

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LABOUR REVISION NO. 6 OF 2022

BETWEEN

**DR. FRANK PAUL MPELUMBE
t/a NYANZA HEALTH CENTER APPLICANT**

VERSUS

ANDREW JOSEPH WAMBURA RESPONDENT

JUDGMENT

2nd August & 31st October, 2022

ITEMBA, J.

The instant proceedings have been preferred at the instance of the applicant, an aggrieved party, against the Commission for Mediation and Arbitration (CMA), decision which was made following an *ex parte* hearing and was decided in favor of the respondent.

The applicant testified at the CMA that between 6th November, 2018 and 31st March, 2021, he was an employee of the applicant, as a clinical officer and that his contract was terminated. The respondent, was not his employee but rather worked on short term basis and he was paid as per the work issued to him, so the respondent owned him nothing. At the end, the CMA ordered the applicant to pay the respondent salaries for 18 months amounting to the tune of TZS 12,600,000/-. The applicant is

aggrieved and filed this application asking the court to revise, quash and set aside the CMA award.

The application is supported by the affidavit of Mr. Linus E. Munishi, and following are the grounds:

- (i) *"Whether the arbitrator properly award total sum of Tshs. 12,600,000/- being the wage cut for 18 months contrary to the evidence adduced by the respondent;*
- (ii) *Whether the arbitrator properly exercise discretionary powers to condone the respondent application; and*
- (iii) *Whether the arbitrator's consideration to the fact that the respondent stayed for almost 18 months without being paid any payment in the absent of any evidence or means enabling him to survive.*
- (iv) *Whether the Hon. Arbitrator properly exercised his powers when he proceeded with the hearing without allowing the respondent's counsel to cross examine."*

The application has been ferociously opposed by the respondents. Through a counter-affidavit sworn by Mr. Andrew Joseph Wambura, the respondent himself, he states that the decision of the CMA is vindicated. The respondents contend that evidence was duly evaluated and considered. He held the view that reasons for the CMA's decision were adduced and there is nothing irregular about the CMA's decision.

Pursuant to the order of the Court dated 20th June, 2022, the application was heard through oral submissions.

Submitting in support of the application, the applicant's counsel Mr. Munishi explained that they will drop ground 9(d) and argue the rest of the grounds. He contended that according to the respondent's employment contract, exhibit A1, the agreed payment was TZS. 700,000/- for 18 months turned to be TZS. 12,600,000/-, which is contrary to the respondent who stated that he was paid half of the salary (TZS. 350,000/=), so CMA misled itself by qualifying payment of TZS 700,000/- times 18 months. He added that, nonetheless in the CMA form No. 1 the dates of employment are between 30th of September, 2019 and March, 2021 which results to 16 and not 18 months.

On the contract of employment, he submitted that exhibit A1 shows that the parties entered into a contract on 1st January, 2020 up to 31st March, 2021, which means earlier the respondent had no contract, and therefore, the amount of money issued by the CMA was not correct due to miscalculation.

With respect to the second ground, referring to condonation form No. 2, the counsel for the applicant explained that the respondent claimed that he was late by 18 months because he was promised by the applicant to be paid his salary. That the respondent did not issue any proof of

negotiations to back up his submission. He argued that even with such promises and ongoing negotiations, the respondent was not limited from filing his application within time. cited the case of **Raymond Patrice Ragita & 3 Others v M/S Alab Constructions Co. Ltd.** HC Mwanza, Revision application No. 41.2018 (Unreported).

On the third ground the applicant stated that the evidence by the respondent could not make sense as to how he would work and live for 18 months without payment of any salary. He also referred exhibit A5 and stated that the document is naked and that exhibit A6 was only signed by the respondent, who by profession was a doctor and not an accountant and the place to be signed by the one who cross checked it, was blank. For these reasons he prayed that the court should allow his application.

In his rebuttal submissions, Mr.Nyamwelo, the counsel for respondent asserted that he was claiming his arrears he named them 'mapunjo ya mshahara' translating as wage cut. He explained that according to the evidence adduced at the CMA, the respondent was working as a clinical officer but he received a small part of his salary. That he started working based on an oral contract up to the year 2020. And that between September, 2019 and March, 2021 there are 18 months, therefore the CMA was justified in its decision. He added that the arbitrator properly evaluated the evidence on exhibit A2 which shows that

the respondent was a member to NSSF, and once document admitted without objection the court is free to use them, a party cannot challenge it's authenticity at appellate stage.

Submitting on the second ground, he stated that this court has no jurisdiction to entertain it and it should be disregarded. He expounded that the decision regarding condonation cannot be challenged at this stage because this is a different type of application. That the applicant should have filed an appeal or revision before the High Court but he opted not to. In alternative he stated that the CMA decision was proper as there were reasonable grounds to extend time. That the respondent could not file his application within time as he was still in negotiation with the applicant and that he was also looking for legal aid. He referred the case of **Benedict Mhagama v Kalaita Yona** Civil Application no. 376/17 of 2019. He distinguished the case of **Raymond Ragita** because the facts therein are that the employee was terminated while the respondent herein was doing negotiation while still working.

On the third and last ground, the respondents' counsel stated that the respondent survived without payment because he was receiving a small amount of money from the applicant as payment for the previous salary areas. He quoted the respondent testimony before CMA that view

on page 16 of the CMA proceeding which reads as "*nilikuwa nalipwa kidogo kidogo kwa mishahara ya nyuma nikapata ya kujikimu*".

Finally, the respondent urged the Court to dismiss the application and uphold the CMA's decision.

From these rival submissions by the counsel the profound question to be resolved is whether the application has merit.

The first and third grounds, that is ground 9(a) and (c) will be answered jointly as they both relate to issues of evidence. Starting with ground 9(c) the applicant is challenging the evidence by the respondent that he did not receive any payment from the applicant for 18 months.

I have gone through the respondent's evidence at CMA, where he testified as **AW1** from page 15 to 17 of the typed proceedings, he testified that he is claiming for the wage cut of his salary between October 2019 and March 2021 which in total amounts to TZS 12,600,000/= . He produced an employment agreement for the duration of January to December 2020 (A1), NSSF card (A4) and 'weekly duty roster' (A5). That was the end of his testimony. Based on this evidence, the employment contract proved that the respondent was an employee only between January and December 2020, as for the remaining months, there were mere allegations which were not supported by any evidence. The NSSF

card issued was not supported by any explanation as to why it was issued in September 2019 while the employment contract started in January 2020. The 'weekly duty roster' which was produced, as well, it is just a 5 pages document, each page covering one week (Monday to Sunday). In the said roster, there is a list of several names and the respondent appears as one of the listed names against the letters 'M','DO' without any explanation on what do those letters mean in relation to the respondent's employment. The rosters are handwritten '2019' without indicating which months they represent in the year 2019. I find these documents very vague and unclear as to what they represent, which makes them not worthy of court's reliance. The applicant was right when he referred the roster as 'naked'. The CMA arbitrator did not also indicate how he assessed and analyzed the said exhibits to arrive to his conclusion that the respondent had worked for 18 months. These exhibits should either speak for themselves or they should have been well described before the court as principles of admissibility requires. In the contrary, they are all silent and the court cannot guess on what they represent. The payroll (A6) was issued within the contractual time, September 2020 therefore, it does not talk of the period outside the said 12 months. I am of the firm view that much as this case was heard *ex parte* there still had to be more clarification on the relation of these exhibits and the respondent's

employment so that the court can assess the weight of the exhibits if any. It is a legal principle that one who alleges is the one responsible to prove his allegation. See **Abdul Karim Haji v Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014 (unreported) and **AFRICARRIERS Limited v Millenium Logistics Limited** Civil Appeal No. 185 Of 2018 Dsm (Unreported). Due to the evidence before the CMA as described hereinabove, apart from the duration of 12 months which was within the contract period, the respondent did not establish that he was working for the applicant between September,2019 and March 2021. Therefore, ground 9(c) holds water.

In ground 9(a) the applicant is challenging the CMA award to the respondent amounting to TZS 12,600,000/= as wage cut 'mapunjo ya mshahara'. He states that the said amount is contrary to the evidence produced by the respondent. He expounded that in the respondent testified that his salary was TZS 700,000 per month and his wage was cut meaning that he was paid just part of TZS 700,000/=. The respondent has not replied on this ground neither in his counter affidavit nor in his submission. In his counter affidavit he only states that the respondent's case was proved to the required standard. I have gone through the said respondent's testimony before CMA and he was claiming for TZS

12,600,00/=at the rate of TZS 700,000/= per month. What is gathered here is that if the respondent worked for 18 months as alleged at a salary of TZS 700,000/=, he was supposed to be paid a total of TZS 12,600,000/= so by the respondent claiming 12,600,000/= it means that he claiming for TZS 700,000/= for each month and not for part of TZS 700,000/=. It also means that he was not paid a single cent for all these 18 months. In other words, this evidence contradicted his claims in CMA Form No.1 was not even *mapunjo ya mshahara* or 'wage cut' but a total nonpayment of salary. I agree with the applicant that the respondent did not substantiate before the court how much exactly he was claiming.

However as stated above while responding to ground 9(c), the respondent has proved to have worked for 12 months. Therefore, if there are any claims of payment, they should be within these 12 months. If the respondent had worked for 12 months from January to December 2020, at the salary of TZS 700,000/= per month, by calculations, he was supposed to be paid a total of TZS 8,400,000/=. If there were any wage cuts they should have been deducted from the monthly pay of TZS 700,000/= . It is not even clear if the respondent was claiming for the wage cut or full payment of his salary. And if it was either full amount or half amount there is no evidence whatsoever to support his complaints.

There is evidence of the payroll submitted by the respondent. Based on the payroll, A6 there was no wage cut. The last column which states '*malipo halisi*' meaning actual payment for the respondent was TZS 700,000/=. According to the said roster, the total deduction was just TZS 81,720. So even the evidence brought by the respondent was supporting that within the contractual period there was no wage cut and the respondent was not being underpaid. Therefore, this ground is also meritorious.

As regards to ground 9(b), according to the respondent's CMA form no. 1 the dispute arose on 30th September 2019 but according to the respondent testimony, he stopped working on 31st March 2021. That when the dispute arose, he kept on working believing that it will be settled as promised by the employer. Under this situation, the case cited by the applicant is distinguished because in that case there was negotiations going on between the appellant and the respondent while in the present case the respondent claims that he was still working while waiting for his full payment based on the applicant's promises. A promise to be paid by the employer is quite different to the out of court negotiations. The CMA was justified to issue condonation to the respondent based on the ground

raised. Therefore, the reasons for condonations were valid and ground 9(b) lacks merit.

That being said the respondent could not establish that he had worked for 18 months under 'the wage cut' conditions, that is, without being paid the full amount of the agreed salary.

The application is allowed to the extent shown in respect of ground 9(a) and (c). The decisions and orders issued by the CMA are hereby revised. The award issued by the Commission for Mediation and Arbitration is hereby set aside.

No orders as to costs based on the nature of the case.

It is so ordered.

DATED at **MWANZA** this 31st day of October, 2022


L. J. ITEMBA
JUDGE



Judgment read in the presence of Mr. Linus Munishi counsel for the applicant who also holds brief for Mr. Musa Nyamwelo, counsel for the respondent and Ms. Minjara RMA.

A handwritten signature in black ink, appearing to read 'L.J. Itemba', positioned above the printed name.

L.J. ITEMBA
JUDGE
31.10.2022