IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 707 OF 2019

HOMELAND SECURITY SERVICES CO. LTD ..... APPLICANT

VERSUS

ALEX KASUSURA AND ANOTHER ..... RESPONDENTS

18th September & 30th October, 2020

JUDGMENT

BANZI, J.:

This is an Application for Revision filed by the Applicant, Homeland Security Services Co. Ltd against the Respondents, Alex Kasusura and Francis Mlaba seeking to revise the proceedings and the award of the Commission for Mediation and Arbitration (CMA) at Dar es Salaam in labour dispute No. CMA/DSM/TEM/653/2018/215/2018.

The Respondents on different dates entered into oral agreement with the Applicant to supervise and run the company on a condition that, the profit be used for rent services, payment of salaries and the remaining balance as a dividend to the Applicant. However, the Respondents did not comply with the terms of the agreement by failing to deposit the dividend to the Applicant. After seeing the company is running on loss, the Applicant through board of directors decided to terminate the Respondents. Aggrieved by their termination, the Respondents referred the dispute for unfair termination against the Applicant to the CMA. The Arbitrator decided on their favour and after being satisfied that termination was substantively and

procedural unfair, awarded them payment of 12 months' compensation, annual leave, severance pay and salary for the months of July and August, 2018. The Applicant being aggrieved with the decision and award of the CMA, filed this revision on the following grounds;

1. *That, the honourable Arbitrator erred in law and facts by holding that there was a contract of employment between the Applicant and the Respondents.*
2. *That, the honourable Arbitrator erred in law and fact by holding that the 2nd Respondent appointed the 1st Respondent to represent him before the Commission for Mediation and Arbitration in labour dispute No. CMA/DSM/TEM/653/2018/215/2018.*

When the revision was called for hearing, Mr. Hemed Omari Kimwaga appeared as Personal Representative of the Applicant while Mr. Sammy Kateregga, appeared as Personal Representative of the Respondents. By consent, the revision was argued by way of written submissions.

Explaining the first ground, Mr Kimwaga submitted that, there was no employer employee relationship between the Respondent and the Applicant because the parties have never signed written contract of employment and no contract with the particulars in the meaning of section 15 of the Employment and Labour Relations Act, No. 6 of 2004 ("ELRA") was supplied to the Respondents. According to him, the relationship that existed between the Applicant and the Respondents is that of ordinary contractual terms on the use of business name and hence, the Respondents worked as independent contractors without being controlled by the Applicant. Since there was no contract of employment between them, automatic termination cannot arise but what happened was just breach of terms of ordinary

contract on the use of company's name. He cited the case of **Bashir Mohamedi v. Markit Market Suport Ltd** [2013] LCCD 65 to support his submission. Mr. Kimwaga did not submit anything in respect of the second ground and proceeded to pray for this Court to revise and set aside the proceeding and the award of the CMA.

On the other hand, Mr. Kateregga contended that, there was employer employee relationship between the Applicant and the Respondents because according to DW1's testimony the Respondents were paid monthly salary to wit; Tshs.200,000/= for 1st Respondent and Tshs.170,000/= for the 2nd Respondent. He added that, by citing section 15 of ELRA, the Applicant admitted to engage the employee without valid written employment contract which contravenes section 14 (2) of ELRA. He cited the case of **Mwita Wambura v. Zuri Haji** [2014] LCCD 182 to support his point about existence of employer employee relationship between the Applicant and the Respondents. He further submitted that; no document was tendered by the Applicant to confirm the assertion that the Respondents were not employees but business partners. Turning to the second ground, he referred to annexure D-3 collectively which clearly indicates how the 2nd Respondent authorised the 1st Respondent to represent him and sign all proceedings of the dispute. The said authority was received by CMA on 24th January, 2019. Thus, he prayed for the revision to be dismissed.

After careful consideration of parties' arguments and grounds for revision in the light of evidence on CMA record, the issues that call for my determination are, one, *whether there was employer employee relationship between the Applicant and the Respondents* and two, *whether the Respondents were unfairly terminated.*

According to section 4 of ELRA, employee is an individual who has entered into a contract of employment or any other contract under which he undertakes to work personally for the other party to the contract. The same section defines employer as any person, including the Government and an executive agency, who employs an employee.

Moreover, section 61 of the Labour Institutions Act, No. 11 of 2004 provides that;

> *"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 anyone 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 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 person is economically dependent on the other person for whom that person works or renders services.*
> *f) The person is provided with tools trade of trade or work equipment by the other person; or*
> *g) The person only works for or renders services to one person."*

Apart from that, there are other factors which can be considered in order to determine the existence of employer employee relationship. The same were set by my learned sister Hon. Rweyemamu, J in the case of **Mwita Wambura v. Zuri Haji** (supra) as hereunder;

> *"There are a number of common factors running through which can aid a decision maker in determining existence of an employment relationship. These principles are among others; (a) defining employment relationship by looking at parties' roles, considering matters among others; dependency; subordination, direction, supervision and control of services rendered; (b) Principle of primacy of facts looking at what was actually agreed and performed by each of the parties; and (c) Use of burden of proof."*

What I gathered from the extracts above is that, for the employer employee relationship to exist, the employee should be not only be working for the employer, but also be economically dependent on him in the sense that, his salary should be paid by the employer.

In the instant matter, upon a thorough examination of evidence on record, it is apparent that, the Respondents were economically dependent on the Applicant in the sense that their salaries were paid by the Applicant. According to the evidence of the 1st Respondent, he was paid a month salary of Tshs.200,000/=. On the other hand, the 2nd Respondent testified that he was paid monthly salary of Tshs.170,000/=. This evidence is corroborated by the evidence of DW1, Applicant's witness. At page 7 of the typed proceeding, DW1 admitted that the Respondents were the employees of the Applicant whereby the 1st Respondent was paid monthly salary of Tshs.200,000/= and the 2nd Respondent Tshs.170,000/=. Apart from that,

upon termination, the Respondents were paid salary of September and October, 2018. If at all they were not the employees of the Applicant, they would not have been paid salaries by the said Applicant. Therefore, it is the considered view of this Court that, there was employer employee relationship between the Applicant and the Respondents. In that regard, the first issue is affirmatively answered.

Reverting to the second issue, according to the Arbitrator, the termination was unfair both substantively and procedural on the ground of retrenchment. Rule 23 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 ("GN No. 42 of 2007") provides that;

> *"A termination for operational requirements (commonly known Operational as retrenchment) means a termination of employment arising from the requirements operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer."*

Form the extract above and according to subsection 2 (a) of this section, retrenchment may arise on the reason of economic needs which relate to the financial management of the company. The Applicant through her witnesses claimed that the company was running on loss. However, nothing was tendered to prove this assertion. There was no financial report tendered during the hearing to establish the claimed loss. In that regard, I am constrained to agree with the conclusion of the Arbitrator that, the Applicant had no valid reason for retrenchment. As for procedure fairness, section 38 (1) of ELRA provides as that;

"(1) in any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be shall-

(a) give notice of any intention to retrench as soon as it is contemplated;

(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;

(c) consult prior to retrenchment or redundancy on-

(i) the reasons for the intended retrenchment;

(ii) any measures to avoid or minimize the intended retrenchment;

(iii) the method of selection of the employees to be retrenched;

(iv) the timing of the retrenchments;

(v) severance pay in respect of the retrenchment.

(d) give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognised or registered trade union."

For retrenchment to be considered procedural fair, the requirements of above quoted provisions must be complied with. In the matter at hand, there is no iota of evidence to establish that the requirements of the law as

quoted above have been complied with by the Applicant. According to the evidence of on record, on 3rd October, 2018, the Respondents were called in the meeting and informed about their termination. There was no notice of intention to retrench issued to the Respondents after the Applicant contemplated the retrenchment. No consultations were conducted according to the law. Therefore, it is obvious that, the procedure for retrenchment was not followed. Thus, termination was substantively and procedurally unfair and hence the second issue is also affirmatively answered. as a result, the first ground lacks merit.

The second ground need not detain this Court. As rightly submitted by Mr. Kateregga, there was notice issued by the 2nd Respondent to authorise the 1st Respondent to represent him in the said dispute. The notice was received by CMA on 24th January, 2019. Worse enough, the Applicant did not raise this issue at the CMA, and raising the same at this stage is nothing but an afterthought. Besides, the notice in question has no any defect. Thus, this ground lacks merit.

That being said, it is the finding of this Court that, the CMA decision was justified in law and I see no reason to fault the same. Thus, I confirm the CMA award and this revision is accordingly dismissed.

I. K. BANZI
JUDGE
30/10/2020