

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

APPLICATION FOR REVISION NO 55 OF 2018

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

MATHIAS MARTIN.....APPLICANT

VERSUS

HEMED HOLDING LIMITED.....RESPONDENT

JUDGEMENT

Date of the last Order: - 16th January, 2020

Date of the Ruling: - 20th March 2020

E. Y. MKWIZU, J.:

In this chamber summons, the applicant seeks to move this Court under sections 91(1) (a) and (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 to exercise its revisional jurisdiction to revise the proceedings and the award of the Commission for Mediation and Arbitration given by Hon. Mwakisopile, I.Eon 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 contract ended in every single day and therefore concluded CMA, that there was no proof of unfair termination and further that, applicant outstanding payment was a payment in lieu of notice under section 4 (1)(b) (i) of the ELRA totaling at 40,000 only.

Discontented,applicant has come to this court withthee 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,I.E dated 26/06/2018 and examine on the correctness,legality and propriety of the said decision and award*

2. That the Honourable court after satisfying on the correctness, legality and propriety of the said decision and award herein 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.

The application was supported by an affidavit sworn by the applicant Mathias Martin on 23rd day of July, 2018. Respondent filed neither a counter affidavit nor any notice indicating that he is opposing the application.

When the application came for hearing before this court on 16th January, 2020. Applicant appeared in person unrepresented while the Respondent was being represented by her Manager, Yohana Peter.

In support of his application, applicant requested the court to revise the decision and the award of the CMA as per his chamber summons and nothing more. On his part respondents' representative requested the court to do what the employment laws requires.

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 applicants relationship with the respondent and as rightly concluded, the applicant fits on the criteria provided for under the above section. In this CMA said

"Kwa

kuzingatiakifunguhichotunaonakuwawalalamikajiwali kuwa

waajiriwawamlalamikiwa,

kwaniwalikuwawanapatamaelekezonavifaavyakazikwamlal

amikiwa,walikuwawanafanyakazikwamlalamikiwapekeyak

enawalikuwawanamtegemeakiuchumimlalamikiwa"

I have no reason to doubt the above conclusion reached by the CMA on the status of the applicant as against the respondent herein. Though no written contract between the parties, there is ample evidence 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. However they differ on reasons for termination. While the applicant is not telling exactly what led to his termination, respondent evidence is to the effect that applicant was terminated due to misconduct and other theft allegations. The arbitrator was convinced that the respondent has proved that termination was with a reasonable ground. The CMA's decision reads:-

*"Hoja ya pili ni endapo walalamikaji waliachishwa kazi. Kwa mujibu wa Ushahidi wa mlalamikiwa aieleza 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 niwazi 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.

Now, what was the rights of the applicant on 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 meaning that his contract was ending at the end of the day.

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 entitled to the payment in lieu of Notice. He then calculated the 10,000 applicant's day salary times four days which came into a total of 40,000 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.

There is no enough evidence on record that the applicant had any outstanding leave or leave allowances payable under section 44 (1) (b) and (c). It is on record that the applicant was paid all his remunerations, meaning that he had no other payment payable under section 41(1)(a) above. There was no evidence suggesting that applicant was entitled to severance allowance and or transport allowance under section 41 (1) (e)

and (f). As stated earlier, applicant was employed on a daily basis and hereceived a 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 e employed on a daily o r weekly basis; or***

(ii) ...

(2) N/A.

(3) N/A.

(4) N/A.

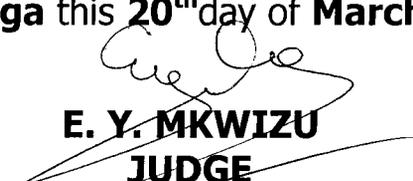
(5) Instead of giving an employee notice of termination, an employermay pay the employee the

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 40,000/= taking into account his own evidence that he was being paid 10,000 /= per day.

All said and done, the revision lacks merit. It is hereby dismissed
It is so ordered.

DATED at Shinyanga this 20th day of March 2020.


**E. Y. MKWIZU
JUDGE
20/03/2020**

COURT: Right of appeal explained



**E. Y. MKWIZU
JUDGE
20/03/2020**