

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

APPLICATION FOR REVISION NO 54 OF 2018

*(Arising from the decision of the Commission for Mediation & Arbitration of Shinyanga by
Mwakisopile I.E. (Arbitrator) dated on 26th June, 2018 in Labour Dispute No.
CMA/SHY/35/2018.)*

JUMA A. KITUNDU.....APPLICANT

VERSUS

HEMED HOLDING LIMITED.....RESPONDENT

JUDGEMENT

*Date of the last Order: 25th March, 2020
Date of the Ruling: 27th March, 2020*

E. Y. MKWIZU, J.:

This is a ruling in respect of a revision by the applicant against the decision of Commission for Mediation and Arbitration, Shinyanga. It was the Applicant's assertion that he was employed by the respondent as a driver since 1st day of January, 2010 to 8th January, 2018 when his employment was unlawfully terminated. Dissatisfied with the termination, he filed a labour dispute No. CMA/SHY/35/2018 before the Commission for Mediation and Arbitration. CMA confirmed that he was an employee of the respondent but erred in not granting him his entitlements accrued from unlawful termination by the respondent as a result he was ordered to be paid Tsh 160,000 despite the fact that he worked for eight years.

The application was brought by a chamber summons, predicated under Section 91(1) (a) (b), 91(2) (b),(c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No 6 of 2004 read together with Rules 24 (1),24 (2) (a), (b), (c), (d). (e) and (f) , 24 (a), (b), (c), (f) ; 24 (11) and 28 (1) ((c), (d) (e) of the Labour Court Rules, GN. No. 106 of 2007 where the applicant seeks revision of the proceedings and the award of the Commission for Mediation and Arbitration given by Hon. Mwakisopile, I.E dated 26/06/2018 in Labour Dispute No. CMA/SHY/35/2018.

Applicant alleged unfair termination. He said, he worked with the respondent since 2012 and he was unfairly terminated on 8th January 2018. Aggrieved by the alleged termination, applicant filed labour dispute No. CMA/SHY/35/2018 before the Commission for Mediation and Arbitration opposing the decision of the employer. CMA entertained the matter and found that there was employer-employee relationship between the parties, that applicant's employment ended in every single day,that there was no proof of unfair termination and further that, applicant outstanding payment was a payment in lieu of notice under section 41 (1)(b) (i) .He finally granted the applicant payment in lieu of Notice amounting to tsh. 160,000/=.

Dissatisfied, applicant has come to this court with three grounds seeking revisional jurisdiction of the court namely;

1. That the Honourable court be pleased to call for records and proceedings and award of Commission for Mediation and Arbitration by Hon.Mwakisopile, dated 26/06/2018 and examine on the correctness, legality and propriety of the said decision and award therein
2. That the Honourable court after satisfying on the correctness, legality and propriety of the said decision and award therein be pleased to revise and quash the award of the Commission for Mediation and Arbitration in the above cited dispute.
3. Any other relief(s) as the court deems fit and just to grant.

At the hearing of this revision, Applicant appeared in person unrepresented while the Respondent was being represented by her Human Resource Manager, Yohana Peter.

In support of his application, applicant submitted that he is not comfortable with the CMA award as it failed to grant him his entitlements. He clarified that; CMA granted him 160,000 only while his employment lasted for eight good years. He asked the court to revise the proceedings and the award of the CMA and grant him what he is intitled to .

On his part respondents' representative requested the court to do what the employment laws requires. He left everything to the court to decide.

Section 61 of the Labour relations Act No 7 of 2004 makes analysis of who is an employee. CMA had well examined this section in relation to the applicant's relationship with the respondent and as rightly concluded, the applicant fits on the criterion provided for under the above section. In this CMA said:-

"Kwa kuzingatia kifungu hicho tunaona kuwa walalamikaji walikuwa waajiriwa wa mlalamikiwa, kwani walikuwa wanapata maelekezo na vifaa vya kazi kwa mlalamikiwa, walikuwa wanafanya kazi kwa mlalamikiwa peke yake na walikuwa wanamtegemea kiuchumi mlalamikiwa"

I have no reason to doubt the above conclusion reached by the CMA on the status of the applicant as against the respondent herein. There is

ample evidence on the records indicating that applicant was working under the respondent's control. He was provided with the working tools, instruction and salary by the respondent. It is also on record that applicant's economy and upkeep depended solely on the respondent.

There is no dispute that applicant's employment was terminated. Both parties agree that applicant's employment was terminated on 8th January, 2018. On the reasons for termination, respondent stated that applicant's employment was terminated due to misconduct and other theft allegations. At the end, the arbitrator was convinced that the respondent has proved that termination was with a reasonable ground. The CMA's decision on this aspect reads:-

"Hoja ya pili ni endapo walalamikaji waliachishwa kazi kwa mujibu wa Ushahidi wa mlalamikiwa alieleza kuwa walalamikaji waliachana na walalamikaji (sic) baada ya utendaji wao kuwa mbovu ambapo walalamikaji walituhumiwa kwa wizi wa Mafuta ya diesel. uharibifu wa kazi na kuchelewa kuanza kazi. Ushahidi upande wa walalamikaji walieleza kuwa

waliachishwa kazi mnamo tarehe

08/01/2018.Kutokana na Ushahidi huo ni wazi

kuwa walalamikaji waliachishwa kazi kutokana

na utendaji mbovu”

I have no reason to fault the trial tribunal on this point. The respondent discharged his duty under section 39 of the ELRA 2004. The issue to be decided is as to what reliefs the applicant is intitled to after his termination. CMA dealt with this issue under the provision of section 44 (1) of the Employment and Labour Relation Act, 2004. The arbitrator grounded his finding on evidence that applicant was working on a daily based contract and that he was paid on a daily basis.

Section 44 (1) provides: -

44.-(1) On termination of employment, an employer shall pay an on employee-

- (a) any remuneration for work done before the termination;*
- (b) any annual leave pay due to an employee under section 31 for leave that the employee has not taken;*
- (c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31 (1);*
- (d) any notice pay due under section 41(5); and*
- (e) any severance pay due under section 42;*

(f) any transport allowance that may be due under section 43.

Before the CMA, applicant had claimed for 12 months salaries, pension and 6 months leave. It was the arbitrators finding at page 8 of its decision that the applicant was only entitled to payment in lieu of notice on the ground that there was no proof of a continued employment between the parties. The arbitrator concluded that the applicant was entitle to the payment in lieu of Notice. He then calculated the 40,000 applicant's day salary times four days which came into a total of 160,000 Tsh.

I have given section 44 (1) above a thorough scrutiny. Indeed, on termination, the employee is entitled to his remuneration for the days worked if any, leave allowance if any, notice under section 41 (5), severance allowance under section 42 and transport allowance under section 43 of the Employment and Labour Relation Act,2004 .

There evidence on record does not tell whether the applicant had any outstanding leave or leave allowances payable under section 44 (1)(a) (b) and (c) (e) and (f) of the Employment and Labour Relation Act,2004 .It is on record that the applicant was paid all his remunerations ,meaning that he had no other payment payable. There was no evidence suggesting that

applicant was entitled to severance allowance and /or transport allowance. As stated earlier, applicant was employed on a daily basis and he received day salary. For that reason, he was entitled to a four days termination notice under section 41 (1) (b) (i) and because there is no evidence as to whether the notice was given or not, the applicant was entitled to four days salary in lieu thereof under section 41 (5). The provisions go thus: -

"41.-(1) If a contract of employment can be terminated on notice, the period of notice shall not be less than-

(a) ...

(b) after that-

*(i) **4 days, if the employee is employed on a daily or weekly basis; or***

(ii) ...

(2) N/A.

(3) N/A.

(4) N/A.

(5) Instead of giving an employee notice of termination, an employer may pay the employee the remuneration that the employee would have received if the employee had worked during the notice period."

I am therefore of the considered view that the calculation made by the arbitrator in regards to the payment in lieu of notice was correctly done. And I find no reason whatsoever to differ with his finding. Applicant was entitled to 4 days' notice which simple calculation gives a total 160,000/= consideration being that he was being paid a day salary of 40,000 /= per day.

In fine, the revision lacks merit. It is hereby dismissed
Order accordingly.

DATED at Shinyanga this 27th day of March 2020.


E. Y. MKWIZU
JUDGE
27/03/2020

COURT: Right of appeal explained.

