IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

REVISION NO. 69 OF 2019

(Originating from labour Dispute No. CMA/MNR/05/2019)

HAMIS MANGU.....APPLICANT

VERSUS

ESTER I. NDOSI.....RESPONDENT

JUDGMENT

10/11/2021 & 8/12/2021

ROBERT, J:-

This is an application for revision of an award of the Commission for Mediation and Arbitration (CMA) in labour Dispute No. CMA/MNR/05/2019) delivered on 05/09/2019. The Applicant, Hamis Mangu, filed a complaint at the CMA against the respondent, his former employer, claiming unfair termination. After a full trial, the CMA dismissed the complaint for want of merit. Aggrieved, the applicant preferred this application seeking to revise the CMA award.

It was alleged that the applicant was employed by the respondent on 5/08/2015 as a small miner and a security guard at the respondent's

mines located at Mererani area, Simanjiro District until 24/01/2019 when he was unfairly terminated. The applicant alleged that he agreed with the respondent that the respondent will not pay him salary but will build him a house worth TZS 50,000,000/= and provide him with capital at the tune of TZS 10,000,000/= if they manage to find minerals. While working on the basis of that agreement the minerals were found on three different occasions but the respondent did not honour their agreement.

On 10th October, 2018, the applicant suffered from Tuberculosis and got treated at Kibongoto hospital but the respondent denied to have known the applicant as his employee. The matter was referred at Manyara Regional Miners Association where the respondent was required to send the applicant money for treatment and he agreed to treat the applicant to his recovery. Thereafter, the applicant referred the matter at the CMA where the hearing was conducted ex-parte after the respondent's failure to enter appearance. The CMA made a finding that the applicant was not an employee of the respondent and dismissed his claims for lack of merit. Aggrieved, the applicant filed this application moving this Court to revise the CMA decision.

When this application came up for hearing the applicant appeared in person without representation whereas the respondent enjoyed the

services of Mr. Herode Bilyamtwe, Personal Representative. Hearing proceeded by way of filing written submissions as requested successfully by parties.

Submitting in support of the application, the applicant argued that, the CMA was wrong to hold that there was no employment relationship between the applicant and the respondent. He referred this court to section 61 of the **Labour Institutions Act**, Cap. 300 R.E 2019 which provides for presumption as to who is an employee. He maintained that, the employment relationship existed because the applicant worked for respondent since 2015 until 2018 and while working the applicant was under full control and directions of the respondent, and the applicant was economically dependent on the respondent.

He submitted further that, the applicant and respondent had an oral agreement through which they agreed not to base their mode of payment on monthly salary but the respondent agreed to build the applicant a house worth 50,000,000/= and give him capital at a tune of TZS 10,000,000/= once they find the minerals.

He maintained that the agreement entered between the parties herein was an agreement of a specific task under section 14 (1) (a) and (c) of the **Employment and Labour Relations Act (ELRA)**, Cap. 366

(R.E 2019) whereby parties had agreed orally on the mode of payment that was to be done once the minerals were found.

He submitted further that, the agreement between the applicant and respondent did not end on the contractual agreement but the applicant was fully under the supervision and control of the respondents which now changes the contractual obligation to employment relationship. He referred the Court to the case of **Sanitas Hospital Limited vs Goodluck Nyakaselula**, Revision No. 866 of 2019 where the Court held that:

> *"the relationship of the applicant and respondent might have been one of an independent contractor however the circumstances changed it into an employer/employee relationship whereby the respondent was under the control of the applicant and was not free as an independent contractor"*

He faulted the CMA for relying only on the ground that the respondent did not pay the applicant salary as a sufficient evidence to prove that there was no employment relationship between parties.

He maintained that the meeting held by Manyara Regional Miners Association between the applicant and respondent on 7/02/2019 proved that the respondent decided to terminate the applicant after knowing that he was suffering from tuberculosis. He maintained that the CMA ought to

have taken that into consideration as proof of the fact that the applicant and respondent were in employment relationship (See Exhibit P2).

Submitting further, he faulted the CMA for holding that the applicant had no evidence to prove the damages of TZS 10,000,000/=. He argued that, exhibit P1 which are documents from Kibongoto Hospital shows that the applicant suffered from tuberculosis while at work and the respondent terminated his employment and denied him being his employee. He maintained that the applicant was injured mentally, physically and emotionally.

Responding to the applicant's written submissions, the respondent through his personal representative submitted that, the nature of the dispute between the applicant and the respondent was not claims for unfair termination. The applicant prayed to be paid general damages and the promise to build a house which the CMA has no jurisdiction for. He noted that the applicant's new claims tries to amend the CMA F-1 by raising issues of unfair termination via his written submissions while he had already admitted at the CMA that he was not terminated but left on his own to attend medical treatment. He maintained that, the CMA was right in holding that the applicant failed to prove his claims and proceeded

to dismiss the application. Based on their submission he prayed for this application to be dismissed in its entirely with costs.

Having gone through the records and the submissions by both parties, this court is now in the position to determine the merit of this matter.

Having revisited the CMA records particularly the CMA Form No. 1, this Court noted that the applicant's claims at the CMA were not based on termination of employment but rather on claims for general damages and an employer's to fulfil his promise to build the house for the applicant (employee). However, the issues raised at the CMA were as follows;

A) iwapo mwajiri alikuwa na sababu za msingi katika kusitisha ajira ya mlalamikaji.

B) Iwapo taratibu zilifuatwa

c) Ni stahiki gani sahihi kwa pande zote katika shauri hili.

Based on issues raised, it was not fatal for the applicant herein to raise the issue of unfair termination as it was also discussed at the trial commission. The question here which was also an issue at the CMA was whether there is an employer/employee relationship between the parties herein and the relief entitled to the parties.

The applicant herein used section 61 of the Labour Institution Act, to prove that there was an employer and employee relationship between them thought there was no written agreement. The said section provides a number of factors to be considered in determining if a person is an employee. For the sake of clarity, the said section provides that:

> *"For the purposes of a labour law, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present-*
>
> *(a) the manner in which the person works is subject to the control or direction of another person;*
>
> *(b) the person's hours of work are subject to the control or direction of another person;*
>
> *(c) in the case of a person who works for an organisation, the person is a part of that organization;*
>
> *(d) the person has worked for that other person for an average of at least forty five hours per month over the last three months;*
>
> *(e) the person is economically dependent on the other person for whom that person works or renders services;*
>
> *(f) the person is provided with tools of trade or work equipment by the other person; or*
>
> *(g) the person only works for or renders services to one person.*

The cited provision is applicable in cases of presumptions as to whether a person is an employee. In the present case, although at the

CMA the applicant said he was one of the employees of the respondent, he also told the Commission that, and I wish to quote the paragraph;

> *"Ilikuwa hakuna mshahara, ilikuwa tunafanya kazi ya ulinzi na kuchimba hivyo ikitokea madini yamepatikana ndipo tunagawana risiki, hakuna mshahara."*

There was no evidence adduced by the applicant to prove that he was under the control of the respondent or that he was required to work for certain hours per day or dependent on the respondent economically. The cited paragraph proves that the agreement between the applicant and respondent required them to distribute the proceeds of what they got from the mines which implies that the applicant did not only render services to the respondent.

In the case of **Kinondoni Municipal Council v. Rupia Said and 107 Others**, Revision No. 417 of 2013, High Court Labour Division at Dar Es Salaam, it was held that,

> *".....among primary facts to be considered in determining existence of employment relationship are economic dependency, remuneration, subordination, discretion, supervision and control of manner service is rendered*".

In the present case, there is no evidence to show that the applicant was receiving remuneration from the respondent or that the respondent supervised and controlled the manner in which service is rendered by the applicant. Therefore, the Commission correctly decided that there was no employment relationship between the applicant and the respondent.

With regards to the issue of relief, although the applicant said he the respondent owes him TZS 60,000,000/= being the costs for general damages and construction of a house the respondent promised to build for him, records indicate that at the CMA he informed the CMA that:-

> *"hivyo sikufukuzwa kazi bali niliugua kazini na kwenda hospitali Mererani Kibuguto na kupewa dawa za TB mwajiri siku hiyo alinitumia Tshs. 100,000 na madai yangu ni damages 10,000,0000/= ila sikujuwa nilijaziwa na wakili wangu Aisha hivyo sikujua anamaanisha nini.*
>
> *Pia nadai 50,000,000/= ambayo ni ahadi ya kujengewa nyumba, ila ufafanuzi wake sijui niijaziwa tu na mwanasheria wangu aitwae Aisha."*

Based on the quoted paragraph, it is apparent that the applicant was not aware of the claims he had against the respondent. It was hard for him to justify or to prove the said amount before the CMA, he simply stated that his advocate wrote the claims for him which implies that he was not aware of the claims he had against the respondent. This situation

is similar to the one in the case of **Tanzania Sanyi Corporation vs African Marble Company** Ltd [2004] TLR 155 where the Court held that: -

> "*General damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrong doing must, therefore, have been a cause, if not a sole or a particularly significant cause of damage*"

In the present matter, there is no action or an act done by the respondent which could move the CMA to award general damages to the applicant herein.

Consequently, I find no merit in this application and I hereby proceed to dismiss it. I make no order as to costs.

It is so ordered.

K.N.ROBERT
JUDGE
8/12/2021