

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT KIGOMA

REVISION NO. 8 OF 2022

(Originating from REF. NO.CMA/KIG/175/2020/17/2021)

TANZANIA POSTS CORPORATION.....APPLICANTS

VERSUS

JUMANNE GAUDENCE.....1ST RESPONDENT

SAMSON SAMWEL.....2ND RESPONDENT

IDDY KIZIGO..... 3RD RESPONDENT

KASIMU JUMA.....4TH RESPONDENT

JOHNSON KIGOGO5TH RESPONDENT

JUDGMENT

25/7/2023 & 5/10/2023

MLACHA, J.

This revision seeks to revise and vacate the decision of the Commission for Mediation and Arbitration for Kigoma (the CMA) made in Labour Dispute Ref. No. CMA/KGM/175/17/2021. The respondents, Jumanne Gaudence, Samson Samwel, Iddy Kizigo, Kasimu Juma and Johnson Kigogo were the applicants at CMA. The applicants, Tanzania Posts Corporation, were the respondents. It is a case for unlawful termination and payment of terminal benefits. The respondents won the case. The records show that there has been earlier attempts at the the CMA and before this court on the same



matter without success. The last order of this court had the effect of referring the parties back to the CMA hence the hearing which led to the decision which is sought to be revised.

The records show that the respondents entered into individual contracts with the applicants (which are similar) in 2008 and 2009 to clean the office on terms which are stipulated in the contracts. They worked upto 2013 when their services were terminated. They could not be paid terminal benefits hence the dispute. The central issue at the CMA and before this court is whether the respondents were employees of the applicants and if so, whether it was right to award terminal benefits to them. The CMA found that they were employees and ordered payment of salary arrears, one months salary in lieu of notice, severance allowance, annual leave and 12 months salary for unfair termination, total Tshs. 16,869,230/=.

Aggrieved by the finding and decision, the applicants have come to this court by way of revision seeking to vacate the decision of the CMA on grounds stated. They are also seeking to revise an earlier decision made by the CMA in CMA/KIG/175/2020/17/2021 which extended the time and allowed the dispute to be heard out of time.

Para 4 of the affidavit supporting the application has a statement of legal issues arising from the material facts. From the statement of issues, I could

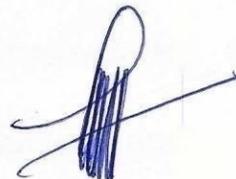


get six grounds upon which the revision is sought. **One**, the arbitrator had no jurisdiction to determine the dispute between the parties. **Two**, that the arbitrator was wrong to find and hold that the respondents were employees of the applicants instead of contractors as stipulated in the contracts. **Three**, that the respondents had no valid contracts in terms of Government Circular Ref. AC/45/260/01/5 of 19/5/2008 entitled 'Utekelezaji wa Muundo wa Utumishi' and government policy contained in 'Sera ya Management ya Utumishi wa Umma, Toleo la mwaka 1998'. **Four**, that the arbitrator erred in making the award for terminal benefits for five respondents based on the evidence of two respondents. **Five**, the arbitrator erred in extending the time to file the dispute (made in CMA/KIG/175/2022) for lack of good grounds to do so. **Six**, that the award for annual leave and other reliefs were made wrongly.

Before going to examine the parties submissions on the above grounds, I find it proper to reproduce the contract between the parties for easy of reference. It reads in part in Kiswahili as under:

"MKATABA WA KUSAFISHA OFISI YA POSTA

MKATABA HUU umefanyika leo tarehe 24 mwezi MEI 2008 kati ya SHIRIKA LA POSTA TANZANIA, SLP 9551, DAR ES SALAAM (ambalo katika mkataba huu litajulikana kama SHIRIKA) kwa upande mmoja and ndugu JUMANNE



GAUDENCE wa SLP 631 KIGOMA (ambaye kwa upande mwingine katika mkataba huu atajulikana kama "MKANDARASI")

KWA KUWA

A: **SHIRIKA** linahitaji ofisi ya Posta iliyopo KIGOMA isafishwe,

B: **MAKANDARASI** ameulewa na kwa hiyari yake amekubali Mkataba huu kama ulivyo.

HIVYO MKATABA HUU UNASHUHUDIA YAFUATAYO:-

1. **MKANDARASI** yuko tayari kutoa huduma ya kusafisha ofisi kwa gharama ya masharti yanayoonekana hapa chini.

1.1 **MKANDARASI atahakikisha kuwa kazi ya usafi inafanyika kwa uaminifu na uaangalifu mkubwa na iwapo itafanywa na mtu mwingine kwa niaba yake mtu huyo atakuwa ni muangalifu na mwaminifu na atatambulishwa kwa SHIRIKA kabla hajafanya kazi kwa niaba ya MKANDARASI.**

1.2 **MKANDARASI atagharamia na/au kulipa SHIRIKA iwapo kifaa chochote cha SHIRIKA kitaharibiwa, kitapotea au kuibiwa huko kuasababishwa na MKANDARASI au mtu aliyeifanya kazi hiyo kwa niaba yake.**

1.3 **MKANDARASI atafanya usafi kila siku ya kazi (jumatatu hadi ijumaa).** Vifaa vya kufanyia usafi atapewa na SHIRIKA na



atafanya usafi huo **kila siku kwa muda usiozidi masaa mawili** tangu ofisi ifunguliwe.

1.4 **MKANDARASI** atahakikisha kwamba:-

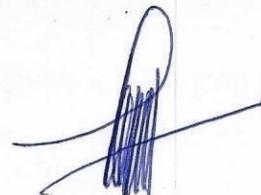
a) Hagusi/hachukui au kutumia vifaa vya **SHIRIKA** vilivyo katika ofisi husika kwa nia yoyote nyingine isipokuwa kwa kuvisafisha kwa kutoa vumbi tu.

b) Hatumii maji, umeme au huduma nyingine iliyo katika ofisi husika isipokuwa kwa ajili ya kufanya usafi tu.

c) **Haingii, habaki au hashindi kwenye ofisi husika isipokuwa katika muda wa kufanya usafi tu na kuwa ataondoka katika eneo husika mara tu baada ya kufanya usafi.**

1.5 **SHIRIKA** litakuwa na mamlaka ya kumtaka **MKANDARASI** amtote katika ofisi husika yeyote atakayeajiriwa na **MKANDARASI** iwapo mtu huyo kwa mtazamo wa **SHIRIKA** ataonekana kutokuwa na tabia nzuri, kutofanya kazi vizuri au kuwa mzembe katika utendaji wake.

1.6 **SHIRIKA** halijamwajiri **MKANDARASI** na halitahusika iwapo **MKANDARASI** au mfanyakazi wake ataumia, kuugua au kupatwa na tatizo lolote katika siku ambazo mkataba huu ukiwa hai.



2. MAKUBALIANO YAFUATAYO PIA YAMEFIKIWA KUWA:-

2.1 Upane wowote utaweza kuvunja mkataba huu kwa kuupa upande mwingine notisi ya siku thelathini (30) ya kusudio la kuvunja mkataba huu.

2.2 Malipo ya MKANDARASI yatakuwaa ni shilingi Elfu hamsini na tano tu (55,000/=) kwa mwezi ambazo zitalipwa kila mwisho wa mwezi. Ndani ya mkataba huu Shirika halitalipa malipo mengine zaidi ya haya yanayotajwa hapa.

2.3 Mkataba huu utahesabiwa kuwa umeanza mnamo tarehe 01 Mwezi MAY 2008 na utaendelea hadi hapo utakapovunjika kupitia utaratibu ulioelezwa katika dondoo No.2.1 hapo juu.

2.4 Kwa madhumuni ya mkataba huu MKANDARASI na/au wafanyakazi wa MKANDARASI hawatakuwa waajiriwa wa SHIRIKA kwa namna yoyote ile.

2.5 Mkataba huu utatawaliwa na sheria za Nchi ya Tanzania

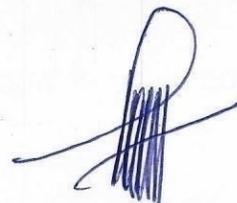
*3. UMESHUHUDIWA na wahusika katika tarehe iliyotajwa hapo juu”
(Emphasis added)*

Mr. Nickson Tengesi state attorney who appeared for the applicants and Mr. Michale Mwangati who appeared for the respondents submitted on all grounds of revision but I think this matter can be disposed on grounds

one, two, four and six only. I will leave ground three and five for an appropriate time in future.

Ground one is on the jurisdiction of the CMA to deal with the problem. Grounds two and six can be joined together to read, whether it was justified, based on the contract between the parties and evidence adduced, to find that the respondents were employees of the applicants and award terminal benefits. Ground four was on whether it was correct to make the finding and award based on the evidence of two witnesses alone. I will start with grounds two and six.

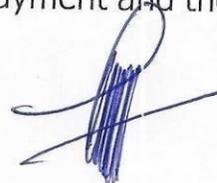
Mr. Tengesi had the view that the contract did not show that the respondents were employees of the applicants. He had the view that they were contractors as reflected in the contracts, not employees. Based on this understanding, counsel had the view that, the CMA erred in finding that the respondents were employees and make the award for terminal benefits. He argued the court to set aside the award. While agreeing that the contracts were not employment contracts, Mr. Mwangati invited the court to find that the respondents were just deceived to deny them terminal benefits. He argued the court to interpret the contracts as employment contracts because that is what was actually taking place at the place of work. They worked longer than what is seen in the contracts



and some of them were in the job prior to the signing of the contracts. He said that they worked under the direct control of the applicants and worked from 8:30 am up to 3:30 pm or 4:30 pm. They worked more than 45 hours per month. He could not produce any document showing that they existed in the job prior to the signing of the contracts or worked longer than what is seen in the contracts. Nevertheless he invited the court to find that they were employee and are entitled to terminal benefits as awarded.

I had a close look of the contract. I have considered the submissions. I think it is trite law that where the contract is in writing, the document must speak for itself. Oral evidence cannot override what is written. Further that, if there is any changes to the document, they must be made by another document. I have no other document explaining or altering the rights of the parties other than what is before the court. I will limit myself to the document now before the court.

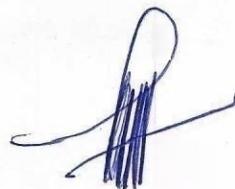
The document say clearly that the respondents were 'contractors' rendering cleanliness services to the applicants. It states clearly that they are not employees of the applicants. They were to work for two hours a day for five days a week, Monday to Friday and were not supposed to stay at the place of work after finishing the work. Their payment and the mode



of payment is stipulated in the contract document. The question on whether they were employees or not is stated very well in clause 2.4 which reads in Swahili as under:

*"Kwa madhumuni ya mkataba huu MKANDARASI na/au wafanyakazi wa MKANDARASI **hawatakuwa waajiriwa wa SHIRIKA kwa namna yoyote ile.**" (Emphasis added)*

This literally means that, for the purposes of this contract, the contractor (the respondents) or any of his employees, shall not be employees of the corporation (the applicants). Now, if the applicants worked for more than 2 hours a day or if they did other activities more than what is stated, those were breaches of the contracts which entitled them to sue. They were supposed to file a suit in the court of competent jurisdiction for breach of contract and if proved, they could be entitled to damages. If they had a right to sue for breach of contract but could not sue, that cannot change their status to fit the situation. Neither can it have the effect of converting them to employees so as to get what they could not get from another forum. The law is clear in section 61 of The Labour Institutions Act, cap 300 and section 4 of The Employment and Labour Relations Act, cap 366 on who is an employee. They are not employees so to say. See also the decision of this court in **OXFAM v. Omary Selemani** and 6 others,

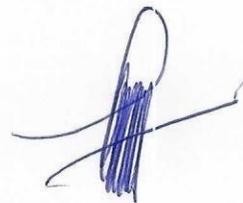


Revision No.4 of 2022 (High Court Labour Division Kigoma). With respect, I will differ with the views of the arbitrator and the counsel for the respondents because the respondents were not employees in view of the status of the underline contract which was the basis of their relations.

Next is ground one. In view of what has been said above, the respondents being contractors engaged to render cleanliness services to the applicants and taking the terms of the contracts which are clear, the CMA had no mandate in the matter. The contracts now before the court are normal contracts not employment contracts rendering the CMA without jurisdiction. This made the proceedings and the award null and void.

Grond four should not detain us. Counsel did not dispute that only two respondents gave evidence. The issue is whether the evidence of two respondents could be used as a base to make a decision involving 5 respondents. This takes us to sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2002 which state inter alia:

"110. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

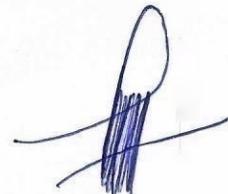


111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. " (Emphasis added)

This means that three respondents did not discharge their burden of proving their cases as required by sections 110 and 111 of the Law of Evidence Act, and thus their cases remained without proof. The evidence of the two respondents was therefore taken wrongly to extend to those who did not come to court. What was said by the two respondents should be limited to their cases not for all for all. See **Akiba Commercial Bank Ltd v Prisca Anyango Raya and Another**, Commercial Case No. 4 of 2005, HCT (Commercial Division) (unreported) Massati, J (as he then was). Even in representative cases, each party must come forward by oral evidence or witness statement to prove his case. That is the practice and the law. It follows that the CMA erred in making a finding and the award for all based on the evidence of two respondents.

That said, with respect to the arbitrator and counsel for the respondents, the proceedings and the award of the arbitrator is found to have been made wrongly and therefore revised and vacated.

It is ordered so.





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L.M.Mlacha

Judge

5.10.2023

Court: Judgment delivered online through the virtual court. I am at the Institute of Judicial Administration Lushoto and counsel for the parties are at Kigoma.

Right of appeal explained.



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L.M.Mlacha

Judge

5.10.2023