IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO 962 OF 2018

BAKARI JABIR NYAMBUKA ..... APPLICANT

VERSUS

QCD SUPPLIES & LOGISTICS.....RESPONDENT

JUDGMENT

Date of last Order: 27/02/2020
Date of Ruling: 17/04/2020

Z.G.Muruke, J.

The applicant **BAKARI JABIR NYAMBUKA**, being aggrieved with the award issued by Commission for Mediation and Arbitration, (herein to be referred as CMA) on 15th November, 2017 in Labour dispute no. CMA/DSM/KIN/R.1274/2016 which was decided in favour of the respondent, filed the present application seeking for court order to set aside the award. Application is supported by affidavit of the applicant's Advocate Felix Edward Makene. In opposition, the respondent filed a counter affidavit sworn by Daniel M. Ngimbwa, the respondent's Principal Officer.

The case was disposed by way of written submission, I thank both parties for adhering to the schedule hence this judgment. The applicant was represented by Advocate Felix Edward Makene, while the respondent enjoyed the service of Advocate Revocatus T. Mathew.

Briefly the applicant was employed by the respondent in 2014 as a driver. He worked with the respondent until 2016 where it was said that he was unfairly terminated. The applicant filed a labour dispute before CMA where decision was in favour of the respondent. Dissatisfied with the same he filed the present application.

The applicant filed eight grounds of revisions. Submitting on the same, the applicant's counsel consolidated grounds I, II and IV and stated that, the arbitrator mislead himself when held that the applicant was employed under specific task contract as there was no any evidence tendered by the respondent to prove the same. Even DW1 in his evidence confirmed that he was the one who interviewed the applicant and employed him until when the applicant decided to abscond himself. He added that, DW1's evidence disqualified the arbitrators assertion on specific task contract since the applicant was paid his salary through payrolls and later through bank account as per **exhibit JBN-1** and was given Staff Identity Card **(exhibit JBN-2).**

On the 3rd ground Advocate Felix Makene submitted that, the arbitrator erred in law and facts in holding that the nature of employment was a contract on specific task, because the applicant was paid only few months through the applicant's bank account maintained at CRDB and NBC. The applicant was paid on monthly basis starting with cash and later through bank. He referred Section 27(1) of the Employment and Labour Relations Act, (herein to be referred as ELRA), adding that the number of payment made does not justify the nature of the contract.

On the Fifth ground the applicant's Counsel submitted that, the arbitrator disregarded the evidence of DW1 who testified that he was the

one who interviewed and employed the applicant on 2014. He maintained that it's a trite principle of law that a good judgment relies on facts, evidence and law on one hand. Regarding ground six, the applicant Counsel averred that, the respondent was the only existing company which employed the respondent after the previous companies have been dissolved prior the formation of the QCD supplies & Logistics Limited. Therefore the arbitrator erred in law and fact in deciding that the applicant had to sue all the three companies he worked for and not only the respondent.

On basis of ground seven, the applicant submitted that there was no any evidence tendered before the commission, to prove that the applicant was paid per trip and that the applicant's employment ended automatically when the task was completed. He referred Section 110 (1) of the law of Evidence Act, Cap 6 R.E 2002. On eight ground, the applicant counsel submitted that, Section 44(2) of ELRA provides for Certificate of Service. The arbitrator awarded the applicant a Certificate of service and denied the payment on termination. He further added that, if the applicant was employed on specific task, then why an arbitrator awarded a certificate of service since in contract of specific task ends immediately once a task is completed.

Responding to the grounds one, two and four of revisions, the respondent Counsel submitted that, the arbitrator's finding were right since they based on DW1's evidence who testified that the applicant was employed as a truck driver and he was called to execute the assignment available at the moment. He was sometimes paid fully or by installment and the rate depended on whether the trip was within the country or

outside the country. He maintained that, exhibit JBN-1 as evaluated by the arbitrator reveals that there was no continuity of payment and the amount paid was varied from one another. On exhibit JBN-2, it only shows the relationship existing between them and cannot be used to substantiate the type of contract of employment between the employer and employee.

On the 3rd ground, the respondent counsel argued that, the applicant did not tender any evidence to indicate that he was on payroll of the company to show that his name appeared on each month. Also no attendance register submitted by the applicant or respondent which shows that the applicant was signing it on daily basis. Regarding the Fifth ground, it was submitted that the respondent never terminated the applicant, only the applicant abandoned his duties while he was in Mtwara. Filing of the dispute at CMA was an afterthought after the respondent had reported at the police station in Mtwara his absence and abandonment of his motor vehicle in Mtwara. Therefore, the principles of unfair termination do not apply to the contract on specific task, refering the case of **Samira Khamis Kimbwi Vs. Double tree Hilton,** Rev. No. 582 of 2017(unreported). The applicant should not benefit from his own wrong as he abandoned the respondents property at Mtwara, insisted respondent counsel.

Having heard both parties submissions this court is called upon to determine the following issues:

i. **Whether the applicant was employed on a specific task contract?**
ii. **Whether the procedure for termination were adhere in terminating the applicant.**
iii. **What are the reliefs of the parties?**

There are three types of employment contract which are recognized in Tanzania Labour Laws, in terms of Section 14 of the Employment and Labour Relations Act, [Cap 366 R.E 2019] namely:-

(a) a contract for an unspecified period of time;

(b) a contract for a specified period of time for professionals and managerial cadre,

(c) a contract for a specific task

From records, it is undisputed that, the applicant was employed by the respondent. What is disputed in this case is the type of contract they engaged in. The applicant alleged to have been employed on unspecified period contract and he was paid his salaries on monthly basis, while the respondent claimed it was a special task contract and he was paid per task performed as he was assigned.

In Contract law, employment contract may be written or oral. Mostly, written contract is more preferable than oral contract as it can be used for evidential purposes and clear the atmosphere in case of any breach of the same. The employer is obliged to keep written records of the particulars of their employees and conditions regarding their employment, in terms of section 15 of Employment and Labour Relations Act, (ELRA) that provides that.

> 15.-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely :
> (a) name, age, permanent address and sex of the employee;
> (b) place of recruitment;

(c) job description;

(d) date of commencement-

(e) form and duration of the contract;

(f) place of work;

(g) hours of work;

(h) remuneration, the method of its calculation, and details of any benefits or payments in kind, and

(i) any other prescribed matter.

(2) If all the particulars referred to in subsection (1) are stated in a written contract and the employer has supplied the employee with that contract, then the employer may not furnish the written statement referred to in section 14.

(3) If an employee does not understand the written particulars, the employer shall ensure that they are explained to the employee in a manner that the employee understands.

(4) Where any matter stipulated in subsection (1) changes, the Employer shall, in consultation with the employee, revise the written Particulars to reflect the change and notify the employee of the change in writing.

(5) The employer shall keep the written particulars prescribed in Subsection (1) for a period of five years after the termination of employment.

After a thorough analysis of the evidence from records, I find that neither the applicant nor the respondent has tendered any employment contract. It was DW1's evidence that he, as the respondent's Human Resource officer, is the one who interviewed and employed the applicant

as a driver. He did not issue employment contract to the respondent, and added that respondent was never terminated rather he absconded himself. It is a principle of law in labour matters that when there is any dispute regarding the terms of employment in a contract burden of proof lies on the employer. Section 15 (6) of the ELRA

> (6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer.

In the case at hand, it is apparent that the applicant has failed to prove under what type of contract the applicant was employed. Since the employer failed to execute his duty of proving the same, benefit of doubt is in favour of the applicant, who was employed on unspecified term contract. From the award, the arbitrator wrongly shifted the burden of proof to the applicant by deciding that the employment was on special task basing on exhibit JBN-1 (the bank statement of the applicant)while the duty to prove the same was on the respondent and he failed to do so. It is the finding of this court that the applicant was on unspecified period contract of employment, this court has to determine if the respondent had a valid reason for terminating the applicant. Again in this aspect the respondent refuted to have terminated the applicant by stating that, while the applicant alleged to have been terminated by the respondent while claiming for his salary arrears.

It is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For the same to be considered fair, it

should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as provided for in **Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004** which states that:-

> 'Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-
>
> (a) that the **reason for the termination is valid;**
>
> (b) that the **reason is a fair** reason-
>
> (i) related to the employee's conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer, and
>
> (c) that the employment was **terminated in accordance with a fair procedure.**
>
> [Emphasis is mine].

In the matter at hand, the respondent denied to have terminated the applicant, rather the applicant decided to abscond himself after abandoning the respondent's truck in Mtwara. The respondent tendered no evidence regarding the said claims. Assuming that, it is true that the applicant abandoned the said truck, what did the respondent do, considering that the truck was valuable property left without any care? Though the burden of proof is on balance of probabilities, I find the respondent's evidence insufficient to prove the fairness of termination of the applicant's employment.

Regarding the issue of procedure for termination, I believe I need not to labour much on this. From records DW1 stated that there was no any procedure which was taken as the applicant absconded himself and also he was an employee on special task. **Therefore, regardless of it being a special task contract, the respondent had a duty to adhere to all the procedure for terminating the applicant on absentism as provided under Rule 13 of the Employment and Labour Relation(code of God practice) Rules, GN.42 (herein to be referred as the Code).** The respondent failed to comply with the procedure for termination of the applicant. I thus, fault the arbitrator's finding that the applicant was on special task contract hence no need to follow the procedure.

On regard to the party's reliefs, the arbitrator found that the applicant is not entitled to anything as he was a special task employee, he only ordered certificate of service. Section 40 (1) of the Employment and Labour Relation Act No 6 of 2004 provides for the remedies for unfair termination. It states that:-

> "If an arbitrator or labour court finds a termination is unfair the arbitrator or Court may order the employer;
>
> (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not Less than twelve months' remuneration.

Having found that the termination was substantively and procedurally unfair, I hereby quash the arbitrator's finding and order that the applicant be paid 12 months' salary as compensation for the same and a certificate of service. I thus allow the application for revision and set aside CMA's award, as above shown.

Z. G. Muruke

JUDGE

17/04/2020

Judgment delivered in the presence of Advocate Hassan Hassan for the respondent and in the absence of applicant having notice.

Z. G. Muruke

JUDGE

17/04/2020