IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO 291 OF 2009

DIRECTOR USAFIRISHAJI AFRICA..... APPLICANT

VERSUS

HAMIS MWAKABALA AND 25 OTHERS ..... RESPONDENTS

(Original CMA/DSM/TEMP/2198)

RULING

14/12/2009 & 30/4/2010

Rweyemamu, R.M.J;

In this application, the employer seeks an order for revision of the *Commission for Mediation and Arbitration* (CMA) award dated 19/11/2008, wherein the employer was ordered to pay each employee T.Shs. 390,000/= being payment of notice, leave entitlement and severance. The applicant believes the decision was in err in so far as the arbitrator's decision was based on the finding that the respondents were employees.

The background information to this matter is as follows: The respondents' employment was terminated on 15/10/2007 and they filed a dispute to the CMA claiming for terminal benefits. The key issue of contention at the CMA was whether the respondents were employees in terms of the law or not. The arbitrator decided that the respondents were employees as defined under section 14(1) of the *Employment and Labour Relations Act*, 6/2004 (the Act) and presumed employees under section 61 of the *Labour Institutions Act*, 7/2004 (LIA). He reasoned as follows:

> *"Kwamba kwa mujibu wa sheria hiyo, walalamikaji walikuwa wanafanya kazi chini ya uelekezaji/uangalizi wa mlalamikiwa na kwamba wameshafanya kazi zaidi ya masaa 45 kwa mwezi kwa miezi mitatu mfululizo. Vile vile kwamba walalamikaji walikuwa wanapewa vifaa vya king na mlalamikiwa na kwa kumfanyia kazi yeye.*
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> *Kwamba mlalamikiwa anapinga ajira yao, lakini hakutoa mikataba yoyote ya maandishi ili kuthibitisha kuwa wao siyo waajiriwa wake. Hivyo wanaomba kulipwa stahili zao za kuachishwa kazi yaani notisi, likizo, kiinua mgogo pamoja na masaa ya ziada kwa kuwa walikuwa wanaingia kazini saa 1.30 asubuhi na kutoka saa 12.00 au zaidi ya hapo".*

He further decided that the respondents were employed on a contract of unspecified period but paid weekly and that they were retrenched by the applicant after he failed to provide uniforms. He found that as employees, they were entitled to terminal benefits in terms of

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section 41 (1) (b) (i) of the Act which he found to be: Notice based on 4 days salary, 28 days leave; and severance pay.

The sum due was calculated based on the average of Shs. 60,000/= since others were paid 58,000/= and others 60,000/=. These entitlements in terms of the law were found to be; notice based of 4 days salary being shs 40,000/=; leave in the sum of shs 280,000/= and severance Shs 70,000/=. The total awarded was shs 390,000/= per respondent.

The arbitrator also; found their overtime claims unproved and dismissed them and declined to decide the issue of fairness of retrenchment because it was not pleaded in their referral *Form No. 1.*

At the hearing of this application, the applicants were represented by Mr. Lugaila advocate and the respondents appeared in person although their pleadings were drawn *gratis* by the Legal and Human Rights Centre. The matter proceeded by way of written submission.

The gist of the applicant's submission was that "..... *the arbitrator did not properly construe the law on who is an employee and as to whether the respondents herein were permanent employees of the applicant":* They elaborated; that the respondents were employed for specific tasks, and were not part of the applicant's payroll; that payment was based on tasks performed i.e. the amount of bags loaded and unloaded and were not on 12 months continuous service.

30/4/2015

In reply, the respondents submitted that they were employees as their form of engagement qualify as a contract of employment under section 14 (i) (c) of the Act which include: "*(a) a contract for unspecified period of time; (c) a contract for a specific task*". They elaborated that they were employed to carry out specific tasks of loading and off – loading cement from train wagons, and the nature of their engagement amounts to employment in terms of section 61 (a) (c) (e) & (f) of the Act. They worked for an average of 45 hours for more than 3 months and were provided with working equipment being protection equipments and gate passes.

Further, they submitted that the applicant had a burden of proof as he failed to keep a record of their employment as required by section 15 (6) of Act.

The issue for decision is whether the arbitrator's decision that the respondents were employees was properly reached on the facts on record.

I have considered the parties arguments in light of the facts on record and the law. Under the law a person who renders service to any other person including for a specific task is presumed to be an employee until the contrary is proved if one or more of the scenerios itemized under section 61 of LIA exists.

That section provides and I quote:

"61. For the purpose 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 organisation, the person is a part of that organisation;

(d) The person has worked for that other person for an average of at least 45 hours per month over the last three months;

(e) The persons 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..."*

On the facts before him, the arbitrator rightly found that conditions specified under section 61 (a), (d) to (f) existed. In view of that, I find no grounds justifying revision of the arbitrator's award. The same is hereby confirmed and this application dismissed.

R. M. Rweyemamu
JUDGE
29/4/2010