

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 189 OF 2021

**ZOE INTERNATIONAL (T) LTD..... APPLICANT
VERSUS
SHUAIB SHUJAA.....RESPONDENT**

JUDGEMENT

24th November & 23rd December 2021

Rwizile J

The applicant being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) filed the present application on the following grounds: -

- i. That the Arbitrator erred in law and in fact to declare that the respondent was an employee of the applicant (ZOE INTERNATIONAL (T) LTD) and render for unfair termination while he is not an employee.
- ii. That the arbitrator did not take into consideration the evidence adduced by respondent which rendering erroneous decision.
- iii. That the arbitrator erred in law and in fact by awarding reliefs to the respondent.

Arguing in support of the application Ms. Mally adopted the applicant's affidavit to form part of her submission. She strongly submitted that the respondent was not an employee of the applicant. She maintained that the applicant was invited just as a friend and there were no jobs by the time the respondent was invited. She argued that to be regarded as an employee there should be an employment relationship as per section 61 of the Labour Institutions Act [CAP 366 R.E 2019] She further submitted that there must be a contract of employment pursuant to Section 14 (1) of ELRA. To support her submission, she cited the case of **Ismail Musa Athman vs Lake Oil** Revision No. 86 of 2019.

Ms. Mally went on to submit that the respondent has never been under the control of the applicant. She added that there is no evidence proving who the respondent was reporting to and who was his immediate supervisor. She alluded further that the respondent worked independently and nobody knew what he did at a particular time. The respondent tendered GPSA, letter, financial year report and power of attorney, to prove he was an employee and there was no supervision on him as such. She said, he did what he did and at the time he wished and no person supervised him and never controlled him.

Ms. Mally went on to submit that the respondent's hours of work were unknown and he had no work identity card to prove his employment. She further submitted that he did not tender register book to prove his attendance at work. Ms. Mally insisted that the respondent has never been party of the company that he was as an independent contractor. Ms. Mally added that the respondent and Mr. Frank Muze (one of the company's shareholders) worked together as friends and was paid from Muze's Pocket. She also stated that the respondent was not provided with tools of work. There was no proof that he was interviewed and did not prove any of the factors under the law.

As to the second ground it was submitted that the arbitrator did not evaluate the applicant's evidence. Ms. Mally strongly submitted that there is no proof that the respondent was employed. Therefore, there was no termination and so ought not to be paid anything, she said. She insisted that the arbitrator did not consider and make a consideration of section 61 of LIA. She therefore urged the court to grant the application.

Responding to the application Mr. Jimmy strongly submitted that the respondent worked with the applicant and signed documents as Company service Director. The Learned counsel argued that it is not

likely that the company director can be simply not employed. He said the respondent performed his duties pursuant to section 61 of LIA. The learned counsel submitted that the applicant paid the respondent and there is no dispute that the workers records are kept by the employer. He added that no such proof that the respondent worked under other directors as testified before the CMA. He insisted that the respondent was party of the company and there is no law that shows he was not an employee. He therefore prayed for the application to be dismissed.

Rejoining Ms. Mally submitted that the law does not provide that whoever signs the document becomes an employee. She argued that there are duties that are contracted by the power of attorney which does not prove that the same was an employee. The letter to GPSA, financial report etc, did not prove that the respondent was employed, she alluded. The Learned counsel insisted that the respondent should have tendered the employment contract. She further reiterated her submission in chief and urged the court to grant the application.

After considering the submissions, I think, this court is called upon to determine the following issues; *whether the respondent was the employee of the applicant, whether the respondent was fairly terminated from employment and what reliefs are the parties entitled.*

On the first issue as to whether the respondent was the employee of the applicant. I have to say, the determinant factors establishing employment relationship are provided under section 61 of LIA as correctly submitted by Ms. Mally. For easy of reference, I hereunder quote the relevant provision: -

'section 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 form 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 v Zuri Haji**, Revision Application No. 42/2012 at Mwanza. LCD 2014 Part II page 182 where it was 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 each of the
parties; and (c) Use of burden of proof'

The tests cited above are the determinant factors of establishing employment relationship and in case they do not exist such dispute lacks qualification to be a labour dispute. The applicant strongly argued that the above testes were not proved in this case. On his part, the respondent strongly submitted that he was the employee of the applicant and tendered exhibits to prove such fact. The respondent tendered the introduction letter to NSSF of Mr. Ndallo Juma (exhibit D1) where he signed such letter as company services Director. The respondent also tendered the framework agreement for supply of common use and item between the applicant and the Government Procurement Services Agency (exhibit D4) where he also signed in the same position as Company services Director. Ms. Mally strongly allege

that by signing the alleged documents does not prove that the respondent was the employee of the respondent because he had power of attorney to that effect. I have carefully gone through the power of attorney in question (exhibit D3), the same was given to the respondent on 09.09.2019 to be the lawful attorney and agent in the execution of Tender no. Amref/2019/PQ/06. To the contrary the introduction letter (exhibit D1) was signed by the applicant on 05.08.2019 before signing of the said power of attorney. Again, the record shows that the respondent prepared the financial statement of the year 2018 (exhibit D5) before existence of the alleged Power of Attorney.

Under such circumstance I find the applicant's allegation that the respondent was not his employee lacks merit and is not backed up with evidence. The record proves that the respondent was the employee of the applicant. As correctly submitted by Mr. Jimmy the allegation that the respondent was only invited to the office as a friend is not backed up by evidence. The person invited as a friend would have not assumed the position of Company Service Director and proceeded to sign documents on behalf of the company. If such was the position then the applicant would have sued the respondent for forgery however, that is not what is reflected in the records.

I have also noted the Ms. Mally's allegation that the respondent should have tendered the employment contract, with due respect to her submission the obligation to tender the alleged contract lies to the applicant pursuant to the provision of section 15 (6) of the ELRA. The respondent in this case proved the terms of the agreed employment contract therefore it suffices to say the employer/employee relationship was established in this case.

On the second issue, since the first issue is answered in affirmative it is my view that the applicant did not follow the required procedure to terminate the respondent as rightly found by the Arbitrator. It is uncertain if the applicant terminated the respondent and on which grounds and what procedures. Thus, the termination in this case was unfair both substantively and procedurally as correctly found by the arbitrator.

On the last issue as to parties' reliefs; since it is found that the respondent was unfairly terminated both substantively and procedurally, I find the reliefs awarded by the arbitrator are correct to the circumstance of this case.

Conclusively, on the basis of the above findings I find the present application has no merit and is dismissed accordingly. The applicant is

ordered to pay the respondent 12 months' salary as compensation for the unfair termination amounting to Tshs. 5,400,000/=, one month salary in lieu of notice Tshs. 450,000/=, leave payment Tshs. 450,000/= and a certificate of service. Thus, the respondent should be paid the total amount of Tshs. 6,300,000/=.




A. K. Rwizile

JUDGE

23.12.2021