IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 560 OF 2018

BETWEEN

TROPICAL CONTRACTORS LIMITED..... APPLICANT

AND

JUMA SHABANI..... 1ST RESPONDENT

SAID HASSAN MGUNDA..... 2ND RESPONDENT

AMINA SALUM MAHAME..... 3RD RESPONDENT

JUDGMENT

Date of the Last Order: 15/02/2021

Date of the Judgment: 05/03/2021

A. E. MWIPOPO, J

The Applicant namely Tropical Contractors Limited has filed the present Application for revision against the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/R.1066/16/995 delivered on 10th August, 2018 before Hon. Sekabila M.E., Arbitrator. The application is supported by affidavit of Loy Sehemba, Advocate for the Applicant. Paragraph 11 of the affidavit contains four grounds of revision. The grounds are as follows;-

i. That the Arbitrator erred in law and fact by deciding that the Respondents were permanent employee of the Applicant and not casual labourers as per the evidence presented.

ii. That, the Arbitrator erred in law and facts by deciding that the Respondents were unfairly terminated and awarding them compensation.

iii. That, the Arbitrator erred in law and facts by awarding the Respondents unproven leave allowance.

iv. That the Arbitrator delivered an illogical and improper award.

The background of the dispute in brief is that the Applicant employed the Respondents namely Juma Shaban, Said Hassan Mgunda and Amina Salum Mahame in the cleanliness department. The Applicant terminated the Respondents employment on 17th October, 2016 for operational requirements. Aggrieved by the termination, The Respondents instituted a complaint before the Commission for Mediation and Arbitration. The Commission heard both parties and found that the Respondents were unfairly terminated. The Arbitrator ordered the Respondents to be paid a sum of Tshs. 5,628,461/= being 12 months' salary compensation for unfair termination, Notice payment, Severance payment and leave payment. The

Applicant was not satisfied by the Commission decision and decided to institute the present revision application.

The Applicant was represented by Ms. Loy Sehemba, Advocate, whereas the respondent was represented by Advocate Madeus Raphael Mwakuka. The hearing of the application proceeded by way of written submissions following parties' prayer. Both parties filed their submissions as ordered by the Court.

The Applicant submitted on all four grounds of revision. On the first ground, it was submitted that the Arbitrator erred in law and facts for holding that the Respondents were permanently employed while the evidence shows that they were casual employees. The testimony of DW 2 shows that the Respondents were employed on a daily basis and their salary was Tshs. 6,000/= per day. Their working station was at Tanzania Portland Cement Company (TPCC). Working for a long time does not automatically change the employment relationship between Applicant and Respondents. DW1 also testified that the Respondents were employed on daily basis and were paid on the number of working days. PW1 in his testimony stated that they were paid according to the number of days they have worked. Exhibit E1 which is the Respondents bank statements shows no fixed amount of salary paid to the Respondents. The Applicant cited in support of the argument the case of **Group Six International vs. Musa Maulid & Another**, Revision No.

428 of 2015, High Court Labour Division, at Dar Es Salaam, (Unreported); and **Idd K. Pazi and 128 Others vs. S.S.B. & Co. Limited**, Revision No. 231 of 2015, High Court Labour Division, at Dar Es Salaam, (Unreported).

The Applicant submitted on the second ground that the Arbitrator erred to hold that Respondents were unfairly terminated and awarded them compensation. The Applicant terminated the Respondent employment since the TPCC reduced the number of casual labourers working for the project. As a result the Respondents and other employees were terminated on 17th October, 2016. Under section 36 (a) (iii) of Employment and Labour Relations Act, 2004, read together with rule 4 (4) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, principles of unfair termination do not apply to specific task or fixed term contract which come to an end on the specified task or completion of a specific task. Respondents' contract expires at the end of each day. To support the argument the Applicant cited the case of **Mtambua Shamte and 64 Others vs. Care Sanitation** and Supplies, Revision No. 154 of 2020, High Court Labour Division, at Dar Es Salaam, (Unreported); and **Abel Kikoti and 5 Others vs. Tropical Contractors Ltd**, Revision No. 305 of 2019, High Court Labour Division, at Dar Es Salaam, (Unreported).

On the third ground of revision the Applicant submitted that the Respondents failed to prove for claims of unpaid leave before the

Commission. As a result the Commission erred to award them unpaid leave allowance which were not proven. The annual leave should be taken within six months according to section 31(9) of the Employment and Labour Relations Act, and if there is extension it has to be authorized by the employer. In the award the Arbitrator did not specify the leave paid to the Respondents was for which particular year.

The Applicant submitted on the last ground of revision that the award was illogical and improper as the Arbitrator unreasonably held that the employees' contract changed to be permanent contract after they have worked for 9 years. The Applicant prayed for application be allowed and the Commission Award be revised and set aside.

The Respondents Counsel replied to all grounds of revision as submitted by the Applicant. It was submitted on the first ground of revision that the term of employment contract has to be in written form according to section 15(1) of the Employment and Labour Relations Act, 2004. In the present case there is no written contract. As result, it was the employer who has burden to prove or disprove the term of contract as per section 15(6) of the Act. The Respondents were rendering service to the Applicant working for 9 hours daily under his supervision, they worked for 9 years and sometime worked overtime until they were terminated. They were paid monthly salary of 180,000/= and overtime in case they work for extra hours.

The Applicant was remitting Respondents contributions to NSSF since 1st July, 2007 to 17th October, 2016. The Respondents were provided with tool and working equipment. All of this proves that the Respondent were employed by the Applicant.

The Respondents' Counsel submitted on the second ground of revision that the Applicant failed to prove that there was fair reason for termination. Exhibit D1 shows that Respondents employment ceased because TPCC has notified the Applicant to reduce the number of its workers. There is no reason for termination in Exhibit D1 than showing the reason of TPCC to reduce casual labourers. Respondent were not employees of the TPCC. The Applicant was supposed to prove the reason for terminating Respondents employment the thing which was not done. To support the position he cited the case of **K.M.M. (2006) Entrepreneurs' Ltd vs. Emmanuel Kimetule,** [2015], LCCD 15.

The counsel submitted further that the employee were supposed to terminated under procedures provided by the law. Procedures for retrenchment are provided under section 38 of the Employment and Labour Relations Act, 2004, and rule 23, 24 and 25 of G.N. No. 42 of 2007. The procedures for retrenchment such as issuing of notice to retrench, consultation prior to retrenchment or method of selection of employee to be retrenched was never notified to the Respondents. The remedy for failure to

follow procedure calls for remedy as provided under section 40(1) (c), (2), (3) and section 44 of the Employment and Labour Relations Act.

On the third ground of revision the Respondents submitted that PW1 testified before the Commission that the Applicant never paid their annual leave for the year 2016. Thus, this is sufficient evidence to prove for unpaid annual leave.

Regarding the Fourth ground of revision the Respondents submitted that the decision of the Arbitrator was logical, proper and fairly construed by the Arbitrator as it based on the evidence adduced before the Commission. The evidence available proved that the Respondents were permanent employees of the Applicant and no procedures for retrenchment was adduced or followed. The Respondent Counsel prayed for the application be dismissed and CMA award be upheld.

The Applicant did not file any rejoinder.

From the submissions, it is very clear that Respondents were employed by the Applicant. The major dispute between the parties is whether the Respondents employment were permanent as it was submitted by the Respondent and held by the Commission or on daily basis as alleged by the Applicant. The Employment and Labour Relations Act, 2004 provides in section 14(1) that there are three types of employment contracts. The sections reads as follows, I quote:-

"14.-(1) A contract with an employee shall be of the following with types-

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

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

(c) a contract for a specific task."

The Contract for unspecified period of time is the contract which had no specific date of coming to an end. This type of contract come to an end when employee retires or terminates in accordance with the law or its terms. The Contract for a specified period is the contract which specify the fixed term or date for the expiry of the contract. According to the above cited section, the fixed term contract is for professionals and managerial cadre. The third type of contract is a contract for specific task. This type of the employment contract is for the performance for the specific task and when the task ends and the contract comes to an end.

In the present case the Arbitrator held that the Respondents were permanent employees since the Applicant failed to prove that they were employed on the daily basis. The Respondents were working daily for 9 hours and sometimes they worked for overtime, where paid monthly salary, were registered members of the social security scheme and they worked with the Applicant for nine years. The Arbitrator was of the view that the use of the term casual labourers was used to disguise the permanent employment of the Respondents. The Applicant submitted that the Arbitrator erred to hold that the Respondents were permanent employees as the evidence shows

that they were casual employees. The testimony of DW 2 shows that the Respondents were employed on a daily basis and their salary was Tshs. 6,000/= per day at Tanzania Portland Cement Company (TPCC) working station. Working for a long time does not automatically change the employment relationship between Applicant and Respondents.

Looking at the evidence available, it is the testimony of DW1 and DW2 which shows that the Respondent were casual employees. The testimony was supported by the identity cards of the Respondents – collectively Exhibit E which was tendered by the Respondents' witness namely Juma Shaaban Hussein – PW1. The identity card shows that the Respondents are casual labourers. Casual labourers are employees' who works under the control of the employer when they performed the work and they are paid for such work done. Thus, casual labourers' are employed under contract for specific task. The Respondents were employed by the Applicant specifically to perform cleanliness and other work at Tanzania Portland Cement Company Limited (TPCC) as casual labourers'. When TPCC decided to reduce number of casual labourers the Applicant had no other option than to end their contract. The facts that the Respondents were paid their salary at the end of the month and they were members of social security schemes does not make them permanent employees. Reading the Bank statement of the Respondents –

Exhibit E1 collectively shows that the Respondents were paid their salaries at the end of the month. However they were receiving different amount as salary each month which means that their salary was not of a fixed amount but depends on the days the employee worked. The Exhibit E1 shows that Said Mkunda received shillings 117,000/= as a salary for August 2016, shillings 105,000 for July 2016, shillings 132,000/= for June, 2016, shillings 230,000/= for May, 2016, shillings 196,560/= for April, 2016 and shillings 209,849/= for March, 2016.

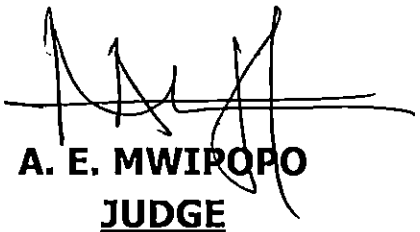
The Exhibit E1 further shows that Juma Shaban Hussein received shillings 140,000/= as salary for August, 2016, shillings 110,000 for July 2016, shillings 257,000/= for June, 2016, shillings 581,000/= for May, 2016, shillings 119,800/= for April, 2016 and shillings 321,640/= for March, 2016. There was no Bank statement of Amina Salum Mahame to prove she was paid monthly as alleged. These evidence prove that there was no specific salary paid to the Respondents at the end of the month but the payment depends on the number of working days that is the reason for difference in salary amount each month. The National Social Security Fund (NSSF) statement also shows that the Respondents' contributions were not consistent as the amount contributed differs in some months. The National Social Security Fund statement tendered was of Said Mgunda and Juma

Shaban Hussein only. This evidence also prove that the salary were paid depending on the days they have worked.

The fact that the Respondent has worked for 9 years doesn't change their contractual relationship from that of casual labourers to be permanent employees as was the position taken by this Court in the case of **Group Six International vs. Musa Maulid and Another**, Revision No. 428 of 2015, High Court Labour Division, at Dar Es Salaam, (Unreported). Thus, I find that the Respondents were casual labourers employed for specific task.

The Arbitrator awarded the Respondents to be paid 12 months' salary compensation for unfair termination and terminal benefits such as one month salary as a notice payment, severance payment and one month salary as leave allowance. Since I have hold that the Respondents were casual labourers working for specific task, they are not protected by the provision for unfair termination according to section 35 of the Employment and Labour Relations Act, 2004, (See. **Hussein Juma Ngobelo vs. China Railway Jiaching Engineerin Co. Ltd**, Revision No. 67 of 2015, High Court Labour Division, at Arusha). Thus, the Respondents are not entitled to the remedies which were awarded by the Arbitrator.

Therefore, I find the Application to have merits and the CMA award is here by set aside. Each party to cover its own cost of the suit.



A. E. MWIPOPO
JUDGE
05/03/2021