IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 62 OF 2018

(Arising from a decision of the Commission for mediation and Arbitration Arusha zone in CMA/ARS/ARB/199/2019 as per A. William- Arbitrator)

SAMARITAN DISPENSARY..... APPLICANT

Versus

OMBENI MOLLEL.....RESPONDENT

JUDGMENT

23th June & 20th August, 2021

MZUNA, J.:

In this revision application, Samaritan Dispensary, the applicant herein, is challenging the CMA Award and the issuance of certificate of service to Ombeni Mollel, the respondent allegedly that he was unfairly terminated.

The brief facts show, the respondent a Clinical Assistant by Profession, at one time worked to the applicant from January 2016. According to the applicant it was a mere temporary work pending his permanent employment in the Government service at Singida. Such temporary work was never confirmed even after six months. That he was told to stop working after the inspection which revealed that his academic Professional was below the required standard of a Diploma and therefore was advised to undergo further training. So their employment relationship came to an end.

As opposed to that view, the respondent says it was a permanent employment and worked for the applicant for more than a year. That, the termination was unfair because he was verbally terminated without conducting a formal hearing. He prayed for the application to be dismissed and the award be enhanced to 12 months remuneration.

The CMA awarded the respondent a total of Tshs 4,219.192/- and certificate of service. Aggrieved, the applicant initially filed five grounds challenging the award, however, he opted to leave three grounds after dropping items (d) and (e) as can be seen in the 7th paragraph of the affidavit deponed by Mr. Deo Patrick Kundy. They raise three issues:-

1. *(a) Whether based on the evidence, the applicant was an employee within the law or a temporary worker?*

   (b) If the first issue is answered in the affirmative, whether he worked for six months or more?

2. *Whether he was terminated, if so was the termination with valid and fair reasons?*

3. *What reliefs to which the parties are entitled thereto?*

With leave of the court, this revision was argued by way of written submission. Mr. George Yananza Mnzava of M/S Bill & Williams Advocates, the learned counsel, appeared on behalf of the applicant whereas Farida Juma and Wilson Kasaro the Personal Representatives represented the respondent.

Let me start with the first issue of employment status of the respondent. In his submission in chief, Mr. Mnzava argued grounds one and two which in essence deals with evaluation of the evidence. He submitted that, had the learned Arbitrator analysed the evidence properly especially those of DW1 and DW3 would have found that the respondent requested for a temporary job.

He said, DW1 Apaisaria Shao, a Nurse, testified that the respondent requested her to help him find a temporary job while waiting for Government service in Singida, the fact which was not disputed by the respondent. Mr. Mnzava further contended that, the said fact was corroborated by DW3 Deo Patrick Kundi who was linked with the respondent by DW1. Mr. Mnzava went on arguing that, the respondent did not tender any document to prove that he was employed by the applicant.

Opposing the application, the respondent through his Personal representatives, argued parallel with his counter affidavit which was adopted. They opted to combine all three grounds of revision. It was their submission that the respondent was employed on 16th January, 2016 to 3rd June, 2017 which marked a year and above, which they say proves that the respondent was duly employed by the applicant. That the respondent was paid a monthly salary of 673,000/= which shows that the respondent was an employee of the applicant. To such proof, they referred me to exhibit A which is the outpatient

Department (OPD) book. They went on submitting that, the fact that the applicant raised the issue of the respondent being asked to go for further studies which however was not proved. The Respondent prayed this Court to dismiss this application for revision.

Reading from the evidence of DW1, she connected the respondent with the owner of the Samaritan Dispensary (DW3). That was in January, 2016. That it was a temporary work. However, DW3 said used to pay him Tshs 450,000/- as salary. Then the respondent was stopped from employment after the Inspectors from Arusha City Council as well stated by DW2 Esther Konga. That evidence was also corroborated by DW3 who said such inspectors came in April 2017 followed by National Health Insurance Fund Inspectors in May 2017. That the respondent who worked as Supervisor, ought to have a Diploma or Clinical Officer not Certificate or Clinical Assistant, the qualification which the respondent had. It is from that reason according to DW2, he was terminated "katolewa kazini" in June 2017. Proof that the said Inspectors went there was based on the Out Patient Register Book (OPD) where they signed tendered as Exhibit A.1.

The respondent Ombeni Raphael Mollel said, started work from 16th January 2016. He was terminated on 3/6/2017 allegedly that there was another Doctor. His salary, he says was Tshs 673,000/-. That it was a verbal permanent employment. He relied on the OPD (Exhibit A1) as well.

From the above evidence, the question is, was the respondent an employee? The applicant says he was a volunteering worker while the respondent says he was a permanent employee. The learned counsel for the applicant has even gone further to say that the respondent was duty bound to tender documents proving that he was employed by the applicant. This argument with due respect is unassailable. In labour cases involving employment dispute, it is the employer who has to prove or disprove employment status. The law places the burden on the employer to supply such documents like employment contract and working particulars under section 15 (1) and 19 (1) of the ELRA.

The term employee is defined under section 4 of the ELRA to mean 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) (N/A).

The wording of this provision shows, not every employee has to enter into a contract of employment. That said contract may be presumed upon one rendering service to another as in our case where DW3 was not of the Profession of the respondent. It was held in the case of **Director Usafirishaji Africa v. Hamisi Mwakabala & 25 Others,** Labour Revision

No. 291 of 2009 High Court Dar es Salaam (unreported) by Rweyemamu, J (as she then was) that:-

> *"Under the law a person who renders services to any other person including for a specific task is presumed to be an employee until the contrary is proved if one or more of the scenarios itemized under section 61 of the LIA exists."*

That being the case, the respondent was an employee within the law.

This takes me to the sub issue, the employment term or period. The evidence shows, he worked for a period exceeding 6 (six) months which automatically makes him to the exception as well stated under the provisions of section 35 of the ELRA read together with section 61 of the Act, No 7 of 2004. He ought to have been categorized as an employee in that he depended on the respondent economically. He was paid salary not a volunteering allowance as alleged. So even without the fear of being contradicted, even without confirmation, still he was an employee. The cited case of **Commercial Bank of Africa (T) LTD vs Nicodemus Mussa Igogo,** Revision No. 40 of 2012 on confirmation of employee, **George Kitinda Nwakasitu vs Temeke Municipal,** Labour Revision No. 946/2018 (unreported) cited by Mr. Mnzava, on the proof of employment, with due respect is distinguishable. The case of **Commercial Bank of Africa (T) LTD**

vs Nicodemus Mussa Iggogo (supra) at page 6, based the decisions on the requirement of the employee on probation whether he acquires such status before confirmation on the cases decided before 5/2/2007 when the ELRA (Act No 6 of 2004), came into operation unlike this case. Reading the provisions of Rule 10 (4) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 which clearly states that the period of probation should be of a reasonable length of "not more than twelve months".

So, the sub issue, relevant for ground No. 3 on the period of work and or confirmation and that the applicant did not employ the respondent is answered in favour of the respondent. He was an employee and was paid salaries. He worked for more than one year Jan 2016 to June 2017. The CMA was right to find that working for over six months automatically amounted to confirmation of the respondent which entitled him for fair termination based on section 37 (1) of the ELRA.

This takes me to the fairness of the reasons for termination. The applicant through out the submission and even the evidence of her witnesses purport to say that he had no requisite qualifications that is why he was asked to pursue further studies. There is a total denial that he was not terminated because there is no such letter. The respondent says, the termination was verbally. That it was unfairly done because the applicant failed to prove

otherwise. They cited section 39 of the ELRA which requires the employer to prove that termination was fair.

This point should not detain me. This omission, one would have expected the applicant to show what were the qualifications which made her employ him based on the employment letter or if it was a temporary work, such letter. It is for this reason, the law under section 39 of the ELRA puts the burden of proof on the employer, the applicant, in any proceedings where the employee alleged that termination is unfair. Section 39 of the ELRA reads;

39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair.

Reading from the OPD tendered as exhibit A1, the name of the person who prepared the report, reads Ombeni Raphael, which I consider to be the respondent as the one who signed as C/O and that he was the Doctor In-charge. If the respondent purported to be the C/O instead of C/A (Clinical Assistant) it means he had no requisite qualifications. Procedure for termination based on poor work performance or sometimes referred to incompatibility or incapacity for poor work performance is stated under the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure. Rules 6 (1) and (6) read together with rule 8 (2) requires a Management meeting and hearing first. DW3 admitted, he summoned the respondent to discuss on the need for further studies. That cannot be termed

as Management meeting. The respondent had a right to have the representative from the Trade union. There was no fairness of termination.

Connected to this, is issue of procedural fairness before termination. The respondent referred this court to section 37 of the Employment and Labour Relations Act, and rule 13 (1)-(8) of Employment and Labour Relations (Code of Good practice) G.N No. 42 of 2007. The law puts the burden of proof to the applicant to prove that she had sufficient reasons and followed the required procedure in terminating the service of the respondent. Reading the record of the trial CMA, nothing is shown as to the procedure conducted by the applicant before terminating the respondent.

Basing on the cited section 39 of the Employment and Labour Relations Act (supra) for the termination to be procedurally fair, an employer must comply with rule 27 (1) of the Code of Good Practice Rules, G.N 42 of 2007 by suspension on full remuneration pending investigation. The applicant was duty bound to satisfy the arbitrator that she complied with such mandatory procedure before terminating the respondent. The applicant did not conduct such procedure at all.

This takes me to the last issue on the reliefs. The question is whether the arbitrator was right and justifiable to order compensation of four months plus other terminal benefits to the respondent. In the submission against the application, Personal representatives of the respondent faulted the decision of

the arbitrator for awarding compensation of four months salaries instead of 12 as provided by the law. They say, it was contrary to the law which obliges the compensation to be not less than twelve months remuneration after the finding that there was unfair termination based on section 40(1)(c) of the Labour and Employment Relations Act (supra). They further referred this court to the case of **Ester Musike vs Akiba Commercial Bank,** Revision No. 100 of 2016, **Gymkhana Club vs Diana Johannes and 2 others,** Labour Revision No. 50 of 2017 and **Branch Director CRDB Bank LTD vs Titoh Kwareh,** Labour Revision No. 14 of 2011 (all unreported)

Mr. Mnzava argued this point as being an afterthought which could not be entertained at this stage otherwise ought to have preferred a revision application. He insisted in his rejoinder submission that the respondent worked for six months. That even assuming he worked for more than six months, still in the absence of confirmation letter, he remained to be a temporary employee.

In dealing with this issue of reliefs, the CMA awarded the respondent a total of Tshs 4,219.192/- based from four moths salaries Tshs 2,692,000/- plus other terminal benefits like severance pay Tshs 181,192 (calculated at the salary of Tshs 673,000/-), notice Tshs 673,000/-, leave Tshs 673,000/- and certificate of service.

Section 40 (1) of the ELRA reads as follows:-

40.-(1) Where 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. (Emphasis added)*

The wording of the quoted provision above signifies that when the arbitrator or Labour Court determines a termination to be unfair, **may order compensation to the employee of not less than twelve months salaries**, depending on the circumstances of each case.

The question is, was the order of compensation for four months salaries as remuneration, correct under the circumstance? Reading from the submissions of the respondent nothing has been said if the award of four moths was not within the powers vested to the Arbitrator. The wording is "may" which is discretionary not "shall" or mandatory. I understand the respondent had worked for almost one year only based on the evidence on record. This no doubt was the reason which the CMA took into consideration, of course other factors must also be taken into consideration.

In the circumstances, the order for compensation of renumeration given is hereby confirmed. This revision application is hereby dismissed for want of merit. It is so ordered.

THE HIGH COURT OF TANZANIA

M. G. MZUNA,
JUDGE.
20/08/2021