

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

LABOUR REVISION NO. 946 OF 2018

BETWEEN

GEORGE KITINDA MWAKASITU.....APPLICANT

VERSUS

TEMEKE MUNICIPAL.....RESPONDENT

JUDGMENT

Date of the Last Order: 21/04/2020

Date of the Judgment: 19/06/2020

A. E. MWIPOPO, J

The Applicant namely **GEORGE KITINDA MWAKASITU** filed the present Application seeking for revision against the decision of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/TEM/340/2012 delivered on 30th September, 2015 before Hon. JOHSON FARAHA, Arbitrator. The applicant alleges that the decision of the Commission was tainted with material irregularity and errors of the law and facts on the face of records. The applicant is praying for the court to revise and reverse the CMA decision following the acts of the Commission to

prejudice the entire process of determining the dispute in question. Also for failure to consider the evidence adduced by the Applicants, hence reaching to erroneous decision. The applicant is also praying for any other relief the Court may deem fit and just to grant.

The background of the dispute in brief is that the applicant was appointed as Secretary of the Kurasini Ward Tribunal on 11/05/2009. On 09/01/2012 the applicant was informed that his appointment was revoked for the reason that he was sick and another Secretary and another member of the Ward tribunal have already been appointed. The applicant did write to the respondent requesting to be paid his salaries for the period he was sick but he was denied for the reason that the holder of the post of Secretary of the Ward tribunal was not an employee of the Temeke Municipal Council. The applicant referred the matter to the Commission which dismissed it after hearing witnesses from both parties. The Commission dismissed the application for the reason that there was no employer employee relationship between the applicant and the respondent. Aggrieved by the CMA decision the applicant have filed the present application.

The Court on 21/04/2020 ordered hearing of the application to proceed by way of written submissions. Both parties adhered to the schedule of the Court, however the applicant did not file rejoinder submission.

The applicant's first ground of revision is that the trial arbitrator misconducted himself and failed to record properly evidence adduced by the applicant where he concluded that there was no employment relationship between the respondent and the applicant. He submitted that there existed a purely employment relationship between the two since the applicant was employed by the respondent on 11th of May, 2009, according to the respondent appointment letter – exhibit PW1. Therefore the arbitrator holding that the applicant was not an employee of the respondent was a baseless which intended to deny justice to the applicant.

He submitted that the post of "Katibu and Mjumbe wa Baraza" which the applicant served to the respondent, is a statutory post, which falls under Section 4(2) of the Ward Tribunal Act, No. 7 1985 (Sheria ya Mabaraza ya kata, 1985). The qualification for the post is provided by Section 5(2) of the Ward Tribunal Act (Sheria ya Mabaraza ya Kata 1985) which means that the post is legally established. The appointment letter – Exhibit PW1 was written by Temeke Municipal Director, and all of the correspondences addressed to the applicant was from Temeke Municipal Council, therefore Temeke Municipal Council was an employer of the applicant without any ambiguity.

On the second ground of revision, he submitted that the applicant is employed by the respondent legally under Section 4(2) of the Act. No. 7, 1985 (Sheria ya Mabaraza ya Kata Na. 7, 1985). Since the applicant qualified for the post under section 5(2) of Act No. 7, 1985, there is no doubt that the applicant was entitled to be paid allowances and salaries under Section 27(2) of the said Act. 7, 1985 which provides that the secretary of the ward tribunal shall be paid salaries and allowances as the appropriate authority may, in collaboration with the Ward Committees, determine.

He submitted further that the employment contract which existed between the applicant and the respondent was for a duration of five years, subject to renewal, this is in accordance with Section 6(3) of the said Act, No. 7 of 1985. Since the applicant worked for a duration of three years starting from 9th May, 2009, up to 9th January, 2012 when he was terminated, he is entitled to be paid his arrears salary for the years of his service being 601,500 per month for 36 months making the claim of salary arrears to be Tshs. 21,654,000/=. He also pray to be paid salary compensation for the period remaining in his employment contract after the respondent have breached the contract which is 601,500 x 24 months equaling to Tshs. 18,04,5,000/=. The applicant is also praying for payment of Tshs. 945,000/=being medical cost. Hence the grand total the applicant

was claiming was Tshs. 39,441,000/= as all terminal benefit accruing after breach of contract by the respondent.

In contention the respondent argued that the applicant was informed by a letter the appointment of the new Ward Tribunal member and new Secretary of the Tribunal which was already implemented. The appointment of a new secretary of the Ward Tribunal was mandatory because cases were not being attended to for long period of time resulting to bulkiness, thus leading to the decision of appointing a new secretary to the Ward Tribunal. The applicant was not terminated by the respondent. For a person to be terminated he/she ought to be in an employment relationship with the employer. In the matter at hand the Applicant was not employed by the Respondent as he claims to be, thus there cannot be any elements or reasons of unfair termination between the Applicant and the Respondent.

The respondent submitted that the post of Secretary of the Tribunal is established by the Ward Tribunals Act, No. 7, 1985 under Section 4(2) which states that:-

"There shall be a secretary of the tribunal who shall be appointed by the local government authority in which the ward in question is

***situate, upon recommendation by the Ward
Committee”.***

The Applicant was appointed as the Secretary of the Tribunal via a letter dated 11/05/2009, this decision was by a meeting of the Kurasini Ward Development Committee. The Respondent letter was adhering to the recommendation made by the Ward Development Committee meeting whereas the said appointment was mainly for the reasons of serving the people of Kurasini Ward, a position which a person volunteering to be such is neither an employee nor does he or she consider the appointment letter as letter of employment as alleged by the Applicant. The letter does not describe the terms of employment such as salary scale, kind of employment, working hours, leave and etc.

The respondent was of the view that the trial Arbitrator evaluated properly the evidence adduced before the Commission and the Applicant failed to convince the Arbitrator that there was employment relationship between the Applicant and the Respondent. The evidence adduced was logical and direct in the sense that the Applicant appointment was through the Ward Tribunal and that the Applicant was providing his services as the secretary and not directly from the Respondent. Although it was statutory

post as alleged by the Applicant still it does not form the basis of Employment by only receiving an appointment letter and rendering the whole procedure to be adhering to the "Employment Procedures". The Respondent is simply misdirecting himself.

The respondent averred that the Applicants submission contains irrelevant issues and matters in regards to the decision of the Commission of Mediation and Arbitration. The Applicant has embarked on explaining the importance of the position of the Secretary of the Tribunal, matters which do not establish the fact that the Applicant was an employee employed by the Respondent simply basing on the importance of the particular post he was holding at that particular time. The arbitral award was fair, accurate and very clear, especially in relying on the Human Resources Manager evidence whereas the witness DW1 testimony proved that there was no employment relationship between the Applicant and the Respondent. The Applicant was only a volunteer who could not fall either under employment of permanent contract or contract of specific period of time as provided for under **Section 14 of the Employment and Labour Relation Act, No. 6, 2004.**

DW1 testimony shows that the Applicant's appointment was based on the Ward Tribunal Act, 1985, in which such appointments did not cater for

the Employment structure of the Respondent since the Applicant's post is not included in such system. Therefore, since the Respondent is vested with power to manage the Ward Tribunals in the particular District, and also has power to oversee the recommendations and decisions of the Ward Tribunals and implement them, that is how the Applicant's appointment was done and he sincerely accepted it knowing exactly that he was going to serve under Kurasini Ward Tribunal.

The respondent asserts in his submission that the arguments by the Applicant is baseless and pointless and it is misleading the applicant. The correspondence from the Respondent to the Applicant does not mean that the Applicant is an employee. The Respondent has the authority to administer and manage the Ward Tribunals, and all correspondences within the Temeke Municipality must go through the Respondent. Therefore for the Applicant to rely on the appointment letter and all others since they were written by the Respondent to mean he was employed is rather fallacious and ill founded.

The respondent was of the view that the Applicant knew by accepting this post that he was only going to paid allowances and not salary. The fact is applicable to date in all Ward Tribunals. The allowances are paid upon

every meeting sat by the Ward Tribunal with its members which is twice per week only, and it is paid if the member is present in such particular meeting to which the Applicant was paid during all the period he attended. The Applicant was well aware of the requirements of the said post that is why he took an oath and signed it knowingly it was volunteering to serve the people of Kurasini Ward by being the Secretary of the Tribunal.

The respondent argued that in the light of his submission the Applicant is not entitled to any of the claims as he asserts in his submission. The applicant was not an employee of the Respondent. All the claims were not proved, the salary claims by the Applicant are not justified since he was only paid allowances upon the meeting attended, the Applicant cannot even justify his salary scale since it's not agreed anywhere on how much the Applicant was to be paid per month. The applicant's purported claims of termination are baseless, there was no termination depending on the Applicant's nature of his position. All other claims like notice of termination, unpaid leave and medical cost are groundless legally and cannot be substantiated due to the fact that the Applicant was not legally an employee and was not under any payroll of the Respondent.

The respondent averred that the Commission Award was fair and just and he prayed for the Court to dismiss the Applicant's Application with costs for being unmeritorious.

The applicant did not file rejoinder submission.

After reading the submission from both sides, the CMA record and the pleadings issues for determination are as follows;

1. Whether the applicant was employed by the respondent.
2. If the answer to the first issue is positive, whether the applicant was unfairly terminated from the employment by the respondent.
3. What remedies are entitled to both parties?

Regarding the first issue whether the applicant was employed by the respondent, the Labour Institution Act, Act No. 7 of 2004, provides for presumption of employment in section 61. The section provides for factors to be considered in presuming existence of employment relationship. The factors includes the manner the person is subjected to the control and direction of another person, the hours the person is working to that other person, economic dependency to the person whom service is rendered, provision of working tool and the person must render the service to one person only. In the case of **Kinondoni Municipal Council v. Rupia Said**

and 107 Others, Revision No. 417 of 2013, High Court Labour Division at Dar Es Salaam, this Court held that “.....among primary facts to be considered in determining existence of employment relationship are economic dependency, remuneration, subordination, discretion, supervision and control of manner service is rendered”. (See **also Mwita Wambura v. Zuri Haji**, Revision No. 45 of 2012, High Court Labour Division at Mwanza).

The applicant submitted that the trial arbitrator erred to hold that there was no employment relationship between the respondent and the applicant while the evidence available shows that the applicant was employed by the respondent on 11th of May, 2009, according to the respondent appointment letter –exhibit PW1. The post of Secretary of the Ward Tribunal is a statutory post established under Section 4(2) of the Ward Tribunal Act, No. 7 1985 (Sheria ya Mabaraza ya kata, 1985), its’ qualification is provided by Section 5(2) Act and the salary and remunerations are provided under section 27 of the Act. The appointment letter – Exhibit PW1 was written by Temeke Municipal Director, and all of the correspondences addressed to the applicant was from Temeke Municipal Council, therefore Temeke Municipal Council was an employer of the applicant without any ambiguity.

In opposition the respondent stated that the applicant was not an employee of the Respondent. All the claims were not proved, the salary

claims by the Applicant are not justified since he was only paid allowances upon the meeting attended. He was of the view that the Applicant cannot even justify his salary scale since it's not agreed anywhere on how much the Applicant was to be paid per month. The applicant's purported claims of termination are baseless, there was no termination depending on the Applicant's nature of his position.

I read exhibit PW 1 which the applicant asserted that it is the appointment letter. It is my opinion that the letter does not qualify to be an appointment letter as it was alleged by the applicant. The letter was sent to Ward Executive Officer informing him about the approval of the council to the nomination of the proposed Kurasini Ward Tribunal Secretary and another member of Kurasini Ward Tribunal. The letter approved the nomination of Mr. George K. Mwakasitu (the applicant) to be the Secretary of the Ward Tribunal and Ms. Fatuma Ramadhani Dagbau to be a member of Kurasini Ward Tribunal. Therefore, the letter was not an appointment letter and was not addressed to the applicant.

Further, I read the alleged termination letter - Exhibit PW1D which was written by the Ward Executive Officer for Kurasini Ward to the applicant. It was not a termination letter but rather a letter to inform the applicant that the post of Secretary of Kurasini Ward Tribunal have already been filed in

through election which was conducted by the Kurasini Ward Development Committee. This also prove that the post of the Secretary of the Kurasini Ward Tribunal was under supervision and control of the Kurasini Ward Development Committee.

The applicant have submitted that he was entitled to be paid allowances and salaries under Section 27(2) of the said Act. 7, of 1985. The cited section provides for remuneration of members of the Tribunal. The section states that members of a Tribunal shall be paid such sitting or other allowances as the appropriate authority may, in collaboration with the Ward Committees, determine. From the provision it is clear that members of the Tribunal are paid sitting or other allowances as determined by the appropriate authority and not salaries as alleged by the applicant. This prove that the applicant was not telling the truth that the Secretary of the Ward Tribunal was supposed to be paid monthly salaries and it raises question as to where the applicant did get the salary which was the bases of his claim.

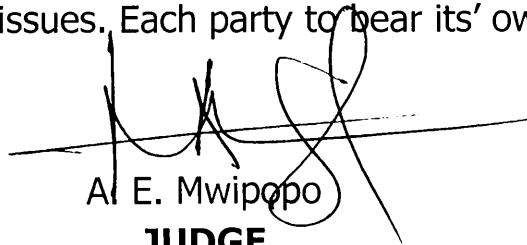
All of the evidence available in the record does not prove that there was employment relationship between the applicant and the respondent. Nothing in the record proves that the applicant depended economically or was paid monthly remuneration by the respondent. There is no evidence to show that the applicant was subordinate to the respondent. The applicant

was subordinate and under supervision of the Kurasini Ward Development Committee. The applicant service was rendered under the control of the Committee and not the Municipal Council.

From above, it is my finding that the evidence available have failed to prove that there was employment relationship between the applicant and the respondent. Therefore the answer to the first issue is negative.

Since there is no employment relationship between the respondent and the applicant, the Commission correctly dismissed the dispute before it. Thus, I dismiss this revision application for want of merits. The CMA Award is hereby upheld.

As the first issue have disposed of the matter, I find no need to determine the remaining issues. Each party to bear its' own cost.

A handwritten signature in black ink, appearing to read 'Al E. Mwipopo', is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

Al E. Mwipopo

JUDGE

19/06/2020