IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 751 OF 2018

BETWEEN

RAPHAEL J. GASPER ..... APPLICANT

VERSUS

KCY MPANGA CO. LIMITED ..... RESPONDENT

JUDGEMENT

Date of Last Order: 10/05/2021

Date of Judgment: 01/07/2021

Aboud, J.

The applicant, **RAPHAEL J. GASPER** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 17/08/2017 by Hon. Alfred Massay, Arbitrator in labour dispute No. CMA/DSM/KIN/75/12/1073. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act); Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

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Briefly, the applicant claimed to have been employed on 07/03/2008 as the Deputy Director and signatory of the respondent's Company which engages in agricultural activities especially cultivation of paddy at Ifakara-Morogoro. The applicant alleged that, he was terminated from the employment because he claimed for his salaries. Therefore, he filed a complaint at the CMA claiming for salary arrears and unfair termination from his employment by his employer, the respondent herein. The CMA on its findings was of the view that the parties had no employer/employee relationship consequently, the matter was dismissed. Aggrieved by the CMA's award the applicant filed the present application urging the Court to quash and set aside the CMA's award.

The matter was argued orally where the applicant was represented by Mr. Michael Mgombozi, Personal Representative while Mr. Augustino Kusalika, Learned Counsel appeared for the respondent.

Arguing in support of the application Mr. Mgombozi adopted the applicant's affidavit to form part of his submission. He submitted that, the award has to be set aside because it was made in error of facts and law as it contravened Rule 27 (3) (b) (d) of the Labour

Institutions (Mediation and Arbitration Guidelines) Rules, GN. 67 of 2007 (herein GN. 67 of 2007). It was submitted that, in the award the Arbitrator failed to mention the legal issues and no consideration was made to the exhibits which were tendered during arbitration. That, the Arbitrator misdirected himself in interpretation of section 61 of the Labour Institution Act, Cap 300 RE 2019 (herein the Labour Institution Act) where he decided that the applicant was not an employee of the respondent.

It was argued that, according to the record all the exhibit tendered by the applicant confirmed that he was the employee of the respondent especially exhibit P1 collectively. On the basis of such letter the personal representative argued that it was wrong for the Arbitrator to decide that, the applicant was not an employee of the respondent. It was further submitted that, at page 5 of the impugned award the Arbitrator decided that the applicant was not an employee of the respondent because he was still employed by SWISSPORT. It was strongly submitted that the Arbitrator's finding was not correct because the applicant retired from SWISSPORT long time ago before joining the respondent's company.

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It was firmly submitted that, the applicant was employed by the respondent as it was established in the case of **Mwita Wambura V. Zuri Haji**, Rev. No. 45 of 2012, HC Mwanza (unreported), where the Court decided who is an employee. It was also submitted that, in the letter dated 09/03/2008 the applicant explained that the Company was transferred from Mpanga to Msimbazi centered Dar es Salaam therefore, the Arbitrator did not consider the evidence in this matter.

It was also submitted that, the Arbitrator failed to consider exhibit RG5, the email communication between the parties, Director of the respondent and the applicant. Thus, he prayed for the application to be allowed.

Responding to the application Mr. Augustino Kusalika submitted that, the award of the CMA was proper as well explained in the respondent's counter affidavit. He prayed for the counter affidavit to be adopted to form part of his submission. It was submitted that, in this matter the only issue which was determined by the Arbitrator was whether there was employment relationship between the parties. It was argued that, in answering the relevant issue the Arbitrator considered the evidence tendered plus the relevant laws to wit the

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Labour Institution Act together with the evidence on record as reflected in page 5 of the award.

It was strongly submitted that, in the award the Arbitrator did not violate any provision of the law especially Rule 27 (3) (d) of GN. 67 of 2007. It was stated that, it is on record that the applicant admitted that he had no written contract between him and the respondent. It was argued that according to the evidence of the respondent his employees were under the NSSF scheme but the applicant was not.

It was further submitted that, the Arbitrator also considered working hours in determining whether the applicant was employed by the respondent or not. It was argued that, under section 61 (d) of the Labour Institutions Act it is provided that the existence of labour relation can be presumed when there is evidence that the employee worked for at least 45 hours per month over the period of three months. It was submitted that, there was no evidence tendered to prove that the applicant worked for such required hours. He argued that, there is no need of setting aside the impugned award as the application has no merit.

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In rejoinder Mr. Mgombozi submitted that, it is true that the applicant was an employee of the respondent and it was not his fault that he was not given an employment contract contrary to the requirement of section 15 (1) of the Act. He added, it is not true that the office of the respondent was at the applicant's resident but his place was used as the packing area for the companies' trucks and storage for spares. He therefore prayed for the application to be allowed.

Having gone through parties' submissions, Labour laws, CMA and court records with eyes of caution I find the court is called upon to determine the following legal issues; whether the applicant was an employee of the respondent, whether the applicant was terminated from employment and to what reliefs are the parties entitled.

I have noted the applicant's representative submission that, the award is in contravention of Rule 27 (3) (d) of GN. 67 of 2007 because the arbitrator did not frame the legal issues. Going through the impugned award at page 2, the arbitrator framed the issues for determination. In the contested award the arbitrator determined the issue of whether there was employment relationship between the

parties and validity of the applicant's claims. Therefore, the submissions and allegations thereto have no merit.

On the first issue as to whether the applicant was an employee of the respondent, the law provides number of factors to be considered in determination of who is an employee. The same are provided under section 61 of the Labour Institutions Act, which I hereunder quote for easy of reference:-

> *'61. For the purpose of labour law, a person who works for or renders a service to other person, is presumed until the contrary is proved to be an employee regardless of the form of contract if any, one or more of the following factors is present:-*
>
> *a) The manner in which the person works subject to the control or directions of another person.*
>
> *b) The person hours of work are subject to the control or direction of another person.*
>
> *c) In the case of person who works for the organization, the persons forms part of the 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 which that person renders service.

f) The person is provided with tools of trade or works equipment by the other person.

g) The person only works or renders service to one person.'

The above factors were also restated in the case of **Mwita Wambura Vs. Zuri Haji**, Revision Application No. 42/2012 at Mwanza. LCD 2014 Part II page 182 where Rweyemamu, J., held that:-

'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

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each of the parties; and (c) Use of burden of proof.'

The above tests are so crucial and important in the sense that the labour court have been reluctant and indeed have no jurisdiction to adjudicate cases arising out of violation of contracts which have no employer/employee relationship. Hereunder, the court will analyze the above listed factors in their application to the circumstances of this matter.

Starting with the first factor, that is the manner in which the person works, it is crystal clear that in the application at hand the applicant was not directly controlled by the respondent. The record shows that the respondent's office is located at Ifakara- Morogoro while the applicant was working in Dar es Salaam. During cross examination the applicant stated that the respondent's office in Dar es Salaam is located in his house where he was working from there. Thus, such fact shows that there was no direct control of the applicant's work by the respondent.

The second determinant factor is on the hours of work. In his testimony the applicant admitted that he was working part time job with Swissport. He did not state the hours he spent in the

respondent's Company and those hours where he was in another employment at the Swissport.

Another test is if the person forms part of the organization. At the CMA the respondent tendered all ID cards of his employees and their NSSF contributions (exhibit D1) but the name of the applicant is not included in the list of those employees. In my view such situation proves that, the applicant was not part of the organization but he was only appointed to help the respondent as a signatory on his bank transactions as it is shown in some of the documents attached at the CMA file.

Again, the applicant alleged that the parties had an agreement of payment of salary to the tune of Tshs 800,000/=. In his testimony the applicant testified that, he communicated with the respondent through phone and email about his salary per month. However, going through the record there is no any email tendered to prove such fact. I am not in disregard of the applicant's representative submission that, it is the duty of the employer to supply the employee with the written contract as required under section 15 of the Act, indeed that is the correct position of the law as provided under section 15 (6) of the Act which provides as follows:-

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'Section 15 (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.'

Having the above the above position of law in mind, I observed in this matter the respondent tendered sufficient evidence to prove that the applicant was not his employee but was only acting as his signatory. Therefore, on the basis of the above discussion, it is my view that the respondent tendered sufficient evidence to prove that the applicant was not his employee as correctly found by the Arbitrator. In other words, in this matter I find there was no employer/employee relationship. Therefore, the Court finds no need to belabour much on the remaining issues.

In the result, the applicant was not an employee of the respondent, therefore I find the present application has no merit. Consequently, the Arbitrator's decision is hereby upheld and the application is dismissed accordingly.

It is so ordered.

I.D. Aboud
JUDGE
01/07/2021

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