee by the mere reason of

the length of their service does not in their view met the requirement envisaged under the Constitution. But also, even if it found that the performance of an employee on probation is unsuitable, he is still entitled fair labour practices which include among other things fair remuneration, reasonable working conditions as well as the right to join and form a trade union.

This research has been conducted with four main objectives which include; (a) to ascertain the legal framework governing rights of probationary employees in Tanzania and Kenya legal system; (b) to assess the required standards to be taken into consideration to decide the suitability of the employee during probationary period by the employers; (c) to explore possible provisions of the law that should be adopted so as to mitigate the existing legal gap between Tanzania and Kenya; (d) to investigate on international instruments that guarantees probationary rights. Basing on the research findings and the comparative study that have been made, the researcher has drawn main conclusions.

- a) both jurisdictions the rights of probationary employees have been highlighted in their Constitution. The Constitution provides general rights which are guaranteed and enjoyable to all people in both jurisdictions among those rights include equality before the law, which bring the idea of equality among all employees, the right not to be discriminated in working places, right to fair remuneration equated to the work performed, right to work as well as the right to access the court being an organ for dispensation

of justice. In order for probationary employees to access these rights, it much depends on the court efforts to interpret these Constitutional rights granted to all people. On the other hand, unlike the Employment Act, 2007, of Kenya, the Employment and Labour Relations Act, 2004 being the principal act governing labour and employment matters in Tanzania, does not contains provisions which clearly guarantee rights and offer legal protections to probationary employees.

- b) both jurisdictions the laws do not clearly states what are the standards to be taken into account to determine the suitability of probationary employee during probationary period. The Employment and Labour Relations (Code of Good Practice), 2007 only states that during the probationary period it is the duty of employer to monitor and evaluate employee's performance and suitability by meeting him or her at regular intervals in order to discuss the employee's evaluation and to provide guidance if necessary, but it does not state are the standards to be taken into account in determining suitability of that person, those in other jurisdiction like that of Canada and Columbia starts clearly what are the standards to be taken into account to determine suitability of probationary employees.
- c) unlike in Kenya, Tanzania provides rights of probationary employee in the Code of Good Practice which is merely subsidiary legislation aiding

interpretation of the provisions of the Employment and Labour Relations Act (principal legislation). The Employment and Labour Relations Act emphasizes that any person interpreting its provision should take into account any Code of Good Practice, but it further provides that whenever there is a necessity of departure from the Code of Good Practice the only requirement is to advance sufficient or good cause.

### **5.3 Recommendations**

It is clear from the foregoing discussion that there is great need for reforms specifically inclusion or incorporation of the provisions affording rights and legal protections to probationary employees, because it has revealed that legal setup of labour laws in Tanzania does not in fact afford protection to such category of employee by the mere fact of the length of their service and they end up being terminated without any sufficient course.

#### **5.3.1 Incorporation of explicit provisions guaranteeing legal protections to probationers in the Employment and Labour Relations Act**

Currently, the Employment and Labour Relations Act, 2004 (ELRA) does not contain explicit provisions guaranteeing legal protections to probationary employees along with the implication under section 35 of the same. I recommend that, there is serious need to incorporate provisions which expressly guarantee legal protections to probationary employees in the ELRA which is the principal legislation instead of being inserted in the Code of Good Practice which is merely a subsidiary legislation. The latter may result into

conflicting interpretation as to weight to be attached to the Code. That should go hand with hand by removing the current discretion envisaged under section 99(3) of the ELRA which allows abstaining or abandoning taking into account the Code of Good Practice while interpreting provisions of the ELRA, that is to say, there should be a mandatory requirement that any person reading provisions of the ELRA should take into account the Code of Good Practice, this will often bring about coherently and consistence of the decisions pronounced by the CMA or by the ordinary courts of law.

### **5.3.2 Procedural and Substantive justification upon terminating probationary employee**

Monica's case of Kenya gives us a lesson that, a probationary employee is like any other employee and the employer who did in fact unfairly terminate probationary employee the court will not hesitate to declare him liable for unfair termination of employment. It is now settled in Kenyan jurisprudence that the provisions which requires valid reasons for termination of employees (commonly referred to as substantive justification) as well as procedural fairness which was previously applied on to confirmed employee are now available to probationary employee unlike in Tanzania specifically going through section 37 of the ELRA is to the effect that the employer is obliged to substantiate valid reasons and fair procedure only when dealing with confirmed employee for the purpose of exempting himself from unfair termination of employee's liability.

### **5.3.3 Amendment of the provisions providing for probationary period**

The Code of Good Practice of Tanzania does not have provisions which clearly prescribe the issue of probationary period, the only requirement is that it as to be reasonable, but

the law itself does not inform us on how reasonable is reasonable, the only justification that brought forward is that, the reasonability of probationary period will depend on the nature and prevailing circumstances of the job and this is left upon the employer to decide for the same, comparing to the position in Kenya, the Employment Act, 2007 clearly states that, the probationary period has to be of six months, though there is the exception that the period may be extended for a further period. In that regard, in order to ensure certainty in law and to remove any degree of doubt, the provision providing for probationary period should be amended so as to exactly state the period of probation, this will often make people certain on what is real reasonable period meant by the legislature, and not to leave people on doubt and speculation as to what real the legislature meant by saying probationary period should be reasonable, so it should be clearly stated from the law in order for both employer and employee to be certain. of another six months but with the agreement of the employee.

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