IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

LABOUR REVISION NO. 23 OF 2020
(Arising from the Award of the commission for Mediation and Arbitration of Dodoma in the Labour Dispute No. CMA/DOM/49/2019)

SOFT BRIDGE TECHNOLOGY AND
CONSULTANCY (SOTEC)..... APPLICANT

VERSUS

ALEX MWAKALIMO AND 5 OTHERS ..... RESPONDENT

RULING

10/5/2022 & 19/05/2022

KAGOMBA, J

This is a ruling in respect of the application for revision filed by Soft Bridge Technology and Consultancy (SOTEC) (the applicant) under Rule 91(1) (a) & (b), 2(b) & (c), 94(1) (b) & (i) of the Employment and Labour Relations Act, Cap 366 (the "ELRA") and Rule 24(1)(2) & (3) and Rule 28(1)(a), (c), (d) & (e) of the Labour Courts Rules; moving this Court to call and quash the mediation and arbitration proceedings before the Commission for Mediation and Arbitration (CMA) of Dodoma. The applicant sought other orders including costs.

The application is supported by affidavit of Godwin Beatus Ngongi, learned advocate for the applicant. The respondents herein opposed the application and filed counter affidavit *(Kiapo Kinzani)* to that effect.

The following narration present the background of this dispute. It was the respondents' assertion in CMA that they were employed by the applicant on diverse dates since September, 2017 to October, 2018 with agreed salary of Tshs. 200,000/= per month each and that their contract of employment was orally made. That in October 2018 their employment was terminated by the applicant without being paid their salary arrears, hence they decided to file a labour dispute before CMA.

The respondents adduced their evidence through Alex Mwakalikamo, the 1st respondent, whose evidence stated that he was working as a manager and head officer in department of network on the applicant's office. He said that he started his work in September 2017.

The 1st respondent further stated that, the other five respondents started to work with the applicant on different dates but all of them were never paid their agreed salaries and were terminated from employment in October 2018. On cross examination the 1st respondent stated that there was no any document to prove that he entered into contract of employment with the applicant and that he was not present when the other respondents entered into contract of employment with the applicant.

The applicant's evidence was to the effect that, the respondents were field students in his business and that their application for field attachment was orally made and that since he opened his business, he had never employed any person. The applicant further stated that the respondents were in his business until early 2018 when he had to close down due to bad economic condition.

The applicant added that he didn't pay the respondents any salary but he was giving them food allowances and transport allowances if they went to business field. On cross examination the applicant stated that the respondents entered his business on different dates and the main activity was ICT services. He also stated that he was responsible for providing the respondents with working equipment.

CMA having heard the evidence adduced by both sides decided the dispute in favour of the respondents by confirming the respondents' employment with the applicant. CMA therefore ordered the applicant to pay respondents their salary arrears accordingly. This decision has resulted in this application for revision before this Court.

With leave of this Court, the application was argued by way of written submission whereby the applicant through the service of Mr. Godwin Beatus Ngongi, advocate filed his submission in support of the revision. The respondents also filed written submission in opposition of grounds for revision using the service of Mr. Erick Christopher (only retained for drafting and filing). The applicant chose not to file rejoinder.

Through the submission of the applicant, it is averred that the respondents were field students in the office of the applicant. That in the course of their field practice, the applicant's office stopped to run its business and therefore the respondent's field had to come to an end. The respondents, under such circumstance decided to sue the applicant in CMA and CMA decided in the respondents' favour saying that, the applicant and

the respondents had employment relationship and therefore it ordered the respondent to pay the respondents all their due salaries.

The applicant's submission was based on the issue whether it was rightly held by CMA Arbitrator that there was employment relationship between the applicant and respondent. The applicant's advocate argued that for a person to be termed as an employee he or she must have entered contract of employment by virtue of S. 4 of ELRA (Supra) which states;

> *"Employee means 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) the other party is not a client or customer of any profession, business, or undertaking carried on by the individual; or*
>
> *(c) is deemed to be an employee by the Minister under section 98(3)"*

The applicant's advocate said that the respondent never produced evidence prove existence of this employment. He further argued that despite S. 61 of the Labour Institution Act, Cap 300 (the LIA) introducing the concept of presumption of employment, for a party to be covered by the same, he or she has to meet the criteria set in the provision. The learned advocate cited the case of **Kinondoni Municipal Council V.**

Rupia Said and 107 Others, Revision No. 417 of 2013 where the High Court Labour Division at Dar es salaam held that;

> *"Among primary facts to be considered in determining existence of employment relationship are economic dependency, remuneration....."*

Based on the cited provision of the law, the learned advocate for the applicant said that since the respondents admitted that, from the day they started to work with the applicant they were not paid any salary, this infers that they were not economically depending to the applicant.

In addition, the learned advocate contended that the said S. 61 of the LIA (Supra) imposes a duty to the respondents to prove the alleged employment relation. And to cement his contention he cited the case of **James Gaty Magabe V. Gud Holding (PTY) Limited, Revision No. 188 of 2020 at Page No. 12.**

He further argued that S. 14 of the ELRA (Supra) provides for types of contracts of employment that an employee may enter with the employer, but the respondent never stated any type of employment they had with the employer. He said, their failure to state type of contract of employment they had with the applicant creates a serious doubt on the contended employer-employee relationship between the parties. He referred to the case of **Aidan Amon V. Mwananchi Communication Ltd, Revision No. 968 of 2019 at Page 6 and 7** where the Court observed that;

> *"Any contract without employer-employee relationship this Court has no jurisdiction to handle".*

Having submitted so, the learned advocate for the applicant prayed this Court to quash the proceedings and the Award with costs.

The respondents are of the view that the applicant's advocate has misconceived the interpretation of the law as far as employer-employee relationship is concerned. That the respondents were covered by the same provisions of law that the learned advocate for the applicant referred to that is, S. 4 of the ELRA and S. 61 of the LIA (Supra).

They argued that the allegation raised by the applicant's advocate that they never claimed for their salaries was misconceived as it was clearly testified by the respondents that they were requesting for their salaries and the applicant was promising to pay them.

The respondents further argued that CMA Arbitrator was correct in deciding that there was employment relation between them and the applicant. They stated the reason for their belief being the fact that they were employed by the applicant at different times and the salary was agreed and they were working under the control of the applicant, facts which they say were never disapproved by the applicant. To cement their argument, they referred to Section 4 of the ELRA (Supra) which was also referred by the applicant's advocate as quoted herein above.

The respondents further quoted the provision of S.61 of the LIA (Supra) which reads;

> *61. "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"

On the above cited provision of the law, the respondents argued that as per evidence tendered in CMA it was clear that the respondents were rendering service to the applicant and they were under the applicant's control and in that circumstance the presumption of employee comes in.

They added that, the applicant's contention that the respondents were trainees was not proved in CMA as there was no any letter produced to such effect and it was not stated as to what time the training commenced and when it was supposed to come to an end. They relied on S. 15(6) of ELRA (Supra) which imposes a duty to the applicant to prove if the respondents were trainee, failure to do so the respondents are presumed to be the employees of the applicant. The said provision states:

"15 (6) : - If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer".

The respondents therefore prayed this Court to dismiss the application for revision with costs for lack of merits and CMA decision and Award be upheld.

In regard to rival submission of both parties, I find two crucial issues for determination by this Court. The issues are (1) whether there was employer-employee relationship between the parties, and (2) what relief are parties entitled to.

To answer the first issue, I will refer to S. 4 (a) & (b) of ELRA (Supra) which define the term employee;

4. *"Employee means 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) the other party is not a client or customer of any profession, business, or undertaking carried on by the individual* ***(emphasis added)***

In the light of above provision, it was rightly submitted by the applicant's advocate that a person who entered a contract of employment with another is an employee but the same provision went further to include

a person who has entered into any other contract which an individual undertakes to work personally for the other party to the contract. This means, failure to produce Contract of employment does not give a final conclusion that a person is not an employee.

Moreover, S. 61 of LIA (Supra) has introduced the concept of presumed employee when it states that;

> *61. 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.*
>
> **(Emphasize added).**

Having gone through the evidence on records and the Award by CMA, it is apparent that CMA had well examined the evidence and has reached a

proper decision in relation to the applicant's relationship with the respondents. Basically, the respondents fit in the criteria provided for under the above provision of the law, that is S. 4 (a) & (b) of the ELRA and S. 61 of the LIA (Supra). In this regard, I have no reason to doubt the conclusion reached by CMA on the status of the respondents as against the applicant.

There is ample evidence on the records indicating that respondents were working for the applicant while under his control. Also, they were provided with the working equipment as well as instructions by the respondent. Since S. 61 of the LIA (Supra) requires proof of even one criterion only, there is no doubt that the respondents were employees in the eyes of the law hence employer-employee relationship between the applicant and the respondent existed.

The contention by the applicant that respondents were field students was rightly disregarded by CMA in terms of S. 15(6) of ELRA (Supra) for a reason that it was the duty of the applicant to prove that the respondents were not employees but field students by producing reliable proof to such effect, as required by the law.

On other hand there is no dispute that respondents' employment was terminated by the applicant upon the sale of his rented office by the premises owner. It is stated by both parties that the employment was terminated in October 2018.

Having decided the first issue in the affirmative, the second issue to be decided now is on the relief entitlements. Page 9 of CMA Award clearly

shows that all the respondents were awarded salaries arrears, but the question comes as to how CMA came to those calculations as far as all respondents are concerned.

Evidence is clear that since the respondents started to work with the applicant, they were never paid monthly salaries of Tshs. 200,000/= as agreed. But the 1st respondent, being the only witness and representative of the other respondents in adducing his evidence on the duration of their employment he only stated the time when he was employed and when his employment was terminated. He stated that is he was employed in September 2017 and termination was in October 2018.

Consequently, there was no reliable evidence with regard to the duration of service for the other respondents. Essentially the 1st respondent was not certain of the time when his colleagues (the five respondents) started to work with the applicant. This means the calculation of salaries made by CMA in respect to the other five respondent was unsubstantiated.

It should be borne in mind that section 110 of the Evidence Act, [Cap 6 R. E 2019] puts the burden of proof on the party who alleges anything in his favour. Therefore, the other five respondents had a duty to produce evidence to prove their claims as they never appeared in CMA to state their claims, such claims were never proved.

In the circumstance I find that there is no proof of claims for salaries awarded to the 2nd, 3rd, 4th, 5th and 6th respondents. Therefore, this Court finds that the application for revision has merit. Accordingly, the

Arbitrator's Award is partly upheld and partly quashed. The Award in respect of the 1st respondent is upheld and the Court quashes the Award in respect of the 2nd, 3rd, 4th, 5th and 6th. No order as to costs

DATED at DODOMA this 19th Day of MAY, 2022

ABDI S. KAGOMBA
JUDGE