

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MBEYA

LABOUR REVISION NO. 51 OF 2013

THE HEAD TEACHER OF IGANZO..... APPLICANT

VERSUS.

FURHA MONGO MWANZOMBA..... RESPONDENT

JUDGEMENT

16/06/2014 & 19/06/2014

Aboud, J

The application is made under section 91(1),(a) and 94(1)(b)(i) of the Employment and Labour Relation Act, No. 6 of 2004, Rule 24(1), (2) and 28(1) (c)(d) and (e) of the Labour Court Rules G.N No. 106 of 2007. The applicant calls upon this court to call for the record and revise the proceeding and set aside the award of the Commission for Mediation and Arbitration (CMA), in the CMA/MBY/143/2012 at Mbeya dated 18/12/2013.

This application emanated from the award delivered on 18/12/2013 by honorable Mwalongo arbitrator who awarded the respondent the total of Tsh 1,237,334/= which includes salary arrears, pension, leave and notice. Such award aggrieved the applicant hence he file this application for revision.

During hearing both parties were unrepresented.

Arguing this application the applicant submitted that the respondent ought to have sued the owner of the school who is the City Director Mbeya Council or the School committee who are responsible for recruiting security guards and to pay their salary. Hence he prayed his application be allowed.

In response from the applicant submission the respondent submitted that during his service of employment was being paid by the applicant and not the school committee. The applicant submitted further that he was recruited by the School Committee which kept on changing every year as there was no permanent school committee members. So he filed his complaint against the applicant as she is the one who was paying him salary. Hence he prayed the application be dismissed.

In rejoinder the applicant insisted that the respondent was not his employee and he had no money to pay him. Therefore the application be allowed as she prayed.

I went through the parties' submission as well as court record with the eyes of caution and I found the point to be determined by this court is whether there was employment relationship between the parties and if is answered in affirmative the second point of determination will be whether the respondent has any claim against the applicant.

In answering the first issue as to whether there was employment relationship between the parties I find it important to explain as who is an employer and an employee in law. Section 4 of the Employment and Labour Relation Act, No. 6 of 2004 defines who is an employer;

"means any person, including the Government and an executive agency, who employs an employee"

A the same above section define who is an employee;

"means an individual who has entered into a contract of employment; or has entered into any other contract under which the individual undertakes to work personally for the other party to the contract; and the other party is not a client or customer of any profession, business, or undertaking"

carried on by the individual; or is deemed to be an employee by the Minister under section 98(3)"

Section 61 of the Labour Institution Act, No.7 of 2004, provide for presumption as to who is an employee and I quote;

"For the purpose of labour law, a person who works for, or renders service to, any other person is presumed, until the contrary is proved to be an employee, regardless of the form of the contract, if any one or more of the following factor is present;

- (a) The manner in which the person works is subject to the control or direction of another person;**
- (b) The persons hour of work are subject to the control or direction of another person;**
- (c) In the case of person's work for an organization, the person is part of the organization;**
- (d) The person has worked for that other person for an average of at least 45 hours per month over the last three months.**
- (e) The person is economically dependent on the other person for who that person works or render service;**
- (f) The person is provided with tools of trade or works equipment by the other person; or**
- (g) The person only works for or renders service to one person".**

The International Labour Organization (ILO) on Employment Relationship Recommendation, 2006 (198) in paragraphs 9 and 13 provides;

"9.....protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may be agreed between the parties.

13.....the specific indicators of the existence of an employment relationship include,.... (a) the facts that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work..... (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the workers sole or principle source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holydays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker."

In our instant case the record shows that the respondent was recruited on the basis of oral contract by the School Committee. However the respondent monthly salary used to be paid by the applicant, and she is the one who terminated the service of the respondent. I asked myself did the applicant act as an agent or was a part of the school committee? I failed to get an answer on that since there was no any written contract which the respondent supplied to justify that. But that being the case the law is very clear in a situation where there are no written terms of employment contract section 15 (1) (e), (h), (i) and 15 (6) of the Employment and Labour Relations Act, No 6 of 2004 provides that:-

" Section 15 (1) subject to the provision of subsection (2) of section 19, an employer shall supply a employee, when the employee commences employment, with the following particulars in writing namely;

- (e) form and duration of the contract,**
- (h) remuneration, the method of its calculation, and details of any benefits or payments in kind, and**
- (i) any other prescribed matter.**

Section 15(6), if in any legal proceeding an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or

the agreeable salary was Tsh 80,000/= per month but the applicant paid him only Tsh 40,000/= per month instead of Tsh. 80,000/=. The respondent also testified that he went to CHODAWU to address his complaint and applicant started to pay him Tsh 60,000/= in June 2012. So the respondent claimed half pay for the whole 2010, 2011 and first six months of 2012. The claims which were not disputed by the applicant. That be the case I find that the respondent claim against the applicant is genuine due to the reason that his claim is basically a matter of right.

In the circumstances I find this application to have no merit and I find no reasons to fault the arbitrator award and it is hereby dismissed.

It is so ordered.



**I.D.ABOUD
JUDGE
19/06/2014**

Date: 19/06/2014

Coram: Hon. I.D.Aboud , Judge

Applicant: Present in person.

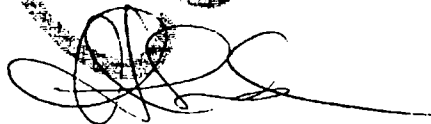
For Applicant:

Respondent: Present in person.

For Respondent:

C/C Subira

Order: Judgement delivered on 19/6/2014 in presence of the
both the applicant and respondent who appeared in
person.



I.D.ABOUD

JUDGE

19/06/2014