**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 31 OF 2023**

*(Arising from an Award issued on 23/12/2022 by Hon. Mbena M.S, Arbitrator in Labour dispute No. CMA/DSM/ILA/584/2021/47/2022 at Ilala)*

**ATB INVESTMENT COMPANY LTD ..... APPLICANT**

**VERSUS**

**HUSNA HAROUN NKYA ..... RESPONDENT**

**JUDGMENT**

*Date of last order: 30/03/2023*
*Date of Judgment: 28/04/2023*

**B. E. K. Mganga, J.**

This judgment is in respect of an application for revision filed by the applicant who was aggrieved with the award issued by the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/ILA/584/2021/47/2022 at Ilala issued on 23rd December 2022.

At CMA, Husna Haroun Nkya, the respondent was complaining that she was an employee of the applicant and that she was unfairly terminated as well as discriminated by ATB Investment Company Ltd, the abovementioned applicant.

In the Referral Form (CMA F1), respondent indicate that there was no valid reason and that procedures for termination were not followed. In the said CMA F1, respondent claimed compensation for unfair termination, notice pay, unpaid annual leave, NSSF, severance pay, general damages for discrimination and an abrupt termination of employment to the tune of TZS. 23,975,000/=. It was alleged by the applicant that the respondent was not her employee, rather, a volunteer and prayed the dispute be dismissed for want of employee and employer relationship.

On 23rd December 2022, Mbena, M.S, arbitrator, having heard evidence and submissions from both sides, held that there was employment relation between the parties. The arbitrator further held that respondent was discriminated and unfairly terminated. With those findings, the arbitrator awarded the respondent to be paid (i) TZS 7,200,000/= being 12 months' salaries compensation, (ii) TZS 600,000/= being one month notice, (iii) TZS 600,000/= being one month leave pay, (iv) TZS 323,078/= being severance pay and TZS 2,000,000/= being general damages for discrimination all amounting to TZS 10,723,000/=.

Applicant was dissatisfied with the said award hence this application for revision. The Notice of Application was supported by an affidavit

affirmed by Prince Caroll Rajab, her Principal Officer. In the said affidavit, applicant is seeking the court to revise the said award on three issues namely: -

1. *Whether the respondent was the employee of the Applicant.*
2. *If she is not employee, whether they are entitled to remedies provided under unfair termination and Employment and Labour relations Act Cap. 366.*
3. *If is an employee, whether the Commission for Mediation and Arbitration was correct to grant the amount contained in the award.*

In opposing the application, respondent filled both the notice of opposition and the counter affidavit.

When the application was called on for hearing, Mr. Shalom Msakyi, Advocate, appeared and argued for and on behalf of the applicant while Mr. Muharami Chuma, Advocate, appeared and argued for and on behalf of the respondent.

During hearing, Mr. Msakyi, learned counsel for the applicant submitted generally that respondent was a volunteer at applicant's place of work from 2019 to 2021 and not an employee. He added that, at all that time, respondent was doing various work as she was directed by her instructor. He argued further that, respondent did not prove that she had employment relationship with the applicant. He further submitted that, the arbitrator in concluding that respondent was employed by the applicant,

relied on the provisions of Section 61 of the Institutions Act[Cap. 300 R.E. 2019] but there was no evidence proving that relationship. Counsel for the applicant submitted that respondent did not tender contract of employment, Social Security contribution or payment of tax. He cited the provisions of Section 14(2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] that all employment contracts must be in writing and added that espondent did not tender such contract.

Mr. Msakyi submitted further that, in her evidence, respondent testified that there was no contract. He went on that, DW2 testified that respondent was not in the payroll and that her expenses to the tune of TZS 500,000/= per month were paid by one of the Directors. He cited the case of ***Zawadi H. Rajabu & 20 Others v. MMI Steel Ltd***, Revision No. 226 of 2021, HC (unreported) to support his submissions that in absence of written contract, respondent failed to prove that she was an employee of the applicant. In his submissions, counsel for the applicant conceded that it was the duty of the employer to draft the contract if any, and not the respondent. Counsel for the applicant was quick to submit that in her evidence, respondent did not testify that there was oral contract between the parties. He submitted further that, respondent relied on the certificate

of service allegedly issued by the applicant. Mr. Msakyi argued that the said certificate of service was allegedly signed by a person who did not indicate the name or title and that DW2, who is the Human Resources Manager, testified that he did not issue that certificate. He added that, DW2 testified that he is the only person who issues certificates.

On absence of NSSF Contributions, counsel for the applicant referred the Court to the case of ***Juma Abdallah Chakulanga v. Group Six International Ltd,*** Revision No. 177 of 2022 HC (unreported). Counsel submitted further that, the arbitrator erred to award reliefs to the respondent based on unfair termination while respondent was not an employee. He added that, in CMA F1, respondent prayed to be paid severance pay of TZS 3,075,000/=, leave pay of TZS 1,500,000/= and salary of TZS 500,000/= but the arbitrator awarded her TZS 600,000/= as notice and salary TZS 323,000/= as severance and TZS 7,200,000/= as compensation. He submitted further that; the award was issued contrary to Section 44 of Cap. 366 R.E. 2019 (supra) that provides how a terminated employee shall be paid. Counsel for the applicant cited the case of ***La Gloire De Dieu Trading & Transport Ltd V. Aloyce Mathew Mtui***, Revision No. 447 of 2022, HC (unreported) to support his submissions that

arbitrator erred to grant reliefs that was not prayed for or pleaded by the respondent. Counsel for the applicant submitted that, even if it is assumed that respondent was an employee of the applicant, the reliefs awarded is illegal. He went on that, respondent was compensated TZS 2,000,000/= for discrimination without proof that she was discriminated. For all these, counsel for the applicant prayed that the application be allowed by setting aside the CMA award.

In resisting the application, Mr. Chuma, learned counsel for the respondent submitted that respondent was an employee of the applicant in view of Section 61 of Cap. 300 R.E. 2019. (supra). Mr. Chuma submitted further that, in her evidence, PW1 testified that she was employed as Senior Coordinator and that she was subject to the control, instruction, and supervision of the Director of the applicant. Counsel for the respondent referred the Court to the case of ***Mwita Wambura v. Zuri Haji,*** Revision No. 45 of 2012, HC (unreported) on how the Court interpreted the provision of Section 61 of Cap. 300 R.E. 2019 (supra) and argued that respondent was paid remuneration.

Counsel for the respondent submitted further that, after termination, respondent was issued with certificate of service (exhibit P3). He submitted

further that DW1, who is the Director of the applicant who issued the said exhibit P3 admitted to have issued it in favour of the respondent. Counsel for the respondent strongly submitted that applicant used to pay salary to the respondent and that it was undisputed fact. He added that, conditions provided for under Section 61 of Cap. 300 R.E. 2019(supra) was complied with. Mr. Chuma submitted that DW2 did not adduce evidence on how payments were done to other employees of the applicant or how social security and tax were paid in favour of other employees for the court to conclude that the mode of payment to the respondent was not similar to other employees.

On fairness of termination, counsel for the respondent submitted that there was no reason for termination and that procedures thereof were not adhered to. Counsel for the respondent submitted further that in his evidence, DW1 testified that respondent was retrenched due to economic difficulties. He went on that; applicant did not comply with the provision of Section 38 of Cap. 366 R.E. 2019 (supra) read together with Rule 23(4) of the Employment and Labour Relations (code of Good Practice)Rules GN. No. 42 of 2007 because there was no consultation, notice and offer of

alternative job to the respondent. He added that, it was only the respondent who was retrenched and that, that amounted to discrimination.

On reliefs awarded to the respondent, counsel for the respondent submitted that, respondent was awarded according to what was pleaded in CMA F1 and in accordance with the provisions of Section 40(1)(c) and (2) of Cap. 366 R.E. 2019(supra) after the arbitrator has found that termination was unfair. Counsel for the respondent concluded by praying that the application be dismissed.

In rejoinder, Mr. Msakyi reiterated his submission in chief and conceded that there was no document tendered showing that respondent was working as volunteer. Mr. Msakyi added that failure of DW2 to tender record showing how other employees were paid is not fatal to this application and prayed this application be allowed.

I have examined the CMA record and considered submissions of the parties in this application and find that respondent was an employee of the applicant as it was held by the arbitrator. My conclusion is based on evidence of the parties in the CMA record as explained hereunder.

At CMA, Husna Haroun Nkya(PW1), the respondent, testified that, she was employed by the applicant on 11th April 2019, as senior

coordinator but was terminated on 30th November 2021. She testified further that, she was performing her duties under supervision of Abdalla Kungulilo(DW1), the Director and Aisha Kungulilo. It was evidence of PW1 further that, she was receiving oral instructions from the director(DW1) and sometimes through WhatsApp messages through her mobile No. 0655607460. The said WhatsApp conversation were tendered as exhibit P1 and P2 without objection. Evidence shows that, exhibit P1 is WhatsApp communication between respondent and Aisha Kungulilo while exhibit P2 is WhatsApp communication between respondent and Abdallah Kungulilo(DW1), the director of the applicant from 2019 to 2022. PW1 testified further that, on 30th November 2021 at 16:00hrs, she was called in office by said Aisha Kungulilo and Abdallah Kungulilo(DW1) who informed her that, she was terminated on the same day due to economic hardship. PW1 testified further that, on 1st December 2021, she handled over the office to Salum, the Manager of the applicant and was paid TZS 500,000/= by Aisha Kungulilo who promised to pay TZS 100,000/= of the remaining salary on later days. PW1 testified further that, she was issued with a certificate of service (exhibit P3) that was admitted also without objection. In her evidence, PW1 testified further that, she was the only employee

who was retrenched and that applicant did not issue a notice of intention to retrench employees due to economic hardship.

While under cross examination, PW1 maintained that her employment with the applicant started on 11th April 2019 and was terminated on 30th November 2021 and that she was discriminated because she was the only employee who was retrenched.

On the other hand, Abdallah Hassan Kungulilo(DW1) testified that PW1 was a volunteer and not employee. DW1 admitted having terminated PW1 and written a certificate of service (exhibit P3) in favour of the respondent(PW1). In his evidence, DW1 further admitted, as reflected in the WhatsApp messages, that he was instructing respondent how to perform her duties.

While under cross examination, DW1 admitted that he is the one who signed exhibit P3 and that respondent was paid TZS 600,000/= monthly but the highest paid employee was paid TZS 1,200,000/= while the lowest was paid TZS 270,000/=.

On his part, Salum Jumbe Emmanuel (DW2) testified that he is doubtful with exhibit P3 because he is the one who prepares all certificates.

DW2 testified that respondent was a volunteer and was not in the payroll because she has no contract of employment.

As pointed hereinabove, evidence of both PW1 and DW1 proves that respondent was performing her duties under instruction of both DW1 and one Aisha Kungulilo who did not testify. It is also undisputed from evidence of both applicant (DW1) and the respondent(PW1) that, respondent was paid monthly salary. In my view, evidence of DW2 that respondent was not in the payroll and that there was no contract of employment between the two, cannot hold water in the presence of solid evidence of DW1 and PW1. It is my view that, respondent has nothing to do with absence of her name in the payroll because it was not her duty to ensure that her name is in the payroll. More so, the said payroll was not tendered to prove that the name of the respondent was not there. Even if the said payroll could have been tendered and find that the name of the respondent was missing, as I have pointed out shortly hereinabove, that alone, could have not proved that respondent was not an employee of the applicant in the circumstances of this case. Again, evidence of DW2 challenging the authenticity of the certificate of service (exhibit P3) and his whole evidence against the respondent, is not reliable, because, it has been seriously contradicted by

evidence of both DW1 and PW1. In fact, credibility of a witness can be gauged in relation to other available evidence as to whether the witness was contradicted or not. It has been held several times that if found that the evidence of the witness was contradicted, then, the witness is not credible. See the case of ***MIC Tanzania Ltd vs Imelda Gerald*** (Civil Appeal 186 of 2019) [2022] TZCA 141 and ***Nyakuboga Boniface vs Republic*** (Criminal Appeal 434 of 2016) [2019] TZCA 461. In ***Nyakuboga's*** case (supra)it was held:-

> *"It is trite law that, every witness is entitled to credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations as it was held in the case of* ***Goodluck Kyando v. Republic,*** *Criminal Appeal No. 218 of 2003(Unreported)"*

It is my view that there are only allegations by counsel for the applicant that respondent did not prove her case. Applicant did not advance cognent reason to show why respondent should not be believed. Based on evidence of both the applicant especially evidence of DW1 and that of the respondent (PW1), I hold as the arbitrator did, that, the provisions of section 61 of the Labour Institutions Act[Cap. 300 R.E. 2019] were complied with and that, there was employment relationship between the applicant and the respondent. Evidence of DW2 relied upon by counsel for the applicant in his submissions that there was no employment

relationship between the two on ground that DW2 disowned the Certificate of Service (exhibit P3) and that there was no contract tendered by the respondent or that respondent was not in the payroll, cannot displace solid evidence of both DW1 and PW1. In my view, absence of the name of the respondent from the payroll alone as held hereinabove, is not a proof that respondent was not employed by the applicant. I am of that view because respondent had nothing to do with the said payroll. More so, the said payroll was not tendered as part of evidence of the applicant. Be as it may, at any rate, it was not business of the respondent to know whether she was in the payroll or not. Her interest at all times, like any other employee, was payment of her salary. By parity of reasoning, absence of the contract of employment between the parties, cannot be proof that there was no employment relationship between the parties.

It was undisputed by DW1 and PW1 in their evidence that PW1 was being commanded or directed by both DW1 and Aisha Kungulilo, who did not testify, on how to perform her duties. It was also testified by DW1 that respondent was paid TZS 600,000/= monthly while the highest paid employee was paid TZS 1,200,000/= and the lowest paid employee was receiving TZS 270,000/= monthly. More so, evidence of the respondent

that after termination of her employment, she was paid TZS 500,000/= by Aisha Kungulilo and that the latter promised to pay TZS 100,000/= as part of her salary was not shaken during cross examination. Considering the circumstances of the application at hand, I associate myself with the interpretation of section 61 of Cap. 300 R.E. (supra) and the reasoning of my learned judge in ***Wambura's case*** (supra).

In her evidence, respondent(PW1) testified that she was informed by DW1 and Aisha Kungulilo that termination of her employment was due to financial constraint. Again, in his evidence, DW1 testified that respondent was a volunteer and that she was terminated due to economic reasons. I have held hereinabove that respondent was not a volunteer, rather, was an employee. Therefore, termination of her employment due to economic reasons was supposed to comply with the provisions of section 38 of Cap. 366 R.E. 2019(supra) and Rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 as it was correctly submitted by counsel for the respondent. Since applicant did not comply with the aforementioned provisions at the time of retrenching the respondent, then, termination was both substantively and procedurally unfair. I am of that view because evidence of the respondent that she was

the only employee who was terminated allegedly due to economic reason was not shaken by the applicant. In my view, there was not criteria for termination of employment of the respondent hence respondent was discriminated.

It was submitted by counsel for the applicant that the award was illegal because respondent was awarded contrary to the provisions of section 44 of Cap. 366 R.E. 2019(supra) and that she was awarded reliefs not pleaded to. I have examined the CMA F1 and the award and find that respondent was paid what she pleaded in the CMA F1. In fact, in the CMA F1, respondent claimed to be paid TZS 23,975,000/= but she was awarded to be paid TZS 10,723,000/=. I have examined the award and find that respondent was awarded in accordance with the provisions of sections 40(1)(c) and 44 both of Cap. 366 R.E. 2019(supra). Considering the circumstances of this application, I find that the award of TZS 2,000,000/= as general damage is justifiable because applicant has not raised anything substantial to warrant this court to interfere with that order. It cannot be said that the said general damage is contrary to the law or is excessive for this court to interfere. The only reason advanced by counsel for the applicant against payment of the said amount is that respondent did not

prove that she was discriminated. It is my view, as I have held hereinabove, that, there was no criteria used by the applicant to retrench respondent allegedly, due to economic hardship. In my view, absence of criteria for selection of the employee to be retrenched amounted to discrimination, because there is no better reason advanced by the applicant.

That said and done, I hereby uphold the CMA award and dismiss this application for want of merit.

Dated at Dar es Salaam on this 28th April 2023.

B. E. K. Mganga
**JUDGE**

Judgment delivered on this 28th April 2023 in chambers in the presence of Muharami Chuma, Advocate for the Respondent but in absence of the Applicant.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) MAHAKAMA YA KAZI

B. E. K. Mganga
**JUDGE**