IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

LABOUR REVISION NO. 10 OF 2022

(Arising from Labour Dispute No. CMA/KLM/MOS/ARB/40/2021 of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi)

UPAMI AGRO BUSINESS LTD.....APPLICANT

VERSUS

HIZANI ABDUL KAYANDA
KAMWE SALIMU
ELIMRUCHI WILSON
RAMADHAN HAMISI
SALIMU JOSEPH
WAHIDY ALLY
KAJITI IBRAHIMU
IDDY MWEDADI
NASIBU SALEHE
GIDIONI JUMANNE
CHARLES DAUDU

..... RESPONDENTS

JUDGMENT

04/04/2023 & 22/05/2023

SIMFUKWE, J.

Upami Agro Business Ltd hereinafter referred to as the Applicant filed this application after being aggrieved with the award of the Commission for Mediation and Arbitration in **Labour Dispute No.**

CMA/KLM/MOS/ARB/40/2021 of Moshi dated 18th March, 2022. The application was filed under **section 91 (1)(a), Section 91 (4) (a)** and **(b), section 91(2)(c)** and **Section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004,** as amended by **section 14(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 (ELRA);** read together with **Rule 24 (1) (2) (a) (b) (c) (d) (e)** and **(f), rule 24(3) (a) (b) (c)** and **(d)** and **Rule 28 (1) (c) (d)** and **(e) of the Labour Court Rules, GN No. 106 of 2007.** The Applicant prayed for the following orders:

1. *That, this honourable court be pleased to call for the records of the proceedings and award from the Commission for Mediation and Arbitration in Labour Dispute No. CMA/KLM/MOS/ARB/40/2021, revise and set aside the award dated 18th March 2022 delivered by Hon. M. Batenga, Arbitrator.*
2. *That the Honourable court be pleased to grant costs of this application.*
3. *That the Honourable court be pleased to make such any other orders as it may deem fit.*

The application was supported by an affidavit sworn by Mr. Zena Mbega which was contested by the counter affidavit sworn by Mr. Hizani Abdul Kayanda, on behalf of his fellow respondents.

The factual background of the dispute is to the effect that before the CMA the respondents alleged that they were employed by the applicant as security guards via contracts which commenced on 22/12/2018. They were claiming for payments of overtime and public holiday allowances. That, they had been working without being paid overtime allowance.

On the other hand, the applicant admitted that the respondents were their employees though he said that they were employed as vermin control. Regarding the claim of overtime allowance, the applicant stated that the same was already paid in their salaries.

After full trial, the CMA decided the dispute in favour of the respondents whereby the applicant was ordered to pay each respondent Tshs 840,840/= as overtime allowance and Tshs 607,800/- each as holiday allowance. Aggrieved with the Arbitral award, the Applicant preferred the instant application and raised the following issues:

1. *Whether it was proper for the Arbitrator to hold that the Respondents were entitled to receive overtime.*
2. *Whether it was proper for the arbitrator to hold that overtime is the matter of getting to work in extra time without permission of the employer.*
3. *Whether it was proper for the arbitrator to hold that if the Applicant were (sic) informing his Boss about the employees complains (sic) amounts to permission and agreement.*
4. *Whether it was proper for the arbitrator to consider expiration of time to apply for overtime during employment could be cured by extension to file appeal in CMA*
5. *Whether it was proper for the arbitrator to hold that the Respondents were watchmen instead of Field guards (Vermin Control)*
6. *Whether it was proper for the arbitrator to contradict herself on the issue of the Respondents being watchmen or not and their entitlements as non-watchmen.*

7. *Whether the respondents were entitled to payment of overtime and other allowances as established by Honorable Arbitrator.*
8. *Whether it was lawful and proper to arrive in the decision she reached to pay overtime and public holidays allowances to the Tune of 1,448,640/= to all eleven Respondents.*

During the hearing of this application, Mr. Eneza Msuya, learned counsel argued the application for the applicant, while Mr. Kitua Kinja, learned counsel opposed the application for the respondents. The matter proceeded *viva voce*.

Mr. Msuya for the applicant submitted to the effect that the matter was filed by the respondents before the CMA claiming for payment of overtime and public holiday allowances. He argued that the respondents were employed by the applicant as field guards on a contract of one year and they were paid daily. All of them are no longer working with the applicant. That, before the CMA, both parties were given an opportunity to be heard and two issues were framed to wit:

i. *whether the claimants were entitled to the payment of overtime and public holiday allowances*
ii. *Whether it was true that the claimants were not paid the claimed allowances.*

Mr. Msuya submitted further that, Mr. Kayanda one of the applicants stated the evidence on behalf of other applicants to the effect that they entered into contract with the respondent (applicant herein). The said contract was admitted as Exhibit A1 which was similar to the contracts of

other applicants. They averred that they were working for 12 hours daily without being paid overtime while the contract required them to work for 8 hours per day. During cross examination, when asked about the daily income as per the contract they replied that their wage was Tsh 5540 per day whereby it involved 3850 as basic salary and they didn't know about the remaining amount.

It was further submitted that the CMA after ascertaining the evidence it decided the matter in favour of the respondents. Thus, it ordered payment of Tsh 1,448,640 per each respondent. The applicant was aggrieved by the decision so they filed this application in order for the court to revise and set aside the decision of the CMA.

Mr. Msuya opted to submit in respect of the above raised issues as follows: he consolidated the first and seven issues and argued them jointly. He abandoned the 3rd issue. The fifth and sixth issues were consolidated while the remaining issues remained as they were.

Starting with the issue as to whether it was proper for the arbitrator to hold that the respondents were entitled to receive overtime and other allowances; Mr. Msuya explained that as per clause 8.1 of the contract of employment **(exhibit A1)** the respondents were receiving a total of Tshs 5540 as daily payment which was distributed as salary of Tshs 3850 plus 1690/=. The learned counsel posed a question as to what was the amount of Tshs 1690/= for? He argued that according to the evidence adduced before the CMA by the respondents, they said that they were doing overtime work almost every day. The applicant had anticipated that due to the nature of their work, the respondents were to guard the farm and crops from being destroyed by animals. That, the applicant knew that it was according to the law that the respondents had to work at least nine

hours, as provided under **section 19(2) of ELRA**. Also, the applicant knew that this time will not be enough, thus he decided to pay the respondents Tshs 1690/= to cover overtime. That's why the respondents were receiving Tshs 5540 daily instead of Tshs 3850/- as their basic daily wage. Thus, the daily wage was basic salary plus overtime allowance.

The learned counsel referred the court to the case of **Emmanuel Muhanda vs BV-USC Tanzania Limited, Revision Application No. 294 of 2019** where at page 5 the court quoted the case of **Benjamin M. Kimu vs Real Security Group and Marine Service, Revision No. 199/2011 LCCD 2013** in which it was held that:

> *"Overtime allowance is part and parcel of employees of salary. Therefore, it was supposed to be claimed as and when the claim arose. The claim arises when the salary is due for payment, the law requires that the claim be lodged within sixty days; see rule 10(2) of the Labour Institution (Mediation and Arbitration) Rules GN 64/2007."*

The applicant's counsel was of the view that, the applicant was correct to pay the respondents the sum of Tshs 5540/= as their daily wages which covered both basic salary and overtime payment. It was stated by Mr. Msuya that, the word used in the agreement as 'kivutio' describes overtime payment or allowances and this word somehow confused the respondents. Hence this dispute arose.

Mr. Msuya drew the attention of this court that we have to bear in our mind that Kiswahili language has a lot of words that can be used to mean the same thing like **"kivutio"**. It was the opinion of Mr. Msuya that the direct translation of the word 'kivutio' is attraction. The question is what

kind of payment may be an attraction to employees other than those allowances?

From the ongoing analysis, the learned counsel was of the view that it was not proper for the Arbitrator to order the applicant to pay the respondents overtime payment as the same was already being paid.

Concerning the public holidays allowance, Mr. Msuya submitted that clause 11 of the employment contract (exhibit A1) provides clearly what is to be done during holiday and how the payments are made. That, there should be an agreement between the employer and employee to work on public holiday. That, the payment of an employee who works on public holiday has to be two times of his daily basic salary. From the observation of employment contract, Mr. Msuya opined that firstly, the respondents were supposed to tender an agreement between them and the employer that they agreed to work during the particular holidays; secondly, the respondents were supposed to claim such holiday allowances immediately after they had accomplished their work or at least at the end of the particular month, but this was not done. He argued that, this position was stated in the cited case (supra) and **Rule 10(2) of the Labour Institutions (Mediation and Arbitration Guidelines) GN 64/2007**.

Mr. Msuya contended that the respondents failed to specify which holiday did they attend because they never tendered any document to show that they attended the work station to be entitled the award of Tshs 607, 800/- for each respondent. That, the Arbitrator did not describe that amount covers which holiday. On the strength of the noted reasons, Mr. Msuya was of the view that it was not proper for the Arbitrator to hold that the respondents were entitled to receive overtime payment and holiday allowances.

The learned counsel referred to page 4; 3rd paragraph of the cited case to cement that there must be an agreement approved by the employer. Also, he referred to page 5; 3rd paragraph of the cited case where it was said that:

> *"…it is clear that the applicant has failed to prove the claim of overtime and the same was filed out of time."*

The learned counsel concluded that the respondents were not entitled to those allowances and there was no agreement to work on public holiday as provided in the agreement.

Submitting on the second issue as to whether it was proper for the Arbitrator to hold that overtime is the matter of getting to work in extra time without the permission of the employer; it was stated that **section 19(3)(a) of the ELRA** requires that there should be an agreement between an employee and the employer to work for an extra time. It was opined that the Arbitrator misdirected herself that there is no need for the employee to get permission from the employer to work for an extra time.

The third issue is whether it was proper for the Arbitrator to consider expiration of time to apply for overtime during employment could be cured by extension of time to refer the dispute to the CMA. In support of this issue, Mr. Msuya stated that all the employees (respondents) are no longer working with the applicant. That, the claims they are making were out of time as they exceeded sixty days since when they worked for overtime. According to **rule 10(2) of GN No.64/2007** the claims for overtime and others have to be lodged within sixty days. In this matter such stated time had already expired, even during the time of applying for extension of time to refer the dispute to the CMA. That, very unfortunately, the

Arbitrator had tried to cure the lapse of time by extending time to file the matter out of time. Thus, the Arbitrator consideration was not proper.

The fourth issue on whether it was proper for the Arbitrator to hold that the respondents were watchmen instead of field guards; the learned counsel submitted that according to the contract of employment in clause 8.2 overtime payment is explained with an exception of people who were not required to be paid overtime allowance. That, those people include drivers and watchmen. The question is whether the respondents were receiving such amount or not? The learned advocate suggested that if the answer is yes, it means the respondents do not fall under the exception. If no, the respondents are likely to fall under exception category. It was stated further that, the respondents when giving their evidence before the Commission, they stated that they were receiving Tsh 5540/= as their daily wage which includes overtime allowances; which means the respondents do not fall under the exception category. On top of that, their duty was to chase animals and not otherwise. Mr. Msuya formed an opinion that the Arbitrator misdirected herself by considering the respondents as watchmen while they were not.

Submitting on the last issue on whether it was lawful and proper for the Arbitrator to arrive at the decision to pay overtime and public holiday to the tune of Tshs 1,448,640/= to eleven respondents; Mr. Msuya explained that the Arbitrator did not give any justification which made her to reach to such a decision. Also, on the issue of holiday allowance, the Arbitrator did not specify which holiday did the respondents attend at work.

As per the above reasons, the learned counsel for the applicant prayed this court to set aside the decision of the CMA.

Opposing the application, Mr. Kitua Kinja, learned counsel for the Respondents in reply to the issue of overtime and public holiday allowance, submitted that it was proper for the respondents to receive overtime and other allowances. That, before the CMA, the respondents tendered **exhibit A2** which was a letter which confirmed that the respondents had their claims of overtime and holiday allowance. The said letter was written by the Farm Manager and it was addressed to the Managing Director. It was substantiated that the respondents worked for more than eight hours. He quoted page 5 of the ruling of the CMA.

Further to that, Mr. Kitua referred to **section 19(2) and (3) of the ELRA** which provides that there should be agreement between the employer and employee in respect of overtime allowance to support the quoted paragraph of the ruling of the CMA.

Concerning allowances termed as 'kivutio' that the same was part of overtime allowance and that the respondents had no claims against the applicant; Mr. Kitua submitted that the said allegations contradict with **exhibit A2**. In addition, the applicant cited the case of **Emmanuel Mahanda** (supra) which is in respect of time limitation. He referred to page 5, 3rd paragraph fifth line of the ruling of the CMA to justify his argument.

Responding to the issue of limitation to file their claims, Mr. Kitua stated that the respondents filled CMA Form No.2 for condonation and their application was granted. That, if the applicant was dissatisfied, they could have applied for revision against the said decision. However, the applicant conceded to the application for condonation and the CMA proceeded to determine the dispute on merit.

On the issue of extension of time, Mr. Kitua said that it was partly submitted on the previous issue. That, the applicants conceded to the application for condonation.

Contesting the issue as to whether the respondents were entitled to be paid Tshs 1,448,640/= each; it was submitted that the CMA reached at the said decision after analysing evidence adduced before the Commission and was satisfied that the respondents deserved to be paid the said allowance as the claim was pursuant to **section 19(2) and (3) of the ELRA**.

In his conclusion, the learned counsel for the respondents prayed the court to dismiss this application because the respondents were entitled to be paid the allowances from 2018 to 2020.

In his rejoinder in respect of **exhibit A2**, the learned counsel for the applicant stated that the aim was not to justify the presence of overtime, leave allowance or any allowance since the same aimed to inform the management threat of strike by the employees and the management found the grievances of the employees to be baseless.

On the issue of overtime, Mr. Msuya emphasized that the same should be pursuant to the agreement with the employer and not as the employee wishes.

Concerning the cited case of **Emmanuel Mahanda** (supra) he insisted that the same was proper. He reiterated his submission in chief in respect of the issue of extension of time. He added that the extension of time was in respect of the dispute and not payment of allowances.

The learned counsel reiterated his submission in chief on the 4th issue in respect of the issue of the respondents being watchmen instead of field

guards. He insisted that the employment contract differentiated the two positions.

Lastly on the issue whether the respondents deserved to be paid Tshs 1,448,670/=, it was added that for the respondents to deserve to be paid such amount, the Commission should have explained which leaves were the respondents entitled to be paid. That, the same was fabricated as there was no justification and the respondents used internal communications to justify their claims.

I have considered the submissions of the learned counsels of both parties as well as their respective affidavits and the CMA records. Pursuant to the issues suggested by Mr. Msuya, this court is of considered opinion that the issues for determination are:

1. *Whether it was proper for the Arbitrator to hold that the respondents were entitled to be paid overtime and public holiday allowances?*
2. *Whether the awarded claims of overtime and public holiday were justifiable?*

Starting with the 1st issue, **whether *it was proper for the Arbitrator to hold that the respondents were entitled to be paid overtime and public holiday allowances;*** this issue was also considered before the CMA whereby the Hon. Arbitrator at page 6 of the Award found that pursuant to **Exhibit A2** which is the letter written by the manager addressed to the Director concerning the respondents' claims of allowances was enough evidence to prove the fact that the respondents were entitled to the said allowances.

It is on that basis that the applicant lamented that the respondents were not entitled to overtime and public holiday allowances since there is no

agreement to work overtime and during public holiday. *Second*, the applicant complained that the respondents' claim should have been claimed immediately after they had accomplished their work. Moreover, the learned counsel submitted that the respondents did not specify which holidays did they attend the working station.

The respondents through their learned counsel submitted to the contrary where they relied on **exhibit A2** believing that the same confirmed their claims of overtime and holiday allowances. They admitted that under **section 19(2) and (3) of the ELRA**, there should be an agreement in respect of overtime allowances. They strongly supported the CMA's Award.

The law is very clear in so far as the claim of overtime is concerned. **Section 19(1) and (3)(a) of the ELRA** provides that:

> ***19****.-(1) Subject to the provisions of this Sub- Part, an employer shall not require or permit an employee to work more than 12 hours in any day.*
>
> *(2) …..*
>
> *(3) Subject to this Sub-Part, an employer shall not require or permit an employee to work overtime-*
>
> > *(a) except in accordance with an agreement; and*
> >
> > *(b) …..*

From the above provision, as rightly conceded by the learned counsel, what is deduced from the above provision, is that the employee shall not work extra time unless there is an agreement with his/her employer to that effect.

My task is to see whether there was such prior agreement with the applicant to work overtime and during public holidays. Paragraph 11.1 of the employment contract (Exhibit A1) provides that:

> *"11.1 Kufanya kazi siku ya sikukuu lazima kuwe na makubaliano kati ya mwajiri na mwajiriwa.*

I have gone through the evidence on record, it is crystal clear that the respondents did not tender any agreement be it oral or written to support the fact that there was agreement for them to work overtime and during public holidays. Since the respondents were the one who alleged that they worked overtime and during public holidays, they were duty bound to prove that fact before the CMA. Therefore, since there is no evidence to substantiate the fact that there was prior agreement, then the respondents were not entitled to such allowances. I am persuaded by the words of my learned sister Honourable Mkwizu, J in the case of **Kuwasa vs Simon Maduka (Application for Revision No. 17 of 2019) [2020] TZHC 996** at page 9 to 10 where she held that:

> *"It should be stressed here that overtime works has to be proved and must be claimed at the end of each month when and as they accrue. See the case of Omary Mwinyimvua na Wenzake V.M/S Sengo 2000 (T) Ltd Revision No.157 of 2009."*

On the basis of the above decision, I am of considered opinion that, in the instant matter, the Arbitrator's findings are not justified since she did not describe how she arrived at the conclusion as the respondents did not prove the days they worked over time and the public holidays they attended at their work place. For any employee to be entitled to overtime

allowance and public holiday allowances, among other things he/she should prove specifically the days he/she worked extra and which public holidays did he attend the work stations. Apart from that, there is no breakdown of the awarded amount to each respondent, thus the number of days which the respondents were ordered to be paid.

The above discussion resolves the above raised issues in favour of the applicant, that is to say, it was not proper for the Arbitrator to hold that the respondents were entitled to be paid overtime and public holiday allowances and thus; the awarded claims of overtime and public holiday were not justifiable.

In the upshot, I hereby revise, set aside the CMA award and findings thereto, and grant this application. This being a labour matter, no order as to costs.

It is so ordered.

Dated and delivered at Moshi, this 22nd day of May, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

22/05/2023