IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 08 OF 2021

(Originating from CMA/ARS/MED/443/19/227/19)

1. **EDWARD LOMNYAKI KIVUYO.....1ST APPLICANT**
2. **ROBERT KIZITO.....2ND APPLICANT**
3. **ROBERT PETRO LUCUMAY.....3RD APPLICANT**
4. **GEOFREY JONAS MOLEL.....4TH APPLICANT**
5. **BABU SAREI MOLEL.....5TH APPLICANT**
6. **BABU LOISHIYE MOLLEL.....6TH APPLICANT**

VERSUS

1. **AGHAKHAN UNIVERSITY.....1ST RESPONDENT**
2. **K. K. SECURITY (T) LTD.....2ND RESPONDENT**

JUDGMENT

08/11/2021 & 14/02/2022

GWAE, J

In the Commission for Mediation and Arbitration for Arusha at Arusha (CMA), the applicants named above jointly lodged complaints against the respondents alleging that, they were unfairly terminated.

The records divulges that, the applicants herein alleged to be the employees of the respondents in the sense that they were under the

supervision of the 2nd respondent but working in the premises of the 1st respondent as security guards. It was their complaint that they were unfairly terminated by the respondents following their demand of being availed with employment contracts.

On the other hand, the 1st respondent disputed to have employed the applicants, according to the testimony, the 1st respondent alleged to have entered into a contract of security services by the 2nd respondent. Therefore the 1st respondent had nothing to do with issues and affairs concerning the security guards. The 2nd respondent in her testimony did not dispute the fact that she is the provider security services to the 1st respondent, however she denied to have employed the applicants.

On its analysis of the parties' evidence, the CMA finally procured its award in favour of the respondents on the basis that, there was no evidence to prove that, there was an employment relationship between the applicants and the respondents. The CMA's arbitral award aggrieved the applicants, hence this application for orders of the court revising and setting aside the CMA's award procured on the 20th January 2021.

During hearing of this application before me, the applicants appeared in person unrepresented, whereas both respondents enjoyed legal services from advocate Ms. Neema Oscar and advocate Fidel Peter. The application was disposed of by way of written submissions where parties reiterated their stand as earlier explained.

Carefully looking at the CMA's proceedings, arbitral award, parties' submissions, it is observed that, the duty of this court is bound therefore to objectively ascertain whether the applicants were the employees of the respondents, and if answered in affirmative, whether they were unfairly terminated.

Whenever there is a dispute as to the existence of the employment relationship between the parties, the court or the Commission has to ensure that, there was such existence or otherwise. And the one who contends that there was existence of employment relationship must sufficiently to prove existence of the same. According to section 61 of the Labour institution Act, Cap Revised Edition, 2019, a person is deemed to be an employee if he or works for or renders services to another person if one of the following factors provided therein, for sake clarity provisions of section of the Act are reproduced herein below;

"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 organization, 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".

This court in its various decisions among others the case of **John Ngwegwe vs. Super Spring (T) Ltd Labour Revision No. 306/2013** court clearly pointed out that;

> "The issue of determination of existence of employment relationship is a complex one, particularly now, given an increase inflexible work arrangements which invariably, also increase incidents of disguised employment relationships."

According to the provisions of the law, it is clear that if an employee alleges that he or she was employed by an employer notwithstanding a form of contract, he or she has to prove existence of one of the following aspects; that, he was under the control or direction of that other person including the person's hours of work, or that, the person who was a part of an organization if such person was employed by that organization, that, the person has worked for that other person for an average of at least forty-five hours per month over the last three months; that, person is economically dependent on the other person for whom that person works or renders services, that person is supplied with working tools equipment by that other person and that, the person only works for or renders services to one person.

In our dispute, it was expected of the 1st applicant and other applicants (who had not even testified to prove their respective complaints nor was there any evidence as to the existence of a representative suit prior to or after the recording of the testimony of the 1st applicant as substantiated by

the typed proceedings from page 17 to 27) since they are alleging to have been employed by private institutions as security guards to prove existence of one of the above factors especially condition (c) to (f) of section 56 of the Cap 300.

From the evidence adduced by the parties, the applicants alleged to have been employees of the respondents, when testifying at the CMA it was their allegation through the 1st applicant that, they were the employees of the 2nd respondent, and not the 1st respondent as earlier stated in their opening statements.

According to the evidence of the 1st applicant, Edward Lomnyaki Kivuyo who testified purporting presenting other applicants stated that, it was the 2nd respondent who used to pay them remuneration though no proof of payment of salaries was tendered. On cross examination the witness stated that on 15th February 2017 they were called to work with the 2nd respondent through the village chairman one Godfas Andrea Siloyan to assist the security guards of the 2nd respondent. Nevertheless, the applicants had no written contract for the services / work they rendered to the respondents despite. Moreover, it was testified that they were not given uniforms, identity cards and that they used local weapons such as arrows and machetes.

The 1st respondent denied to be the employer of the applicants and had nothing to do with the issue of employment of security guards except that, they had hired the 2nd respondent to provide security services in their premises. This fact is supported by the evidence of the 2nd respondent's witness who testified that, the 1st respondent is their client and they provide security services in her premises. Nevertheless, the 1st respondent denied to have employed the applicants and nor does she know the applicants.

From the evidence, it is undisputed fact that the 1st respondent herein has no any employment relationship with the applicants even the applicants in their testimony admitted to be employed by the 2nd respondent and not the 1st respondent. The question that follows is, whether there is employment relationship between the applicants and the 2nd respondent. The applicants maintained to be the employees of the 2nd respondent while on the other hand the 2nd respondent denied to have employed the applicants nor does she know them. Even though the applicants alleged to be paid their salaries by the 2nd applicant but there was no evidence to support that assertion. There is no further evidence to substantiate that the applicants were the employees of the 2nd respondent. In their own evidence they admitted that they were not given uniforms, nor were they availed with

security weapons and they had no even identity cards. They also stated that they were not given any training on security services.

If I were to rely on the applicants' undated complainants' letter which was not received on the ground that the same was copy, yet the same does not envisage if the 2nd respondent was party of the complainants and a way forward or parties' agreement thereof dated 19th August 2019 via the then Arumeru District Commissioner. Furthermore, the applicants' exhibit P1 (PE1), the letter purported by the applicants to be termination letter yet the same is all about the 1st applicant and above all, it does not constitute a termination of employment rather a suspension letter dated 22nd day of July 2019 directed to the 1st applicant.

If the applicants were still under probation or were employed after probation of three months and there would evidence of written contracts of employment as per the testimony of the 1st applicant (See page 19 of the typed proceedings, question to be posed, if as adduced by the 1st applicant, where are those contracts of employment allegedly entered by the parties after three months? Through my careful examination of the annexed documents and the same either admitted or rejected during arbitration yet, there is no clue of such piece of evidence.

Moreover, other applicants are observed to have stated in their referral forms No. 1 that they were effectively terminated by the respondents on the 1st August 2019 but no such evidence on record nor any other piece evidence establishing that the 2nd -6th applicants were employed either the 1st or 2nd respondent or that they were unfairly terminated.

Unquestionably, the 2nd respondent who is the most famous and experienced security company, was and is not expected to have employed unexperienced persons with no working tools such as uniforms, identity cards and security equipment, to have not procedurally been paid their wages, to have not inserted their names in attendance register or duty roster without undue regard to the facts the security guards used to perform their duties in shift. It follows therefore, the employment relationship between the parties is questionable.

Before concluding, perhaps it is apposite to cement on the requirement of obtaining leave to file a representative suit. The CMA's record reveals that the applicants' representative (Mr. Maganga P/R) notified the Commission that, there was one witness who would testify and then they would bring to the Commission a leave for representative suit, that was procedurally wrong (See page 17 of the typed proceedings). If other applicants consented to the

filing of representative suit by the 1st applicant, they first ought to have file an application for leave for filing a representative dispute as was judicially stressed in **Wanjiru v Standard Chartered Bank Kenya Ltd and others** [2003] 2 EA 701

> "Order I, rule 8 of the Civil Procedure Rules is applicable where a plaintiff brings a representative action. A representative action should have leave of court and/or direction at the time of being filed".

In our instant dispute, the 1st applicant merely gave evidence on behalf of other applicants after their personal representative having informed that Commission that they would bring a representative suit after close of their evidence through their sole witness (AW1-1st applicant) while according to their referral forms, the 1st applicant alleged to have been terminated on the 22nd August 2019 whereas other applicants are found complaining to have unfairly been terminated on the 1st August 2019. That being premises, the evidence of the applicants would be expected to be different, be oral or documentary evidence. Thus, it follows that each applicant was required to prove his complaints otherwise the 1st applicant was to produce necessary documents, if any, pertaining the complaints of other applicants.

To this end, I unhesitatingly find that no legal reason to fault the CMA's holding with effect that, there was no employment relationship that existed between the parties.

It is so ordered.

M. R. GWAE
JUDGE
14/02/2022