IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISIONS No. 93/2019

(CMA/MZ/NYAM/823/2018/52/2019)

BETWEEN

MWAKISONGO. M. ALFRED .....APPLICANT

VERSUS

DHL TANZANIA LIMITED .....RESPONDENT

JUDGMENT

30th April, & 08th July, 2020

TIGANGA, J

This judgment is in respect of an application for revision namely Labour Revision No.93 of 2019 filed by a notice of application and chamber summons supported by an affidavit of applicant Mwakisongo M. Alfred who was the complainant in the labour dispute before the Commission for Mediation and Arbitration, in the dispute the subject of this revision.

The application was preferred under sections 91(1)(a), 91(2)(c) of the Employment and Labour Relations Act No. 6 of 2004, read together with Rule 24(1), Rule 24(2)(a),(b),(c),(d),(e),(f), Rule 24(3)(a)(b)(c)(d) and Rule 28(c)(d) and (e) of the Labour Court Rules 2007 GN No.106 of 2007

In this application, two substantive orders are sought, namely;

(i) The court to call for, examine and revise the records of proceedings and the award in CMA/MZ/NYAM/823/2018/52/2019 pronounced by **Hon. Lucia Chrisantus**, Arbitrator, dated on 06/09/2019 and satisfy itself as to the correctness, legality, regularity, and propriety of the award,

(ii) Any other reliefs as the court may deem just to grant,

According to the record, the following is a brief background of this dispute. On 01st April 2018, the applicant was employed by the respondent as a courier under contractual basis. He was terminated on 31st November, 2018 under operational requirement procedure. Following that termination, the applicant lodged a complaint before the Commission for Mediation and Arbitration (hereinafter referred to as the commission) before which, upon agreement by both parties, four issues were framed for determination. The framed issues go as follows;

(a) Whether there was an existence of employment relationship/ contract between the parties,

(b) Whether there was fair reason(s) for termination of employment.

(c) Whether the procedures for fair termination of employment were complied

(d) What reliefs are entitled to the parties?

Upon full trial, which involved the presentation of evidence from both parties, the commission in its award, held in respect of the first issue that there was employment relationship between the parties in accordance to

section 61(f) and (g) of the Labour Institution Act No. 7 of 2004 on the ground that; the applicant was provided with tools of trade or work equipment. However the applicant rendered his service to the respondent for almost six months only.

While on the second issue as to whether there were fair reasons for termination of employment, the arbitrator held that employment relationship was not intended to last for more than six months, because it is under probation terms. Therefore the issue was taken not to be holding water, hence it was withdrawn.

On the third issue which is whether the procedures for fair termination of employment were complied with, the arbitrator held that the relationship was under probation arrangement which was not confirmed yet, it was held that the procedures for fair termination cannot be taking place in this matter as the complainant was found to have been an independent contractor not an employee. However she concluded that, an independent contractor is not an employee therefore he was not supposed to be put under probation.

According to the commission, the contract by an independent contractor is normally ended by the company's simply putting to an end an independent contract which was done by the respondent in this case, making the contract by the parties to be ended by following the procedure. That resulted into the arbitrator to dismiss the dispute for the reasons given.

The applicant was aggrieved by the award; as a result, he filed this Labour Revision seeking this court to revise and set aside the award on two main grounds.

(i) Whether the Arbitrator, was correct while composing her award to raise *suo motu* the issue that the applicant was under probation terms with the respondent company without affording right to be heard to the parties.

(ii) Whether it is proper to raise the legal issue *suo motu*, in the course of composing the commission's award which was not pleaded nor canvassed by the parties in the course of evidence or at all.

The application was countered by the respondent through the representation of Mr. Paul Bomani, learned counsel, who filed the notice of opposition, the counter affidavit sworn by Christopher Mboje who introduced himself as a principal officer of the respondent who disputed the allegations in the affidavit in support of the application, and the notice of representation.

In the affidavit, it was deposed that it was true that the CMA arbitrator was wrong to discuss the issue of probationary employee while in fact while it had made its decision that, the applicant was working as independent contractor for the respondent.

It was also deposed that the arbitrator was right to raise the issue *sou motu*, and if he felt that the same would assist it to procure the award it had the duty to call upon the parties to address it on that issue.

He raised the statement of legal issue that, whether the CMA award was substantially improperly procured by the arbitrator.

By the leave of the court, the application was argued by way written submissions, parties filed their respective submissions according to the schedule, in which the applicant submitted strongly that in framing the issues to be determined by the arbitrator, the issue of the probationary status of the applicant was not framed and neither was it pleaded and canvassed by the parties in the proceedings before the Commission. He also submitted that the same was not raised by the parties in their opening statements, in their testimonies during hearing, and in their final closing arguments.

It is his submission therefore that, the Arbitrator arrived at a conclusion that the applicant was under the probationary term under the provisions of the Employment and Labour Relations Act No. 06 of 2004 without giving the parties the opportunity to be heard on that issue.

He submitted that, it is the stand of the law that any decision affecting the right or interest of any person, arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. He cited the authority in the case of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo**, Civil Appeal No.161 of 2016 CAT –Mwanza in which **Margwe Erro Benjamini Margwe & Pater Marwe vs Moshi Bahalulu**, Civil Appeal No.111 of 2014 was cited with approval in which it was held that,

> *"The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that the right*

to be heard on the question of time bar vitiated the whole judgment and decree of the high court. Without much ado we find there to be merit in the appeal which we accordingly allow. We find the judgment of the high court to have been a nullity for violation of the right to be heard."

Furthermore, the court of Appeal cited with approval the case of **Mbeya –Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] T.L.R 251. In which it was held that,

"Natural justice is merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among the attribute of equality before the law".

Relying on the above principles, he asked this court to find that, the parties were not afforded an opportunity to be heard on the crucial issue in which the arbitrator, predicated upon the decision, then one concluded that the entire proceedings and the emanating award therein are the nullity. He invited this court to invoke its powers to quash the proceedings and the award with direction that the matter be remitted to the commission for mediation and arbitration (CMA) to be heard a fresh before another competent arbitrator.

In the reply submission by Paul Bomani Advocate for the respondent, he put forth the objection like argument that the counsel who purported to represent the applicant, has filed the said submission in chief in violation of section 56 (e) of the Labour Institution Act, 2004 and Rule 43(1) of the Labour Court Rules, 2007 which provides for the mandatory requirement

for the person intending to represent a party in Labour Court to file a notice of representation. The basis of that contention was that, the counsel who drew and filed the said submission did not file the notice of representation. In support of that contention, he cited the authority in the case of **Royal Furnishers Limited vs. Nicodemus Jackson Mkwai** (unreported) Revision No. 943 of 2018 Labour Division Dar Es Salaam.

That being the case he said he hastened to reply to the said submission on that ground. However alternatively he submitted that the applicant referred the dispute to the Commission for Mediation and Arbitration and both parties were afforded equal opportunity to present their evidence, before the commission had used the evidence presented before it to decide. It is from the evidence presented; the commission found that the applicant was not an employee but an independent contractor. That being his submission in his reply he asked the application to be dismissed basing on the reasons he gave.

These facts summarize the pleadings and the arguments by the parties for and against the application that calls for the determination of this case.

From the foregoing, before going to the merits of the application, I feel indebted to first address the issue raised by Mr. Paul Bomani, on the propriety of the submission filed by Mr. Mussa J. Nyamwero advocate for the applicant while he had not filed the notice of representation in the first place as required by law. This issue being the point of law was ordinarily supposed to be raised as the point of preliminary objection at the earliest stage so that it can be dealt with by the court in determining the

competence of the application. Raising it at the stage of submissions is to take the other party by surprise and the court too. Although it is a principle that the objection on point of law can be raised at any time even on appeal, that is where a party had no opportunity to raise it early. In this case all application documents were drawn and filed by Mr. Nyamwero, it was indicated in the documents that they were drawn and filed by him, all documents had his address and on the third paragraph of the Notice of application he mentioned that AND TAKE NOTE THAT the applicant will accept services of the proceedings in the above matter at the address of the office of the applicant's representative which is;

Mussa Nyamwelo Advocate
Mutalemwa and Company Advocate
New Mwanza Hotel Building
Post Road
P.o.Box 6485
Tel. +255765980213.
E.mail: nyamwelo2012@gmail.com

The purpose of the notice of representation under rule 43 of the Labour Court Rules, 2007, intends to inform the Registrar the name and postal address of the representative as well as the phone number, email and the place of his business. The above address by the counsel representing the applicant has all the details required by rule 43 of the Labour Court Rules, 2007. The arguments by Mr. Paul Bomani have no merit and it is hereby dismissed.

Now, having resolved that issue, the issues for determination in this revision are two, the first one being "whether the Arbitrator was correct while composing her award to raise *suo motu* the issue that the applicant was under probation terms with the respondent company without affording right to be heard to the parties". I entirely agree with the legal principle that any decision affecting the right or interest of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. I entirely agree with the principle in the authority in the cases of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo**, Civil Appeal No.161 of 2016 CAT – Mwanza and **Margwe Erro Benjamini Margwe & Pater Marwe vs Moshi Bahalulu**, Civil Appeal No.111 of 2014 in which it was generally held that where a judge raises an issue *suo motu*, he has the duty to call the parties to address him on the issue raised before basing on that issue to reach to the decision in that particular case. I also entirely agree with the principle in the case of **Mbeya –Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] T.L.R 251 that, hearing of parties on the issue raised *suo motu* by the court shows respect of the principle of natural justice, the right to be heard, and the constitutional principle of equality before the law as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977.

However, I find these case authorities distinguishable in the case at hand. I hold so because, upon a thorough perusal of the record, I have not at all came a cross where the arbitrator raised an issue of the probationary status of the employment of the applicant. I say so because in law an issue

is a question framed by the parties and the court which when resolved, it assists to determine the case or part of the case in controversy. In the case at hand, the issue was whether there was an existence of employment relationship/contract between the parties. This issue was generally resolved that there was no employment relationship, but the applicant was an independent contractor as opposed to an employee.

As I have indicated, I have not seen that issue rose, however in the discussion of the first issue the arbitrator discussed about the probationary nature of the engagement between the applicant and the respondent. I cannot say that was an issue framed. Even if we find for the sake of argument that to be an issue, it was not a base of the decision of the court as the case and all other issues were resolved basing on the finding that there was no employment contract but an independent contractor contract. For that reason, I find no ground for revision on the first ground.

The second ground for revision was "whether it is proper to raise the legal issue *suo motu*, in the course of composing the commission award which was not pleaded nor canvassed by the parties in course of evidence or at all".

Having found in the first ground that there was no such as issue raised, definitely the second ground which complain about the issue raised, also lacks base upon which the same can be deliberated upon. It is important to note that the applicant complained only on these two issues, of procedure, he did not challenge the substantive findings, and the reasons as to why the decision was reached. Having not challenged the substance of the decision but the procedure, and having not found any

fault in the procedure complained of. I find no any ground for revision. The application therefore stands dismissed for want of merit.

It is accordingly ordered.

DATED at **MWANZA** this 08th day of July, 2020

J.C Tiganga

Judge

08/07/2020

Judgment delivered in open chambers in the presence of counsel for parties on line via teleconference.

THE HIGH COURT OF TANZANIA
MWANZA

J.C Tiganga

Judge

08/07/2020