

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
HIGH COURT LABOUR DIVISION SHINYANGA**

**AT SHINYANGA**

**REVISION APPLICATION NO. 68 OF 2018**

**BENJAMIN EDWARD NG'HWANI.....APPLICANT  
VERSUS  
BARIADI TOWN COUNCIL.....RESPONDENT**

**JUDGEMENT**

*Date of Last order: 13.3.2020  
Date of Judgment: 11.12.2020*

**MKWIZU, J.:**

The applicant in this revision namely Benjamin Edward Ng'hwani lodged this revision against the respondent Bariadi Town council. The application was brought under *Section 91 (1) (a) (b), 91 (2) (a) (b) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act. No. 6 of 2004 as amended by section 14(b) of the Written Laws (Miscellaneous Amendment) Act No.3 of 2010, Rule 24 (1), (2) (a), (b), (c) (d) (e) and (f), 24 (3) (a) (b) (c), 24 (11) (a) and Rule 28 (1) (c), (d) (e) of the Labour Court Rules G.N. 106 of 2007 and any other enabling provision of the law. The application is supported by the affidavit of the applicant.*

The application was premised on the following grounds:-

*1. That the honorable Court may be pleased to call and revise the arbitration Proceedings in respect of the Labour Dispute No. CMA/SHY/127/2015*

*2. That the Honorable court may be pleased to revise the award issued under that Arbitration due to irregularities and improper procured; and order proper procurement of Labour Dispute no CMA/SHY/32(B)/2016 in which parties are **BENJAMIN EDWARD NG'HWANI VERSU BARIADI TOWN COUNCIL.***

*3. That the honorable court may be pleased to grant any order that it consider just and convenient to grant.*

Facts giving rise to the revision at hand are that, applicant was a driver, driving a Vehicle with Registration No. T 509 AGS the property of Bariadi Water and Sanitary (BARWASA). It is also on the records that in the year 2013, respondent hired the said vehicle and that the vehicle came to her

hand with the applicant as a driver. Parties also agree that, applicant was only paid allowances whenever the hired vehicle was used. The respondent used the vehicle until July, 2015 when the same was handled over to BARWASA. Thereafter, in October, 2015, applicant filed a labour dispute before the Commission for Mediation and Arbitration claiming inter alia to be declared respondent's employee and he be paid his salaries and unpaid leaves. Respondent opposed the claim. It was submitted that the appellant was never employed by the respondent.

The arbitrator decided in favour of the respondent. Applicant was aggrieved hence the present application. Paragraph 15 of the applicant's affidavit itemized three legal issues for consideration by this court as follows:

- a. Whether it is proper and fair for the arbitrator to procure and issue a ruling (Award) in respect of a dispute which does not exist in CMA records?*

*b. Whether it is proper for the arbitrator to hold that there was no employer employee relationship between the Applicant and the respondent*

*c. Whether the arbitrator decision was supported by point of law or based on his own findings and he was biased?*

At the hearing of the application, the applicant was represented by Mr. Benjamin Dotto and the respondent had the services of Mr. Kheri Shabani solicitor assisted by Ms. Maria Mvungi also solicitor.

Submitting in support of the revision, Mr. Dotto faulted the CMA for titling the case as CMA/SHY/127/2015 instead of CMA/SHY/32 (B)/2016. He referred the Court to the ruling for condonation issued by the CMA on 6<sup>th</sup> July, 2017, Certificate of non-settlement dated 21<sup>st</sup> July, 2017, A notice to refer the matter to the arbitration and opening statements filed by the parties, and the summons which were all titled CMA/SHY/32 (B)/2016. He was of the view that, the award was improperly procured.



On his second ground, Mr. Dotto blamed the arbitrator for holding that there was no employer-employee relationship between the parties. Applicant was employed by the respondent from January, 2013 to July, 2015 as a driver. He was working under the control of the Planning officer who was his daily supervisor, reporting to the Planning officer, Bariadi Town Council who provided him with a tool of work which is a light vehicle with Registration No. T 509 AGS insisted Mr. Dotto. He urged the court to revise the arbitrators award for failure to consider the provision of section 61 (a) (b) (d) and (f) of the Labour Institution Act No 7 of 2004 .He referred this court to exhibit No P1 to P7 which were tendered before the Commission and letters marked BTA3 and BTA2 attached to the respondent's counter affidavit .

Responding to the submission by the Applicant's representative, Mr. Kheri Shabani, for the respondent's prayed to adopt his counter affidavit to be part of his submission. He, conceded forthrightly that the arbitrator confused the number of the dispute, instead of citing a correct registration number of the dispute as CMA/SHY/32 (b)/2016 he cited CMA/SHY/127/2015. He however suggested that, the confusion in the

numbering of the dispute did not anyhow prejudiced the appellant. He said, this is a matter which would have been corrected through a review before the same arbitrator.

On the second ground for revision, it was Mr. Kheri's submission that, the applicant was not the respondent's employee. He was employed by the Bariadi Water and Sanitary (BARWASA) who owned the vehicle which the applicant drove. The respondent had hired the said vehicle from BARWASA and it came with the applicant as a driver. Mr. Kheri elaborated more that, applicant was paid only when the hired vehicle was in use and not otherwise. To prove that, applicant was not employed by the respondent, Mr. Kheri stated, in the year, 2014, respondents announced employment vacancies including drivers and the applicant applied but was not recruited for failure to meet the requirement. He said, had the applicant employed by the respondent, he could not have applied for the post. Mr. Kheri, supported the CMA's award and prayed for the dismissal of the revision.

In his rejoinder, apart from reiterating his submission in chief, Mr. Dotto conceded that the vehicle in which the appellant was driving was owned by BARWASA but applicant was under the control of the respondent, Director Bariadi Town Council. On why the applicant had applied for employment in the year 2014, Mr. Dotto submitted that, applicant was working in a contractual term that is why he had to apply to be employed as a Public Servant.

I will determine first, the issue regarding the title of the award. And before I go further, I should state here that, this decision is delayed due to the facts that having pegged as a ground for revision the confusion on the title of the CMA Award, the court wanted, before making any conclusion on the matter to go through the details of the records and see what transpired. One of the records, that is Labour Dispute No CMA /SHY/32B/2016 was not availed to the court for courts' perusal and that its whereabouts was not known. This took the CMA for about a year to trace the records fruitless. This court therefore decided to compose the judgement with the available records before it.



As stated above, appellant is complaining that the award was procured illegally by citing a wrong case number. I have carefully studied the record of this revision and to do justice to the case I had to go through the original records of the labour dispute Number CMA /SHY/127/2015 and the documents attached to the application pertaining to Labour Dispute No. CMA /SHY/32B/2016. I have confirmed that applicant in this case had lodged at the CMA Labour dispute No. CMA /SHY/127/2015 which was withdrawn on 28 /1/2016 with leave to refile. The refiled dispute was registered as labour Dispute No. CMA/SHY/32(B)/2016. Parties filed all necessary documents including the opening and closing statement followed by the hearing of parties' evidence. The arbitrator issued an award in favour of the respondent on 8<sup>th</sup> November, 2018. However instead of titling the Award as Labour dispute No CMA/SHY/32(B)/2016, the Arbitrator named it No CMA/SHY/127/2015. That is the basis for Mr Dotto's first ground of revision. The confusion on the title considered however, did not extend to the details, evidence and submission of the parties available for arbitrators decision. In essence, Mr. Dotto concedes that the decision was on the submission and documents tendered in labour dispute No. CMA/SHY/32B/2016 the problem is only on the number of the dispute at



the title of the award. This is, in my view, curable. With the principle of the overriding objective requiring our courts to deal with cases justly and to have regard to substantive justice rather than being knotted with legal technicalities read together with rule 55 (2) of Labour Court Rules, Government Notice No. 106 of 2007, I find the omission to properly cite the case number curable by an order of correction. The citation to the CMA award is hereby corrected to read as CMA/SHY/32 B/2016 instead of CMA/SHY/127/2015.

In the second issue, the applicant faults the arbitrator for holding that there was no employer- employee relationship between the Applicant and the respondent. Section 4 of the Employment and Labour Relations Act No. 6 of 2004 gives a definition of who is an employer and employee: The section provides:

*""employee" means an individual who-*

*(a) has entered into a contract of employment; or*

*(b) has entered into any other contract under which-*

*(i) the individual undertakes to work personally for the other party to the contract; and*

*(ii) the other party is not a client or customer of an profession,  
business, or undertaking carried on by the individual; or  
(c) is deemed to be an employee by the Minister under section 98(3);*

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

Section 61 of the Labour Institution Act No. 7 of 2004 provides for factors to be considered when presuming the existence of an employment relation.

It states:

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

*a) The manner in which the person works subject to the control or directions of another person.*

*b) The person hours of work are subject to the control or direction of another person.*

*c) In the case of person who works for the organization, the persons forms 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 which that person renders service.*

*f) The person is provided with tools of trade or works equipment by the other person.*

*g) The person only works or renders service to one person." [Emphasis is mine].*

Applicant's evidence was that he was employed by the respondent as a driver of a motor vehicle with registration No.T.509 AGS. He was paid allowances only. He clarified that he unsuccessfully applied for a driver post at the respondent's office in the year 2014. In dismissing the applicant's claim, the arbitrator was of the view that if at all applicant was already respondent's employee, he could have not applied for the driving post with the same employer.

In his part, respondent did not deny to have used the applicant as a driver, her explanations were that applicant came with a vehicle they hired from



BARUWASA and that they only paid the applicant when they used the said vehicle and not otherwise. This version of testimony is supported by the applicant's statements in the opening statement at page 1 where he said, I quote:-

*"Kwamba majukumu yake yalikuwa ni kuendesha gari la Halmashauri hiyo ambalo liliyimwa kutoka mamlaka ya maji (BARUWASA.."*

A general examination of the record divulges that there was no employer-employee relationship between the parties, respondent was not responsible for the working affairs of the applicant, she was neither providing the working tools nor supervising the applicants work. Respondent was not also paying applicant salaries all along from 1/1/2013 to 2015 when the dispute at the commission was filed. Honestly, applicants claim is without merit and for that reason I find nothing to fault the arbitrator's decision.

On his last grounds, applicant challenges the arbitrator for being biased. I have given the said decision a thorough scrutiny, there is no indication whatsoever that arbitrator was biased. The decision was legally

constructed. It contains summary of evidence by the parties, issues for determination, detailed analysis of each issue and the findings or reasons for the decision. Applicant has shown no single point as to why this court should believe on this ground. The last point is therefore baseless.

In the upshot the application lacks merit. It is hereby dismissed. Being a labour matter I make no order as to costs.

Order accordingly.

**DATED** at **Shinyanga** this 30<sup>th</sup> day of **October**, 2020.



  
**E.Y. MKWIZU**  
**JUDGE**  
**30/10/2020**

**COURT:** Right of appeal explained

  
**E.Y. MKWIZU**  
**JUDGE**  
**30/10/2020**