IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

APPLICATION FO REVISION NO 67 OF 2019

(Arising from the decision of the Commission for Mediation & Arbitration of Shinyanga in Labour Dispute No. CMA/SHY/151/2017.)

KUWASA..... .....APPLICANT

VERSUS

SIMON MADUKA..... ...RESPONDENT

JUDGEMENT

Date: of Last order: 25th March, 2020
Date of Judgment: 15th May, 2020

MKWIZU, J:

Applicant filed a chamber summons, moving this Court under sections 91 (1) (a) (b), 91 (2) (a) (b), (c) and 94 (1) (b) of the Employment and Labour Relations Act, No 6 of 2004 and Rules 24 (1), (2) (3) and Rule 28 (1) (c), (d) (e) of the Labour Court Rules, to exercise its revisional jurisdiction to revise award of the Commission for Mediation and Arbitration

in Labour Dispute No. CMA/SHY/151/2017 on the ground that there is material irregularity that goes to the merits of the case.

When the matter was called on for hearing, Mr. Muyengi Muyengi advocate appeared for the applicant while respondent entered appearance through his personal representative, Mr. Benjamin Dotto.

Arguing the revision, Mr. Muyengi invited this court to see if there was any validity on the twelve (12) months' salary order issued by the Commission for Mediation and Arbitration's. On why they are not contented with the Arbitrator's order on this point, Mr. Muyengi said, the contract between the applicant and the respondent was for a period of six months only not 12 months and appellant failed to prove his salary rate.

On another angle, Mr. Muyengi challenged the Arbitrator's decision for his failure to evaluate the documentary evidence presented. He elaborated that there was no agreement that respondent would be paid extra duty. The contract which was tendered as exhibit is for the year 2010 which indicated

that respondent would be paid extra duty where need arises. The counsel argued further that the claim for overtime allowance cannot be valid in absence of agreement between the parties to that effect.

Explaining on the award of 9,195,000 as overtime allowances, Mr. Muyengi said, Arbitrator was wrong in awarding that amount because, *one,* there was no proof that respondent worked any extra hour and *secondly* that even if he so worked, the claim was time barred .He referred the court to the Standing Order 19 of 2009 as the claim was lodged after a lapse of one year period after the accrual.

In his last point Mr. Muyengi faulted the arbitrator for failure to shift the burden of proving the extra duty claim on the applicant. He said, it is the trite law that who alleges must proof and therefore respondent was duty bound to prove that he really worked extra hours. He finally requested this court to allow the revision and set aside the Arbitrator's award.

In reply, Mr. Dotto Benjamin, respondent's representative supported the Arbitrators award. He said, the award is justified by the fact that the applicant was found to have unfairly breached the contract. It was concluded that the notice of termination (Exhibit D1) was given contrary to the law, it was 18 days notice instead of 28 days' notice issued on 30/9/2014 to 18/10/2014 contrary to section 41 (1) b of the ELRA, No 6 of 2004.He argued further that the 12 months compensation was given as per the provision of the law and after it was found that the termination was unfair. The Arbitrator did correctly calculated monthly salary of 400,000/= time the 12 months which is equal to 4800,000/=

In respect to the overtime claims, Mr. Benjamin responded that, respondent worked extra hours for 12 days from 18/10/2014 to 30/10/2014 when he was barred to work with the applicant. He relied on clause 4.6 of the last contract with the applicant which provided that assignment included working overtime. Mr. Dotto expounded further that, at the hearing, applicant admitted the fact that respondent was working for 12 hours a day and overtime payment was 5000/= per day, therefore the arbitrator rightly relied on the provisions of section 36 (a) (iii) of the ELRA No 6 of 2004 read

together with rule 4 (3) of ELR (Code of Good Practice) Rules, GN No.42 of 2007 to grant the claim.

Submitting on the figure of 9,195,000 arrived at by the Arbitrator as an overtime allowance, Mr. Dotto elaborated that, the evidence on the records showed that respondent worked extra time since 6/9/2009 to 18/10/2014 when his employment was terminated. He calculated the time to a total of 5 years, one months and 12 days which is equal to 1867 days minus 28 days leave taken Mr. Dotto expounded further that overtime allowance was paid 5000 per day and therefore 1839 days times 5000 a day gave the awarded amount of 9,195,000.He supported the extra duty award on two reasons, one that it was a contractual duty under clause 4.6 of the contract secondly, that respondent did proved that he worked overtime. He opposed the suggestion that the overtime claim was time barred claiming that the claim was condoned via Revision No 27 of 2016 in Simon **Madula Lugembe V. KUWASA.**

Mr. Dotto prayed to have the Arbitrators award confirmed and the revision dismissed.

In his rejoinder Mr. Muyengi opposed the proposition that the respondent worked extra hours. He insisted that respondent's employment contract was for 6 months and that on 18th October, 2014 he was just reminded that his contract was coming to an end. Exhibit P2 was a contract known to himself as it was not signed by the applicant. He argued that there was no admission by the applicant before the Commission that respondent worked extra time. He refereed this court to paragraph 9 of the affidavit. The rest of his submission was a replication of his submission in chief.

I have passionately gone through the submission for and against this revision plus the records available. It is not in dispute that the respondent employment contract was unfairly terminated. The questions that have been brought for this court's determination is first, whether the CMA was justified in granting compensation of 12 months salaries and at the tune of 400,000 monthly. Second, whether the respondent was intitled to overtime allowance, if yes, at what rate.

Going by the records, after it was concluded that the respondent's employment contract was unfairly terminated, the CMA went ahead to

determine the entitlement of the parties. One of the reliefs respondents awarded, is a compensation of 12 months salaries at the rate of 400,000/= under the provisions of section 40 (1) (c) of the ELRA No 6 of 2007.The section reads:

> *"40.- (1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
>
> *(c) to pay compensation to the employee of not less than twelve months' remuneration."*

The provision of the law quoted above provides twelve months as a minimum rate for compensation on unfair termination. The Arbitrator has a discretion to award twelve months salaries or more depending on the circumstances of each case. This is the position in the case of **Juma Kanuwa V. Eckenforde Tanga University**, Revision No. 17 of 2012.Given the position, I entertain no doubt to the award of compensation by the CMA. Twelve months was the minimum compensation the Arbitrator could give under the law.

The issue that follows is on the salary rate. Applicant is suggesting that respondent failed to prove the salary rate and therefore the rate of 400,000 awarded was not proper. I think this should not detain me. The record is clear that the respondent had a salary of 400,000 plus 40,000 house allowance. The salary slip was tendered as exhibit P4 and no serious query was directed to this document. This complaint was brought as an afterthought. I find no reason to fault the decision of the arbitrator on this point.

On the issue of overtime, the applicant is complaining that the respondent never worked extra time and if any, the claim is time barred under Order 9 of the Standing Order 2009. This issue was extensively discussed by the Arbitrator in his decision. To say the least, section 19 (2) (c) of the ELRA permits maximum 9 working hours per day and therefore 45 hours per week. The law allows overtime works subject to agreement between the parties. The respondent had alleged to have worked extra time without pay since the year 2009 claiming first, that it was a contractual obligation under clause 4 .6 of the contract and secondly, that he has been working for four (4) hours per day. This claim was opposed by the applicant.

Clause 4 dot 6 of the contract referred to by the respondent before the CMA reads: -

> *"Water business is for 24 hours a day,* ***therefore the employee shall have to work extra hours, when the work situation shall require him to do so.*** *For that purpose he/she shall be paid extra duty allowance as per the approved Budget."*

The above clause does not give automatic right for an extra hour work. The extra time work, as per he above clause, depends on the situation of the assignment. The question is, was there any extra time hours worked by the respondent and under whose authority? The Arbitrator accepted the respondent's claim and awarded 9,195,000 as overtime payment for the year 2009 to 2014. However, nothing in the records was brought to prove this claim by the respondent. The statement by the Arbitrator at page 16 of his decision that applicant acknowledged that complainant worked overtime is not supported by the evidence. It should be stressed here that overtime works has to be proved and must be claimed at the end of each month when

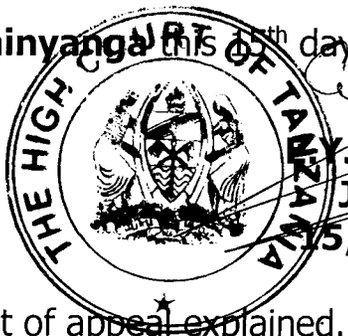
and as they accrue. See the case of **Omary Mwinyimvua na Wenzake V. M/S Sengo** 2000 (T) Ltd Revision No.157 of 2009.

I think it is worth noting here that, the applicant contract subject of this revision started from 18/4/2014 after the former contract had come to an end on 17/4/2014.It is also not contradicted that the respondent's contract was for a specific period of time of 12 months. This is the contract which the respondent claimed to have been unfairly terminated and not the former contracts which, going by the records, ended up peacefully between the parties. Thus, if anything worth discussion, should have been aligned within the respective contract period between the parties. Even if it was proved that respondent worked overtime, still the claim and the subsequent award was to be restricted within the period of the contract under scrutiny and not otherwise. Therefore, the Arbitrator went astray, not only in granting overtime payment which was not proved but also by granting overtime claim for a period over and above the period of the terminated contract.

I therefore find that the arbitrators award had material irregularity and he erred in awarding the overtime claims which were not proved. The award is reversed and set aside. Otherwise, this court finds that the award of 12 months salaries compensation is justified. It is in accordance with the law. The revision is allowed to the extent explained above.

Order accordingly.

Dated at **Shinyanga** this 15th day of May, 2020.



E.Y.MKWIZU
JUDGE
15/5/2020

Court: Right of appeal explained.

E.Y.MKWIZU
JUDGE
15/5/2020