IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DODOMA

APPLICATION FOR REVISION NO. 16 OF 2020

(Originating from an Award of the Commission for Mediation and Arbitration (CMA) HON. MATALIS, R (Arbitrator) Dated 2nd April, 2020 in Labour Dispute No. CMA/DOM/2/2020)

MOHAMED BUILDERS LTD .....APPELLANT

VERSUS

JACOBO THOBIAS MHEPE..... RESPONDENT

RULING

19/5/2022 & 23/5/2022

KAGOMBA, J

The applicant, MOHAMED BUILDERS LTD, has moved this Court by way of a Chamber summons under relevant provisions of the law to revise the proceedings and the Award of the Commission of Mediation and Arbitration (CMA) in original Labour Dispute No. CMA/DOM/2/2020 between JACOBO THOBIAS MHEPE (the respondent) and the applicant delivered by Hon. Matalis, R (Arbitrator on 2nd April, 2020.

The Application is supported by an affidavit of Ms. Joyce Mtekela, a Principle Officer of the applicant's company who has narrated the episode pertaining to the labour dispute and the reasons for this application. That, the respondent used to be given piece work by the applicant as and when

such works were available, without being given a contract of employment. He was also being paid after completion of such work. In November,2019 the respondent decided to vacate himself without any undue pressure from the applicant. To the surprise of the applicant, the respondent instituted complaints at CMA which gave rise to the impugned Award aforementioned.

During the hearing of the respondent's complaints, the CMA determined whether the respondent was an employee of the applicant but found that he was not. Yet, in determining the reliefs the parties were entitled to, the CMA awarded leave and severance pay to the respondent. This decision has not been well received by the applicant who prays this court to make an order quashing and setting it aside.

The applicant seeks the court to consider some legal issues which are summarized as follows:

1. Whether the Arbitrator was correct to order statutory payments being leave and severance pay, while he had already appreciated that there was no employments contract between the parties.

2. Whether the Arbitrator was correct to award statutory pay while there was no any incident by the employer of either a fair or unfair termination.

The hearing of this revision application proceeded *ex-parte* after the court had observed that the respondent, who was aware of presence of this

application in court, defaulted appearance for more than six times and the court process server having filed a report of his inability to trace him.

During hearing of the application, Mr. Nixon Tugara, learned advocate represented the applicant. He submitted on the application along the lines of the averment made in the supporting affidavit. Briefly, the learned advocate told this court that the respondent had clearly told the Hon. Arbitrator at CMA that he has no employment contract with the applicant but was employed by another person who was contracted by applicant. That, when the respondent failed to agree with his employer on some matters he decided to resign voluntarily. He argued that under such circumstances, the respondent failed to prove his case against the applicant. He added that there was no constructive termination for the Hon. Arbitrator to grant the respondent leave and severance pay and that even if the respondent had a right the Arbitrator should have ordered the applicant to pay notice in lieu of leave.

Mr. Tugara also challenged award of severance pay, submitting that under section 42(3) of Employment and Labour Relations Act, [Cap 366 R.E 2019] (hereinafter the "ELRA"), severance allowance is payable to an employee who has worked continuously for 12 months period. It was his views that the essential preconditions for severance pay which are existence of an employment contract and engagement for a continuous period of 12 months, were not considered by the Arbitrator. He wound up his submission by reiterating that the Arbitrator grossly erred both in law and fact by

awarding the respondent rights which the applicant was not the cause of the respondent being denied the same.

Having heard the submission by the applicant's advocate and after careful perusal of the supporting affidavit, the impugned Award and proceedings thereof, I am satisfied that my determination of the issues earlier raised herein will sufficiently dispose of this revision application.

The first issue is whether the Arbitrator was correct to order statutory payments being leave and severance pay, while he had already appreciated that there was no employment contract between the parties. The impugned Award is very clear that the respondent was not an employee of the applicant as there was no employment relations established between the parties in terms of the provision of section 61 of the Labour Institutions Act, [Cap 300 RE 2019]. However, the Award shows that despite of there being no such employment contract, the evidence adduced by DW1 Dastan Steward Shomari and DW2 Rayson Merinyo in light of the provision of Rule 9(1) of the Labour Institutions (General) Regulations, 2017, GN No. 45 of 2017, there existed a presumed employment relation between the parties. The point is simple. While there is no dispute that the respondent used to work in two works sites of the applicant, namely; the market site and Mtumba site, DW1 and DW2 testified to the effect that the works whereby the respondent was engaged to perform was outsourced to DW1 and DW2 by the applicant. It is under such circumstances the Arbitrator invoked the requirements of Regulation 9(1) of the cited Labour Institutions (General)

Regulations, 2017, that such outsourcing by the applicant is mandatorily required to be in writing and to commit to compliance with Labour laws and other laws. The Rule states:

> *"9.-(1) Outsource of service from another person shall be in a written contract committing compliance to Labour Laws and any other written laws."*

Since there was written contract for outsourcing of work between the applicant and DW1 and DW2, the Hon. Arbitrator found, and I agree with him, that the testimony by DW1 and DW2 to exonerate the applicant by showing that the work performed by the respondent was assigned by them, and not by the applicant, had no legal base. The buffer wall which the testimony of DW1 and DW2 was trying to build to fence off the applicant from the applicant's claims has failed to raise because of lack of a written outsourcing contract, which would have cemented it. Had it been there was such an outsourcing contract, the liability would fall on the duo. The fact that the respondent used to be given some work by the applicant's employee and the knowledge of the applicant that the respondent vacated work in November, 2019 as admitted in paragraph 3 and 4 of the supporting affidavit, further solidifies the Arbitrator's views that the respondent was, in fact, employed by the respondent.

The admission by the applicant that the respondent was being given some work by an applicant's employee, and the testimony of DW1 that he

was an employee of the applicant and was giving the respondent some work is connected to show that the employee referred to under 3 of the affidavit is DW1. Such an admission, in my view, erodes the testimony that there was outsourcing of work between the applicant and DW1. In final analysis, as there was no written outsourcing contracts between the applicant and DW1 as well as applicant and DW2 as aforesaid, the respondent was correctly deemed to be an employee of the applicant. It is for this reason, the CMA was correct to hold that the applicant is liable to the respondent's claims filed at CMA.

On the second issue whether the Arbitrator was correct to award statutory pay while there was no any incident by the employer of either a fair or unfair termination, I think he was. Evidence adduced by the respondent as PW1 is to the effect that he was employed from 10/9/2018 up to 28/11/2019 and that he determined the employment. Section 36(a) of the ELRA defines termination of employment to include a lawful termination under common law. Rule 3(d) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN No. 42 of 2007, defines "a lawful termination under common law" to include determination of employment by employee. This being the case, there was termination of employment at the instance of the employee. The issue is whether leave pay was legally justifiable?

Section 44(1)(b) of the ELRA requires that on termination of employment the employer shall pay any annual leave pay due under section

31 of the ELRA for leave that the employee has not taken. Section 31(8)(a) of the ELRA requires the employer to pay his employee a *pro rata* amount for annual leave accrued at the termination of employment. Provided that, the employee shall not be entitled to such a pay, if he has not taken the leave within the periods and circumstances prescribed in sub section 3. The conditions so spelt under sub section 3 of section 31, which are mandatory, would not support the pay of annual leave. It provides:

> *"(3) An employer may determine when the annual leave is to be taken provided that it is taken no longer than-*
>
> *(a) Six months after the end of the leave cycle; or*
>
> *(b) Twelve months after the end of the cycle if-*
>
> *(i)the employee has consented; and*
>
> *(ii) the extension is justified by the operational requirements of employer".*

The above requirements are further clarified under Regulation 14 of the Employment and Labour Relations (General) Regulations, 2017 which mandatorily provides:

> *"14-(1) Subject to the provision of section 31 of the Act, employee shall comply with procedures for applying an annual leave which shall be set by employer".*

In such circumstances, I find no legal ground for ordering payment of leave to the respondent. In my view, it is not enough for there to be a

provision allowing payment of leave on termination, the award must comply with the mandatory procedure for such payment as clearly stipulated by legislature. The payment of a *pro rata* annual leave on termination under section 33(8) of the ELRA is subject to the employee taking the leave timely as stipulated by sub section 3 of section 8 of the ELRA. I find no other legal way the CMA could award leave to the respondent without considering the provision of sub section (9) of the cited provision of the ELRA, much as the circumstances the respondent was in are different.

With regard to severance pay, Rule 26(1) of the Employment and Labour and Relations (Code of Good Practice) Rules, 2007 makes it mandatory for the employer to pay it for each year of continued service with the same employer. The respondent testifying as PW1 told CMA that he was employed by the applicant from 10/9/2018 to 28/11/2019. This period was slightly more than one year. It was one year plus two months and eighteen days to be precise. The evidence adduced by the applicant through DW1 in particular, being a person who invited the respondent to Dodoma to work at the appellant's work sites, showed that he worked with the respondent for eight (8) months. He did not specifically object the dates of employment span stated by the respondent. While the respondent was specific as to his dates of employment, DW1 adduced evidence along that line in general terms. DW2 who adduced evidence that he engaged the respondent for five days, also did not dispute the dates of respondent's employment with the applicant. As such, what was stated by the respondent regarding the period

he worked with the applicant was not specifically controverted by any of the applicant's witnesses.

The implication of the above scenario is that the respondent worked for over one year period consecutively. To determine this, the court has considered the weight of evidence adduced. Whereas both DW1 and DW2 have shown that there was a short engagement with the respondent, the respondent has been so specific by mentioning the exact date he was employed. For this reason, the decision in **Hemedi Saidi v Mohamed Mbilu [1984] T.L.R 113** that in measuring the weight of evidence it is not the number of witness but quality of evidence that count is very useful. It is therefore the period specified by the respondent which should be taken as the basis for awarding severance pay. For this reason, I find the award of severance pay by CMA supportable.

In the upshot, the application for revision partially succeeds. The leave pay was not procedurally correct but award of severance pay is upheld.

Dated at Dodoma this 23rd of May, 2022

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE