IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO 294 OF 2019

EMMANUEL MAHANDA..... .....APPLICANT

VERSUS

BV-USC TANZANIA LIMITED..... RESPONDENT

JUDGMENT

Date of last Order: 02/03/2020
Date of Judgment: 20/04/2020
Z.G.Muruke, J.

Applicant, **EMMANUEL MAHANDA,** filed application for revision of the proceedings and award issued by Commission for Mediation and Arbitration, (herein to be referred as CMA) on 11th March, 2019, in Labour dispute no. CMA/DSM/TEM/326/2016 by Hon. Ngalika-arbitrator decided in favour of the respondents. Application is supported by affidavit of the applicant himself. Challenging the application, respondent filed affidavit sworn by Titus Mwau 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 Margaret Ringo, while the respondents enjoyed the service of Advocates from Locus Attorneys.

Briefly are the facts of the case. On 2nd February, 2015 the applicant was employed by the respondent as a Finance and Administration Manager. He worked with the respondent until 15th May, 2016 when he decided to resign from his employment and filed a dispute before CMA

claiming compensation for overtime payment, medical and house allowances. The award was partly in his favour, however whereas he was dissatisfied with the same hence the present application.

Applicant Counsel submitted that, the arbitrator failed to consider the evidence adduced by the applicant regarding the monetary claims. The applicant as an accountant, observed the necessary deductions and contributions which were purported to be for his allowance were done but, the same were not paid by the employer. Ms. Ringo added that for the period of 12 months from February 2015 to 31st January, 2016 the amount which was not paid was Tshs.26,280,000/=. From there, the respondent started paying the housing, social security contributions and all other government taxes. The arbitrator misdirected himself in his decision since he has noted in his award (at paragraph 5 of page 4) that, under exhibit 4 the deductions were made but not paid to the respondent.

Regarding overtime allowances, the applicant counsel submitted that in the employment contract paragraph 5 and 5.4 that, the parties agreed that the working hours by the applicant 08:00hrs to 17:00hours Monday to Friday and shall be paid according to Tanzanian laws. Referred Section 19 (2) and (3) of the Employment and Labour Relations Act, Cap 366 R.E 2019. She insisted that there is no need for the separate agreement regarding overtime as the arbitrator misdirected himself. And it was not disputed by the respondent on overtime worked by the applicant only it was argued by one of the respondent's witness that it was not applied on time. The arbitrator could not award less award less overtime

payment for 60 days that the applicant has worked with the respondent prior to his resignation as stated in paragraph 1 page 5 of the award.

In response the respondent's counsel contended that, house allowance was not claimed in CMA F1, it just emerged during the course of proceedings. However the applicant was living in the house fully paid by the respondent in course of his employment as testified by PW1 and PW2. The applicant never claimed for the house allowance until he resigned and filed the complaint. The claim for the same was retrospectively, he ought to have brought his claim within sixty days from when aggrieved. Moreover, he insisted that the employment contract does not provide for housing allowances. Therefore, the respondent is not compelled to pay for the same to the applicant.

With regard to over time, counsel for respondent submitted that, there is no evidence that the applicant had worked overtime. That, the arbitrator relied on the email sent on 14th May, 2016 at 20:35 hours from a personal email. That email is not sufficient to prove that the applicant worked in overtime 60 days. The arbitrator was right to rule out that the application was time barred as it was claimed out of 60 days from the date it was done referring. The case of **Rwaichi John Mosha Vs. Heaven Manase Mtui** [2013] LCCD, 15. The applicant abandoned his claim for medical allowances of which was not provided under the employment contract. In rejoinder, the applicant reiterated what has been stated in submission in chief.

Having cautiously considered the parties submissions and the records, I believe this court is called upon to determine; whether the applicant is entitled to the relief sought? The applicant claimed payment of house allowances, medical allowances and overtime allowance.

Starting with Overtime allowances, from records the applicant claimed the amount of Tshs.30, 225, 006/= for 15 months that he worked with the respondent, without payments of overtime allowances. He tendered Exhibit A3 email sent to him at 20:35 as a proof that he worked overtime. Through this exhibit the arbitrator awarded him the sum of 3,461,538.46 as overtime payment for 60 days worked before his resignation.

I have gone through the exhibit A3 email sent to him and found that it was sent on 14th May, 2016 at 20:35. The email was an alert for deadline of submission of bids. **Such an exhibit is not sufficient proof that he worked overtime hours considering the fact that, email may be received anywhere and anytime as long as one has access to internet. Again it does not mean that he was directed to act on time.** Exhibit A2, employment contract Clause 5:3 provides that overtime may only be worked when agreed to, and approved by the employer in advance. The applicant didn't show approval to work overtime.

It is a trite law that over time claims had to be made at the end of every month when and as they a acruew, otherwise they are time barred as they are not terminal benefits.

In the case of **Benjamin M. Kimu v Real Security Group& Marine Service**, Revision No. 199/2011 LCCD 2013, it was held that:

> "Overtime allowance is part and parcel of employees of salary. Therefore it was supposed to be claimed as and when the claim arose. The claim arises when the salary is due for payment, the law requires that the claim be lodged within sixty days; see rule 10 (2) of the Labour Institution (Mediation and arbitration) GN. 64/2007."

Also in the case of **Rwaichi John Mosha v Heaven Manase Mtui,** Revision No. 77/2012 LCCD 2013. It was held;

> "The overtime allowances must be claimed when the claim arises. The time limit per Labour Institution (Mediation and arbitration) GN. 64/2007 is sixty days.
>
> ...the overtime hours worked had to be proved."

Basing on the above discussion, it is clear that he applicant has failed to prove the claim of overtime and the same was filed out of time. The arbitrator misdirected himself to award the applicant Tshs.3,461,538.46/= for 60 days overtime worked while the same was not proved.

Regarding house and medical allowances, the applicant has failed to prove the same as no evidence adduced to show that he was entitled to be paid the allowances. I thus find no need to fault with the arbitrator's finding regarding the same.

In view of the above finding, I hereby quash and set aside the arbitrator's order regarding overtime payments of Tshs.3,461,538.46/=. In totality application is dismissed for lack of merit.

Z.G.Muruke

JUDGE

20/04/2020

Judgment delivered in the absence of all the parties having notice.

Z. G. Muruke

JUDGE

20/04/2020