

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT MOROGORO

REVISION NO. 11 OF 2019

ELIZABETH SILAYO.....APPLICANT

VERSUS

HALMASHAURI YA MANISPAA MOROGORO.....RESPONDENT

JUDGMENT

Date of Last Order 24/11/2020

Date of Judgment: 08/12/2020

Z.G.Muruke, J.

Elizabeth Silayo, filed dispute at CMA on 10th September, 2015 claiming to be paid a areas of salary, leave pay, allowances for two months and certificate of service. In total, she claimed sum of 15,859,463. At CMA, her claim was dismissed, with exception of certificate of service. Being dissatisfied she filed present revision raising following grounds.

- (i) That the arbitrator erred in both fact and law for failure to consider the testimony of the witness especially DW1 who testified that he gave a letter to the applicant appointing her as a secretary of Kihonda ward tribunal. Thus without such letter there could be no dispute at all.
- (ii) That honourable arbitrator erred for failure to consider that the applicant was denied the right to be heard. Right to be heard is amount the fundamental basic principle of human right.

- (iii) That the decision and award did not comply with the basic principle of human right and it is irrational comparing to the witness and evidence tendered before it.

On the date set for hearing Kijua Kinja learned counsel, represented applicant, while Joice Kasolo, Learned Advocate represented respondent.

In support of revision, applicant counsel submitted that: Elizabeth Silayo has been working according to job assigned including writing report to municipal director, to explain how may cases tribunal has registered, case finalized and pending cases. Being secretary of the ward tribunal, she was also assigned other work like updating of the electoral registered book, assignment was being given by ward executive officer. She has been doing all that until dispute arose. The agreement was made orally in 2007, she was being paid 100,000 per month as allowances, dispute arose in 2015, when she started claiming her salary. She made follow up to the ward, she was told to go to director of Morogoro Municipal, only to be told that she does not owe municipal anything. She was then terminated in 2015, by Director of Morogoro municipal. Following termination, she filed dispute at CMA in which decision was not in her favour. CMA ruled that applicant had no contract with respondent in terms of paragraph two of CMA award/ decision.

Replaying applicant submission, respondent counsel adopted, counter affidavit to be part of her submission, and submit further that, applicant was appointed to be secretary of the ward tribunal of Kihonda by Baraza la Maendeleo ya Kata Kihonda (BMK) under the Ward counselor, and ward executive office, who is under Director of the Municipal. Applicant was

appointed by Baraza la Maendeleo ya Kata Kihonda without involving the Director of Morogoro Municipal. When appointed, they agreed that Elizabeth Silayo, will be paid 100,000 Tshs, as allowances. Office of respondent has not received from the Kihonda ward, number of cases that was being handled at Kihonda ward tribunal. Issue of updating election registered book was short term contract that parties are employed under agreed payments. Applicant submission that, she was assigned work on updating electoral registered book by Director Mvomero Municipal council is not right. According to ward tribunal Act, tenure for tribunal is three years. In 2015, ward tribunal was dissolved. Members had to apply. Elizabeth Silayo applied to be appointed tribunal ward secretary. But refused to report and filed dispute at CMA. There is no any letter from Morogoro Municipal director to terminate applicant. CMA decision was proper for failure by applicant to adduce contract of employment. Issue of certificate of service was not proper on account of none existence of Employer/Employee relationship. BMK (Baraka la Kata la Kihonda) was the proper institution to issue certificate.

In rejoinder, applicant counsel submitted that; Respondent counsel submitted that Director of Morogoro Municipal is not involved in applicant employment, While Ward Executive Officer, does all his work on behalf of the Director of Municipal. Even the meeting conducted in the Ward, has to be reported to Director of Municipal Concerned. Director of Municipal normally receive report form secretary of the ward to know; Cases registered, Cases pending, and Cases finalized

It has been said that, Baraza tenure is for (3) three years, this is the responsibility of the Director Municipal Director. It has not been said by the respondent counsel as at what times, Baraza has been dissolved until 2015. Once, there is employment, it is the duty of employer to give an employee contract. It is not the duty of an employee to prepare his/her own contract. Thus, applicant had an oral contract with the respondent. On certificate of service, respondent counsel admitted that, certificate of service ought to have been given to the applicant by Baraza la Maendeleo la Kata (BMK) not respondent. That is not right, Baraza la Maendeleo ya Kata had only duty to conduct exercise of selecting the secretary for ward tribunal, the name is taken to Municipal Director, in which letter of employment is issued by director or issue directive to ward Executive secretary to issue employment letter on his/her behalf. Applicant counsel asked court to quash and set aside CMA award and order, respondent to pay applicant areas of salary.

Having heard both parties submission, gone through this court and CMA records, central issue for determination is whether in terms of evidence available on record, there exist employer/employee relationship between the applicant and respondent.

Before answering the issue, it necessary to explain little bit on contract of employment. Employment and Labour Relations Act, Act No. 6/2004 has not defined what employment contract is. However, it is important to note that, the employment contract forms the basis of the relationship between the employer and employees. This relationship was historically referred to as a 'master' and his 'servant'. The employment

contract is based on the ordinary law of contract and so the same requirements as to agreement, consideration and intention apply.

Formation of contract of employment are governed by the general principles of the law of contract, that is, must comply with the requirements of offer, acceptance, consideration intention to create legal relations and must be free from vitiating factors such as illegality. In general no special formalities are required for entering into a contract of employment, it might be written, or oral. Both are legal binding agreement.

A written contract of employment is preferable to an oral one because of two main reasons. **First**, it is able to incorporate most of the terms that are necessary to define the rights and obligations of the parties unlike an oral contract where most of the terms have to be implied by the existing law or custom. **Secondly**, it is important for evidential purposes, In a dispute as to whether there is a contract of employment or not, it is easily resolved by producing the written agreement itself.

The law recognizes three types of employment contract: **Firstly**, a contract for an unspecified period of time, which means that the contract does not specify the date when the contract comes to an end. This kind of a contract is a long-term contract which may be terminated upon statutory notice of termination or retirement as the case may be. **Secondly**, another category of contract is for a specified period which is for professionals and managerial cadre. As distinct from unspecified time contracts, specific time contracts have an expiry date on which case the contract ends immediately after the expiry of the contract period although the parties may enter into new contracts. **The third type of** contract is the contract for a specific

task which means once the task is performed the contract ends. It should be noted, however, that although all three types of contract may be oral or written, the law requires that if the contract requires the employee to work outside the United Republic of Tanzania, it must be in writing.

However, although the law permits domestic contracts to be oral, it obliges employers to keep written records of the particulars of their employees and some terms and conditions regarding their employment. The employer is obliged to keep a written record of the personal employee's personal details such as name, age, permanent address and sex of the employee. The employer is obliged to give the employee a copy of these written particulars. According to Section 15(1)(a) Employment and Labour Relations Act, (supra) the employer is required to write other details such as place of recruitment, job description, date of commencement, form and duration of the contract and the place of work. The details enable the employee to know the category of the employment contract, i.e. for a specified time period, an unspecified time period or a particular task. In terms of Section 15(1)(b)(f) of Employment and Labour Relations Act, Act No. 6/2004 the employer is also obliged to indicate in writing the hours of work per day and per week including rest periods. Equally important, the employer is obliged to keep in writing details about remuneration, how it will be calculated and other payments to be made to the employee including payments in kind. Finally, the employer is required to record in writing the details of other matters which the law may require such an employer to keep in writing. A copy of all these detail written by the employer must be given to the respective employee.

One of employee rights is the 'total value of all payments, in money or in kind, made or owing to an employee arising from the employment is payable by the employer. It is called remuneration. The mode of payment of such remuneration is through cash payment, a cheque or direct deposit into an account designated by the employee in writing. In the case of paying by cash or cheque, the employer must ensure that remuneration is given to the employee in a sealed envelope. Similarly, where an employee receives remuneration by direct deposit in an account, the employer must also give the written statement of particular relating to remuneration in a sealed envelope.

Relevant to our case, is section 61 of the Labour Institutions Act No. 7/2004 provide that;

- (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 case of person who works for an organization, the person is part of that organization.

- (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 person is economically dependent on the other person for whom that person works or render services;
- (f) The person is provided with tools of trade or work equipment by other person, or
- (g) The person only works for or renders service to one person.

Employing above section, to the case at hand, revisiting evidence on applicant employment status is necessary. Evidence of Alfonse Omari Hoza at page 41 of CMA typed proceedings read as follows:

Swali: Unamfahamu vipi mlalalmikaji

Jibu: Namfahamu kwa kuwa nilifanya nae kazi kama Katibu katika usuluhishi baraza la nyumba na kata.

Swali: Katika kata gani.

Jibu: Kata ya Kihonda na kesi zake zilikuwa zinachukua kata ya mkundi na Lukobe

Swali: Wewe ulikuwa kama nani

Jibu: Nilikuwa kama mwenyekiti wa baraza hilo

Swali: Katika mabaraza mlikuwa mnakaa nani alikuwa anaandika kilichokuwa kinaendelea.

Jibu: Ni katibu.

Swali: Je katibu alikuwa kwa mujibu wa sheria?

Jibu: Ndiyo, alikuwa akipata dharura anatoa taarif kwa afisa mtendaji wa kata alikuwa akilipwa mshahara kwa afisa mtendaji ssi tulikuwa tukilipwa posho.

Swali: Je Elizabeth amewahi kukuonyesha barua yake ya ajira.

Jibu: Sisi tumeonana kazini na nimemkuta kazini.

Swali: Unajuaje alikuwa analipwa mshahara.

Jibu: Mimi najua na nimesema alikuwa akifanya kazi massa yote ya kazi na sisi kwa wiki mara moja kesi zikiwa nyingi mara mbili kwa wiki na tulikuwa tukilipwa kulingana na kesi zinazolingia.

Swali: Posho zenu nani alikuwa anawalipa.

Jibu: Afisa mtendaji wa kazi.

More evidence on applicant employment status is also found at page 56 of CMA typed proceedings in the evidence of Shabani Dulu as follows:

Swali: Eleza kwa kina unaposema ulimfamhu kama katibu wa baraza wa kujitolea unamaanisha nini.

Jibu: Nilimfahamu kama katibu kwa mazingira yafuatayo; baraza nililolikuta linakaa mara moja kwa wiki na siku ambayo waliuwa wanakaa ni siku ya Alhamisi na siku nyingine ndani ya wiki walipanga kwenda kwenye eneo la mgogoro wa ardhi linalogombaniwa kwa hiyo kwa wiki walikutana mara mbili. Katika utaratibu huo wa baraza la kata nilikuwa Elizabeth akilipwa posho kwa kazi hiyo ya kujitolea kwa mwezi Shs. 100, 000/= (laki moja) na mimi nikaendelea kumlipa kiasi hicho hadi 2015 baraza la maendeleo la kata lilipovujwa. Lilivunjwa kwa sababu muda wake ulikuwa umekwisha kisheria.

Nafasi hizo zilitangazwa pamoja na nafasi ya kujitolea ya katibu. Waombaji walileta maombi pamoja na Elizabeth Silayo, aliomba nafasi ya ukatibu. Baada ya uteuzi, Elizabeth alipendekezwa kuendelea na nafasi ya utakatibu wa kujitolea. Kwa hiyo, baraza la maendeleo kwa wakati huo lilisitisha posho hadi baraza jipya litakapoanza kazi yake ndipo katibu aanze kulipwa posho yake baada ya baraza kuanza. Baada ya hapo ndipo mlalamikaji Elizabeth Silayo akawasilisha mgogoro wake huku.

Swali: Je mlalamikaji baada ya kuondoka kwenye ofisi ya kata, je kuna deni lolote analodai kata.

Jibu: Mlalamikaji hakuwa anadai mapunjo yoyote ya mshahara au deni lolote hakuwa anadai kwa sababu alikuwa halipwi mshahara, badala yake alikuwa akilipwa posho na alilipwa posho hakuna deni. Pia hakuachishwa kazi kwa sababu hajaajiriwa.

While being asked by the tribunal Shabani Dulu his evidence reflect as follows:

Swali: Katika utendaji kazi wa mlalamikaji ni nani aliyekuwa anamlipa posho.

Jibu: Alikuwa anamlipa posho ofisa mtendaji wa kata kwa niaba ya baraza a maendeleo ya kata.

Swali: Ni sababu zipi zilizopelekea mlalamikaji kutokuwa mwajiriwa wa kata ya kihonda.

Jibu: Sababu ni kuwa kamati ya maendeleo ya kata si mamlaka ya ajira yake hiyo isingeweza kumwajiri bali ingekuwa imefika hakua ya kuridhika na utendaji ili aweze kuajiriwa, kamati hiyo ya maendeleo ya kata ingepekeza jina lake kuwa halmashauri ya wilaya hiyo aliendelea kujitolea kama walivyo kubaliana.

- Swali:** Je katika utendaji wa kazi wa mlalamikaji ni nani alikuwa anamlipa mshahara.
- Jibu:** Hayupo alikuwa anamlipa mshahara mlalamikaji, kwa kuwa hakuwa ameajiriwa na yoyote kwa kazi aliyokuwa akiifanya.
- Swali:** Kabla ya mlalamikaji hajaachishwa kazi au kuacha kazi, ni utarabu upi ulifuatwa.
- Jibu:** Kabla ya mlalamikaji kuacha kazi kulikukuwa na kuundwa upya baraza la kata, pamoja na kumchagua katibu wa baraza hilo wa kujitolea, wakati mchakato huo unaendelea na baraza lilismama kufanya kazi ndipo mlalamiakji alipowasilisha madai yake licha ya kuwa alichaguliwa kuendelea kwa kazi hiyo.
- Swali:** Katika taratibu za kati, je ajira za katibu huwa zinakuaje.
- Jibu:** Taratibu za kata awali ni kumpata katibu ambaye huyo tayari kuitolea kwa ridhaa yake mwenyewe ikiwa lengo ni kuwezesha baraza la kata ihudumie kero na malalamiko ya wananchi yanayohusu ardhi na mengineo kwa kuwa mchakato wa kumwajiri katibu ni mrefu na haipo kwenye mamlaka ya kata hiyo endapo mtu wa kujitolea kufanya kazi hiyo akikosekana kamati ya maendeleo ya kata kufanya maamuzi mengineo ikiwemo kufunga kabisa baraza hilo.
- Swali:** Je, mamlaka ya ajira ya katibu ipo kwa nani.
- Jibu:** Ninavyafahamu mimi mamlaka ya ajira yake ipo kwa halmashauri ya manispaa itakapoamua kuajiri.

I have reproduced two important witness in length, just to ascertain kind of relationship existed. Evidence adduced at CMA, reveals that, applicant was working as secretary to Baraza la Maendeleo Kihonda, thus

paid allowances and not salary. There is no any proposal by Baraza la Maendeleo la Kata to the respondent for an employment of applicant as clearly testified by Shaban Dulu, who worked with applicant, and more so, he was present when the said Baraza la Maendeleo Kihonda BMK was dissolved in 2015.

From the records it is clear from applicant evidence, respondents evidence, and counsel submission, that Elizabeth Silayo has been working as secretary of Baraza la Kata ya Kihonda since 2007 receiving allowance of 100,000 per month, thus in line with section 61 of the Labour Institution Act No. 7/2004.

It is worth noting that the ward tribunal was established by the ward Tribunal Act, Cap 206 RE 2002. Under part II, section 3 provides that;

There is hereby established a tribunal for every ward in Tanzania to be known as the ward tribunal for the ward for which it is established:

Provided that the Minister may, by notice published in the Gazette, established to tribunals for a ward if he is of the opinion that there are special circumstances which make it necessary or desirable to do so.

Section 4 of the same provides that every tribunal shall consist of

- (a) Not less than four nor more than eight to other members elected by the Ward Committee from amongst a list of names of persons resident in the ward compiled in the prescribed manner;
- (b) A chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a).

- (2) There shall be a secretary of the Tribunal who shall be appointed by the local government authority in which the ward in question is situated, upon recommendation by the ward committee.
- (3) The quorum at a sitting of a Tribunal shall be one half of the total number of members.
- (4) At any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote.

On the tenure of the tribunal Section 6(1) of the ward tribunal Act (supra) provides that:-

6(1) Every member of a Tribunal shall hold office for a term of three years from the date of his election and shall be eligible for reelection.

(2) If a vacancy occurs in the membership of a tribunal by death, resignation or effluxion of time or any other reasonable cause the appropriate authority shall appoint an appropriate person to fill the vacancy until the date of the next election of members.

(3) Appointment to the office of Secretary shall be permanent in the service of the Local Government Authority within which the Tribunal to which he is appointed to be secretary is situated.

From the provision of the law above, secretary to the ward tribunal is appointed by the Local Government Authority in which the ward in question is situated, upon recommendation by the ward committee. From the evidence available, not disputed by both parties, Kihonda ward committee

did not make recommendation for secretary to be appointed for (8) eight years from 2007-2015, when same was dissolved.

Despite tenure of (3) three years, for the ward tribunal, law was not adhered. Worse enough, for all these time of (8) eight years no recommendation forwarded to the relevant authority for the secretary to be appointed officially. Elizabeth Silayo just continued to work under those circumstances until dissolution in 2015. She successfully applied for the position of secretary, but refused to work and institute dispute at CMA, that culminated to this revision.

It is astonishing for Government Local Authority of Morogoro, not to follow the law for (8) eight years, buy not dissolving the Kihonda ward tribunal. Was it by default or by design? Ward tribunals are suppose to be inspected for furtherance of the purpose of which it was established in terms of Section 25(1) of the ward tribunal Act that provides:

25(1) The minister shall, after consultation with the minister for the time being responsible for regional administration, by notice published in the *Gazette*, make provisions for a system of inspection of Tribunals and instruction of local government authorities and Ward Committees for the purposes of ensuring the furtherance of the purposes and objects of this Act.

(2) The Minister may, in the notice under subsection (1) appoint such persons or authorities as he may think fit for the purposes of this section.

This court wonders, for (8) eight years there was no dissolution of the Kihonda Ward tribunal which is very close to Morogoro Municipal Head Office. Then who is to blame? Is failure by Kihonda Ward Tribunal to make

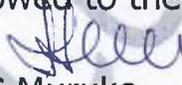
recommendation to the Director of Morogoro Municipal fatal to the applicant right? Before answering the above question, it is worth noting that, Kihonda ward committee is under the Morogoro Municipal Director. Director office is the one to supervise the tribunal committee. What was done by Kihonda Ward Tribunal, Morogoro Municipal Director is directly accountable under master servant relationship in which master is vicariously liable for the acts done by his servant. Thus, the whole issue of none dissolution of tribunal for (8) eight years whether it was by default or by design it is responsibility of the Morogoro Municipal Director.

Having established responsibility, then, whether applicant is entitled for salaries as she claims. Had Kihonda Tribunal Ward Committee complied with Section 4(1) of the Ward Tribunal Act, (Supra) by recommending applicant to the respondent, then, I believe, respondent could have acted accordingly. But that was not done. Applicant claim salary from 2007-2015 when tribunal resolved. This is contract issue, which limitation is (6) six years, above six years claims are barred by law of limitation Act Cap 89 RE 2002.

Thus, claim of salaries from 2007-2008 (two years) are time barred. Then is applicant intitled for salary from 2009-2015? As said before, the tenure of office of tribunal in terms of Section 6(1) of the ward tribunal Act Cap 206 RE 2002 is 3 years. The tribunal was legally in existence, for three years, the rest of the years was illegally existing. Applicant cannot benefit from illegality. Applicant has also duty to ensure that, she was is working with legal recognized ward committee. As part of employment contract she claims, she was duty bound to ascertain legality of her part to the contract.

More so, applicant at CMA has not produced evidence to prove that, she inquired anything on the status of the Kihonda Ward Tribunal Committee, from 2007 to 2015 when dissolved.

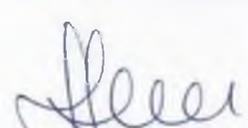
To this court, legally recognized years is three years only in which respondent will be vicariously liable for the acts of Kihonda Ward Committee. For interest of justice, and for better end of parties rights, applicant to be paid minimum wage for three years, ie 2013, 2014 and 2015 less, what she received as allowance. On the certificate of service, as correctly submitted by applicant counsel Kitua Kinja and as held by tribunal, certificate of service to be issued to applicant by respondent, recognizing applicant having worked as secretary of the Kihonda Ward tribunal (BMK). To this end, revision application allowed to the extent shown.


Z.G. Muruke

JUDGE

08/12/2020

Judgment delivered in the presence of the applicant in person and Joice Kasolo for the respondent.


Z.G. Muruke

JUDGE

08/12/2020