THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA
LABOUR REVISION NO. 14 OF 2018
(Arising from Labour Dispute No. CMA/MBY/197/2016)
BETWEEN

RICHARD MALABEJA.....APPLICANT

AND

HUSSEIN YUSUPH NGOWI.....RESPONDENT

RULING

09/07 & 07/10/2020

UTAMWA, J:

This is an application for revision by RICHARD MALABEJA hereinafter called the applicant. The applicant filed the instant application in this court pleading the court to revise and set aside an award (impugned award) of the Commission for Mediation and Arbitration at Mbeya (CMA), issued in Labour Dispute No. CMA/MBY/197/2016 dated 13/04/2018 and make any other order(s) or reliefs as it may find just to grant.

The application was made under Rules 24 (1), 24 (2) (a) – (f), (3) (a) – (d) and 28 (1) (a) - (e) of the Labour Courts Rules, 2007 (GN No. 106 of 2007) and sections 91 (1) (a), (b), (2) (a), (b) and (c), of the Employment and Labour Relations Act No. 6 of 2004, hereinafter to be referred to as the ELRA.

The back ground of this matter according to the record of the CMA is to the effect that, the applicant was an employee of HUSSEIN YUSUPH

NGOWI (the respondent). The respondent is living in Mbeya city. Among other things, the respondent is engaging in the business of barber shop (saloon). On October, 2011 he recruited the applicant from Dar es Salaam and he employed him as a barber in one of his saloons located at Uhindini Street in Mbeya city. It was claimed that, the respondent was paying commission to the applicant on each customer he attended and the same commission was accumulated and paid at the end of month. The employment became sour and terminated in November, 2016, this is when the respondent required the applicant to give plausible explanation on the stolen money, Tanzania shillings (Tshs.) 986,000/=. The applicant had reported to the respondent that the money had been stolen by unknown bandits.

The applicant being aggrieved by the termination, he referred the matter to the CMA claiming to be unfairly terminated in both, substantively and procedurally. He prayed to the CMA to order for the payment of Tshs. 546,817,846.15/= as his legal terminal benefits and general damages for loss of his employment.

After hearing both sides, the CMA pronounced the award in favour of the respondent; it ruled that, there was no termination since the employment contract between the applicant and respondent was for specific task under section 14 (1) (c) of the ELRA. The applicant was discontented by the impugned award, hence the present revisional application.

The grounds for the application as can be gathered from paragraph 9 (i – iv) of the affidavit sworn by the applicant and supporting the chamber summons, were these:

i. The honourable Arbitrator committed a gross error by failure to take into account that the employer had failed to discharge his statutory duties to prove the fairness of termination.
ii. The honourable Arbitrator grossly erred to adjudicate that the applicant was employed for specific task in absence of any contract to prove the nature of specification of work.
iii. The honourable Arbitrator erred in law and facts by not considering evidence adduced and document presented by respondent dated 02/05/2016 which expressed clearly that the applicant was paid salary unlike his statement that he was paid commission.
iv. The honourable Arbitrator erred in law for relying on evidence of PW2 Veronica Raymond Swallo which is contradictory with the evidence of PW1 Hussein Ngowi.

The applicant suggested for this court to determine six (6) issues as follows:

(i) Whether the respondent discharged his statutory duties to prove fairness of termination both substantively and procedurally.
(ii) Whether the respondent remuneration was salary or commission.
(iii) Whether it was proper to depict the nature of employment contract by mere looking on employee's remunerations only.
(iv) Whether the nature of the employment contract was for specific task.

(v) Whether the Arbitrator failed to exercise his powers vested by the law.

(vi) Which reliefs should this court deem fit to grant.

The applicant thus, prayed for this court to revise and quash the impugned award and order the respondent to pay terminal benefits to him as they were contained in CMA Form No. 1.

The respondent objected the application through a counter affidavit. In essence, the counter affidavit was to the effect that, the CMA properly considered the evidence tendered and complied with the law hence rightly made the impugned award.

At the hearing of this revisional application, the applicant was represented by Mr. Isaya Mwanri, learned Advocate whereas the respondent was represented by Mr. Daniel Muya, also learned advocate. The application was heard by way of written submissions.

In his written submissions supporting the application, the learned counsel for the applicant adopted the contents of the affidavit. And he proceeded to submit on the first issue that, the arbitrator did not discharge his statutory duties as provided for under Regulation 12 (1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, hereinafter referred to as the Code. These provisions provide for a judge or arbitrator to decide on the termination for misconduct by looking as to whether the employee contravened a rule or standard regulating conduct relating to employment. He further contended that, the arbitrator embarked on the issue of employment contract between the applicant and

the respondent and arrived to the conclusion that it was a specific task contract while the same was not raised by the parties.

Moreover, he submitted that, the evidence in the CMA record substantiated that the respondent terminated the applicant on unfair reason of theft without following procedures hence contradicted the provisions of section 37 (1) and (2) (a) and (c) of ELRA and Regulation 13 of the Code. He added that, the same positions were discussed in the case of **Tanzania Meat Company Ltd v. Mohamed Ghost and Others (2013) LCCD 150.** So he concluded on this issue that, the respondent terminated the applicant unfairly.

On the second issue, the applicant's counsel submitted that, the arbitrator ruled that, the applicant was paid commission and not salary. This fact contradicted the evidence of the respondent that he paid salary as they were contained in the covering latter to a list of employees admitted at the CMA as exhibit A1. He also contended that, the observation by the arbitrator that the payment made to the applicant was commission and not salary because, they referred to is as such, was an invitation of extraneous matters which were not adduced in evidence by the parties.

Regarding the third issue, the applicant's counsel blamed the arbitrator for determining the nature of employment contract between the parties basing on the mode of payment instead of looking to the employment contract as per the requirement of section 15 (1) of the ELRA or section 15 (6) of the same law. These provisions of law impose the duty to prove the nature of contact to the respondent/employer. To substantiate his contention he cited the decision of this court in the case of the **Head**

Teacher of Iganzo v. Furaha Mongo Mwanzomba, Labour Revision No. 51 of 2013, High Court of Tanzania (HCT) Labour Division at Mbeya (unreported).

He further submitted that, a contract for specific task is non-continuous in nature as per section 4 of ELRA. Nevertheless, the applicant worked for the respondent for more than five years. This fact substantiates the continuation of the contract. The arbitrator thus, misconceived this fact and held it to be a contract of specific task by looking at the nature of payment.

When submitting to the fourth issue, the applicant's counsel contended that, the nature of the contract between the parties shows that, it was not a specific task contract. This is because, there was no evidence by the respondent to prove the same. He also contended that, the continuation of five years without specific words from the respondent to address the time when the contract was to come to an end, implied that, the agreement was not a contract of specific task. To buttress his contention he cited the cases of **Nzito Handcraft Furniture v. Charles Kuranda & 5 Others, labour Revision No. 168 of 2013, HCTLD at Dar es salaam** (unreported) and **Tanganyika Instant Coffee Co. Ltd v. Jawabu W. Matembei, Revision No. 210 of 2013, HCT at Dar es Salaam** (unreported).

Regarding to the fifth and sixth issues, the applicant's counsel argued that, the arbitrator failed to exercise his powers vested to him by the labour laws of Tanzania. These laws require the respondent to prove the matter on balance of probability. Therefore, he contended that, the

applicant was unfairly terminated and he should be paid by the respondent a total sum of Tshs. 546,817,846.15/= being a compensation of 100 months Tshs. 40,000,000/= for unfair termination as per section 40 (1) (c) of ELRA, one month statutory notice Tshs. 400,000/= as per section 41 (5) of the ELRA and general damages Tshs. 500,000,000/=. The general damages follow the fact that, the applicant believed that, he had acquired a green pasture for unspecified period of time, transportation costs to the place of recruitment i.e Dar es Salaam as per section 43 (1) of ELRA and accrued annual leave and clean certificate of service.

On the other hand, through the replying submissions, the respondent's counsel argued on the first issue that, there was no termination of contract since the applicant was paid 30% commission for service of barber he rendered to each customer. The contract was accomplished after a task of barbering as it was held in the case of **Mtambua Shamte & 64 Others v. Care Sanitation & Suppliers (Revision No. 154/2010) HC Labour Division at Dar es Salaam** (unreported). He further submitted that, the evidence adduced by the respondent and other two witnesses of his side substantiated that, the applicant was employed for specific task. This was why he was paid a commission in lieu of salary.

In relation to the second issue, he submitted that, the applicant was paid commission. That was why his payment differed from one month to another.

While submitting on the third issue, the learned counsel for the respondent contended that, the arbitrator did not decide on the nature of

employment contract by only looking to the applicant's remuneration. Instead, he based his decision on the task that was performed by the applicant in connection to the evidence adduced by the respondent and other two witnesses. He further submitted that, the definition of specific task as provided under section 4 of ELRA fits with the circumstance in the matter at hand. This is because, the applicant's task was seasonal and was not continuous as it ended at each act of barbering.

Additionally, the respondent's counsel responded to the fourth issue that, the arbitrator was justified to hold that the contract of employment between the parties was for specific task.

Moreover, on the fifth and sixth issues, the counsel for the respondent submitted that, the arbitrator correctly exercised his powers vested to him by the labour laws especially the standard set under the provisions of rule 26 and 27 of the Labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2007. He therefore, concluded that, the applicant was not entitled to any claim since there was no termination of contract, leave alone the said unfair termination. He urged this court to dismiss the application for lack of merits.

I have considered in length the submissions by the parties, the record of the CMA and the labour Laws. I am of the view that, the contentions by the parties can be resolved through only the following major issues;

1. Whether or not the applicant employment contract was for specific task.

2. If the answer to the first issue will be negative, then whether or not the applicant was terminated.
3. In case the second issue will be answered affirmatively, then whether or not termination was fair both substantively and procedurally.
4. The last issue will be, to which remedies are the parties entitled.

I will start with the first issue, of *whether or not the applicant employment contract was for specific task*. However, before I examine this issue, I see it prudent to resolve some sub-issues pertaining to this major issue. These are; **Firstly**; *whether the arbitrator decided the issue that was not raised by the parties*. **Secondly**; *whether the applicant was paid commission or salary*. **Thirdly;** *whether the arbitrator determined the nature of employment contract by looking on the mode of payment*.

On the first sub-issue, the applicant's counsel raised a concern that, the arbitrator did discuss this issue while it was not raised by the parties. Indeed according to the record of the CMA, parties did not raise this issue. However, the evidence and submissions by the parties show that, they had a plan to discuss the issue. The course taken by the arbitrator did not thus, prejudice the parties.

On the second sub-issue, this court was urged to decide on the nature of the remuneration paid to the applicant (i. e. whether it was a commission or the salary). The applicant's counsel contended that the applicant was paid salary of 400,000/=. He further submitted that, the respondent's and his witness's (DW 1 and DW2) testimony substantiated the same. The respondent's counsel argued that, the applicant was paid a

commission according to exhibit A1 which showed that, the applicant was paid different amount like 135,000/= on 4/4/2016, 432,300/= on 4/7/2016 and 325,500/= on 2/6/2016. He further argued that, in case the applicant did not work, he earned no commission. That is why there was fluctuation on the received commissions.

When this court cross checked the exhibit A1 which consists of covering letter to the paying Bank (CRDB) and a list of names of the employees with their payments amount alongside their names. The covering letters dated 2/5/2016 and 02/04/2016 reads;

> "……
> ……
> ……
> YAH: OMBI LA KULIPA WAFANYAKAZI WANGU KWENYE AKAUNTI ZAO ZILIZO KATIKA BENKI YAKO.
> ……
> Mimi ni mteja katika benki yako mwenye akaunti…… Ninakuandikia kuomba wafanyakazi wangu **walipwe mishahara yao** kupitia benki yako. Naambatanisha orodha ya majina yao kwa kumbukumbu..."

The contents of the letter quoted above can be literally translated as follows:

> "*I am a customer of your bank with bank account …… I hereby make a request for my workers whose names are attached hereunder, to be paid salaries through your bank.*"

Again, according to the testimony of the respondent (Hussein Yusuph Ngowi as the first defence witness) at page 11 of the typed proceedings of the CMA, it shows that, he paid his workers according to their ability of performing their works and he was paying 30% to the applicant. He also testified that, he used the same mode so as to encourage the workers to have good customer care and increase their respective payments.

Nonetheless, when he was clarifying on the letter mentioned above, he testified that he was paying salaries.

The second witness, being one of the respondent's workers (Veronica Raymond Swalo) testified, as per page 16 of the typed proceedings of the CMA that, their employer (the respondent) did not specify their emoluments. They were paid according to what one could produce motherly through his/her performance. The best monthly performer with many clients could be paid more salary than others.

Furthermore, the third witness for the respondent (John Motela Kameta) testified that, he was paid the commission of 20% which was accumulated every day of working and it was paid at the end of the month.

Now, according to the above evidence of witnesses who testified in favour of the respondent before the CMA, it is obvious that, the employees at the respondent's barbershop were not certain of whether they were paid a commission or salary. This can be seen on the variance of testimony between the second and third witness. While the former called the payments as salary, the latter called same as the commission. Moreover, the respondent who testified as the first witness he was also not sure on what he was paying. For instance, during the examination in chief he said, he was paying the commission. Nevertheless, on the document tendered in evidence (the covering letter) and during cross-examination, he said that he was paying salaries.

It is trite law that, in labour matters like the one at hand, the employer is required to produce a contract or written particulars stating *inter alia* the remuneration, the method of its calculation and details of any

benefits or payments in kind. In the absence of such contract or written particulars, the burden of proof lays on the employer. The provisions of section 15 (1), (2) and (6) of the ELRA for example, provide thus, and I quote them for the sake of quick reference:

> "15.-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing,namely-
>
> (a) name, age, permanent address and sex of the employee;
> (b) place of recruitment;
> (c) job description;
> (e) form and duration of the contract;
> (d) date of commencement;
> (f) place of work;
> (g) hours of work;
> (h) remuneration, the method of its calculation, and details of any benefits or payments in kind; and
> (i) any other prescribed matter.
>
> (2) If all the particulars referred to in subsection (1) are stated in a written contract and the employer has supplied the employee with that contract, then the employer may not furnish the written statement referred to in section 14.
>
> (6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."

Regarding to the provisions of the law above, in connection to the matter at hand, the respondent was supposed to supply the applicant with written particulars. However, in the record it is apparent that, he did not do so. In the circumstance, he was obliged to prove that, he was paying the commission and not salary. However, according to the evidence I have demonstrated above, the respondent did not prove that fact on the balance of probabilities. Failure to do so, entitles this court to resolve this sub-issue

in favour of the applicant and I according to so. I thus, find that, the respondent was paying salary to the applicant and not a commission.

About the third sub issue, the applicant's counsel complained that, the Arbitrator decided the type of employment contract basing on the remuneration paid to the applicant. On the other hand, the respondent's counsel claimed that, the arbitrator did not decide so basing on the mode of payment to the applicant, but he based on the task the applicant was performing.

Indeed, according to page 13 of the typed version of the impugned award, it is shown that, the arbitrator held thus, and I reproduce the relevant part of the holding for a swift orientation:

> "katika aina tatu za mikataba ya ajira, naona mkataba wa ajira wa mlalamikaji unaangukia katika mkataba wa kazi maalum **kwasababu mlalamikaji alikuwa analipwa kulingana na uwezo wake wa kufanya kazi.** Na kwa kuwa **malipo yake yalikuwa yakiendana na kiwango alichoingiza kwa siku inamaanisha kwamba mkataba wake ulikuwa ukikoma kipindi anapomaliza kazi kwa siku."**

This can be literally translated thus; from the three types of employment contract; I consider an employment contract of the complainant fall within the contract for specific task because the complainant was paid according to his ability of performing his work. And since his payment depended on the amount of income he was earning per day, his contract ended after each day of work.

Basing on that holding, it is apparent clear that, the Arbitrator decided the type of employment contract basing on the remuneration the applicant was paid.

I now revert to the main issue of *whether or not the applicant employment contract was for specific task.* Section 4 of ELRA defines specific task to mean, a task which is occasional or seasonal and is non-continuous in nature.

The applicant's counsel submitted on this regard that, the CMA holding that the contract was for specific task since he was paid commission does not prove the nature of contract. What was necessary was the contract showing how it was ending in each day. But from the submission of the respondent's counsel, he argued that, the payment mode cannot be a guiding factor of the nature of employment, but the task which the applicant was performing which ended at the end of barbering. He cited Rule 4 (2) of the Code. These provisions guide that, where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

Regarding the argument that, the applicant was on specific task that is why his payments deferred from one month to another, this logic can be fetched from the evidence adduced by the first witness (Hussein Ngowi, the respondent) who testified that;

> "...malipo yanaendana kulingana na kiwango alichoingiza tunajumlisha kuanzia tarehe ya kwanza ya mwezi hadi mwisho wa mwezi tunalipa commission"

The above quoted passage meant that, payments were according to what he has earned by making a total from the first date of the month to the end of the month when a commission was paid. At page 11 of the typed proceedings, he further testified that;

"...nilitumia mfumo wa kulipa kwa asilimia ili mfanyakazi ajue kila anachouza anapata commission awe na lugha nzuri na awe mbunifu ili kupandisha kiwango cha malipo..."

This meant that, he had decided to pay commissions so as to enable a worker to know that, what he would earn depended on the work performed. This could assist the employee to work hard and have good customer care so as to accumulate more money.

From the evidence discussed above it is clear that, the applicant worked with the respondent for five years. He was barbering different customers. There was no specific salary, but he was paid on monthly basis according to the work he executed per month. It is my concerted view that the mode of payment applied by the respondent to the employees, was applied as a motivation for an employee to work hard for a better payment at the end of the month.

Furthermore, it is my view that, though the applicant was paid differently in each month, he was not employed for specific task. That is the reason he worked with the respondent for about five years continuously.

In the case of **Nzito Handcraft Furniture** (supra), there was a situation akin to the matter at hand. In that case the respondents/employees were working with the applicant for five years and they were paid according to the amount of work each respondent completed in each month. Mipawa, J. in his decision held thus;

"...it is on record that respondent worked with the applicant for about 5 years and they received their monthly paid though based on the amount of work each of them completed in each month. They worked in such terms continuously for the good five years before their termination of employment. .....therefore in my view the arbitrator correctly

> considered the employment contract of the respondents not to be of specific task that ended on completion of the tasks. Respondents employment never completed on those basis, that is why they were fully engaged for five years continuously without being told by the applicant when such employment contract was to end. There were no written contract that would have complied with section 15 (1) (e), (h) (i) and 15 (6) of the Employment and Labour relation Act, No. 6 of 2004 discussed above and disprove the terms of employment as submitted by the respondents that were permanent employment."

Despite of the submissions made by the respondent's counsel, it is a principle of law in labour matters that, when there is any dispute regarding the terms of employment in a contract, the burden of proof lies on the employer; see the provisions of section 15 (6) of the ELRA quoted above.

In the case at hand, it is apparent that the respondent did not produce any contract or written particulars, hence he failed to prove under which type of contract the applicant was employed. Since the employer/respondent failed to discharge his duty of proving the same, the benefit of doubts is in favour of the applicant, who claimed that he was employed on unspecified term contract.

I therefore answer the first issue negatively i.e the applicant was not employed for specific task, instead; he was employed on unspecified term contract.

Coming to the second issue of *whether or not the applicant was terminated.* It is my opinion that, since the first issue has been answered negatively, the second issue shall not detain. This is because, the evidence on record shows that, the respondent terminated the applicant. This is seen from the evidence of the respondent himself who testified that, when he was told about the theft which had occurred in his barbershop, he was

not satisfied with the narration by the applicant, so he decided not to allow him to continue with work until when the applicant could give sufficient explanation. This is clear at page 12 of the typed proceedings.

I now examine the third issue of *whether or not termination was fair both substantively and procedurally*. The answer to this issue is, in my view, negative. This is because, it is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For the same to be considered fair, it should be based on valid reasons and fair procedures. There must be therefore, substantive and procedural fairness of termination of employment as provided for under Section 37(2) of the ELRA which states that:

> "Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-
> (a) that the **reason for the termination is valid;**
> (b) that the **reason is a fair** reason-
> (i) related to the employee's conduct, capacity or compatibility; or
> (ii) based on the operational requirements of the employer, and
> (c) that the employment was **terminated in accordance with a fair procedure."**
> [Emphasis is mine].

In the matter at hand, the record of the CMA shows that, the respondent got information from the applicant about the stolen money, he went to his barbershop. After a short observation he convened a meeting with the employees including the applicant. He told them that, the scenario narrated by the applicant was not appealing to him. He therefore told the applicant not to proceed with the work. The applicant returned keys to the respondent and he left.

According to the said evidence it is clear that, the respondent terminated the applicant for suspecting him of being involved in the reported theft. However, the provisions of section 37 (5) of ELRA restricts an employer from terminating an employee on the bases of a complaint with criminal nature, until he/she is charged and tried on the same and all appeal procedures have been finalized. The same provision states thus, and I reproduce them for ease of reference:

> "37 (5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto.

On that regard, the applicant was terminated on the invalid reason.

Regarding the issue of procedure for termination, I believe I need not to labour much on this. From the record, there was no any proper procedure which was taken since there was a belief that the applicant was an employee on specific task. Since I have already resolved that the applicant was not on specific task, the respondent had a duty to adhere to all the procedure for terminating the applicant as provided for under Rule 13 of the Code. The respondent failed to comply with the procedure for termination of the applicant. I thus, hold that the applicant was unfairly terminated both substantively and procedurally. Therefore, I reverse the holding of the CMA that, the applicant was on special task contract hence no claim of unfair termination.

The fourth and last issue is, *to which reliefs are the parties entitled*. The arbitrator found that, the applicant is not entitled to anything as he was on specific task employment. However, I have found that, the

termination was substantively and procedurally unfair. Section 40 (1) of the ELRA provides for the remedies for unfair termination. The applicant prayed to be compensated a total sum of Tshs. 546,817,846.15/=. I however, find the amount claimed by the applicant is unreasonable, instead I see the applicant is entitled to a compensation of 12 months' salary, one month salary in lieu of notice, repatriation costs for him and his belongings to the recruitment place i.e Dar es Salaam and a certificate of service.

Owing to the above findings, I grant the application for revision. I also set aside CMA's award. I consequently order the respondent to pay the applicant's entitlements just listed herein above. Since this is a labour matter, I make no order as to costs. It is so ordered.

THE HIGH COURT OF TANZANIA

J.H.K. Utamwa
JUDGE
07/10/2020

07/10/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: Absent.
Respondent: absent.

BC; Mr. Patrick, RMA.

Court: Ruling made in the absence of the parties in court, this 7th October, 2020. Partie be notified of the ruling.

JHK. UTAMWA.
JUDGE
07/10/2020.