IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 350 OF 2020

JMB INTERNATIONAL LIMITED ..... APPLICANT

VERSUS

MBIKE MOHAMED MBIKE & 29 OTHERS ..... RESPONDENTS

JUDGEMENT

23rd November & 22nd December 2021

Rwizile J

The applicant filed the present application challenging the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/PWN/MKR/05/2020 delivered on 11.08.2020 by Hon. Amos, H, Arbitrator.

The dispute arose out of the following context; the respondents claimed to be employees of the applicant who were employed on different dates from 2017 to 2019. They allege that they were employed to work at the Ngunguti project within Mkuranga district. In the respondents opening statement at the CMA they alluded that they had oral contracts. The dispute between the parties arose on 03.02.2020 after the applicant forced the respondents to sign new employment contracts.

The respondents felt the new and formal contracts to be signed aimed at superseding the previous oral contracts.

The respondents contended that if they would have accepted to sign the written contracts, they could lose their rights originated from previous contracts. Aggrieved by the applicant's decision the respondent referred the matter at the CMA claiming for unfair termination. After considering the evidence of both parties the CMA found that the respondents were unfairly terminated from employment hence, proceeded to award them 12 months' salary as compensation for the alleged unfair termination, four (4) days salary in lieu of notice of termination as well as severance pay for one year.

The applicant was dissatisfied by the CMA decision. He therefore filed the present application to challenge such decision on the following grounds:-

i. *That the arbitrator erred in law in interpretation general principles considered in determining existence of employment relations.*

ii. *That the arbitrator erred in law and fact for failure to properly evaluate the evidence before the commission.*

iii. *That the arbitrator erred in law and fact in holding that the respondents were unfairly terminated while admitting that they were daily wagers.*

Arguing in support of the application Mr. Kobas learned advocate submitted that an employee is defined under section 61 of the Labour Institutions Act, [CAP 300 R.E 2019] (LIA).

He stated that Pw1 did not prove that the respondents were under the control of the applicant. The learned counsel strongly submitted that there is no evidence in record to prove that the respondents were the applicant's employees.

As to the test of hours of work Mr. Kobas submitted that the respondents were not part of the organization and they did not state the hours of work apart from stating that they worked until 2020. He was of the view that section 61 (c) of LIA was not complied with. He further submitted that no proof of the respondent's payment. He said apart from PW1 who testified that he was paid Tshs. 15,000/= per day, the payments of the remaining respondents are unknown. He added that PW1 testified that he was given written contract of six months to the contrary the same was not tendered as proof. Mr. Kobas went on to submit that no tools of work were provided

to the respondents. He stated that PW3 admitted that the applicant engaged sub-contractors and his evidence was not shaken.

As to the second ground, it was submitted that PW2 did not prove that he was the employee of the applicant. He contended as well, that his evidence (PW2) is based on hearsay because no written contract was tendered to prove his allegation.

Submitting on the last ground, it was submitted that unfair termination cannot be proved in this case because existence of employment relationship was not proved. Mr. Kobas argued further that the respondents were employed on different dates but alleged to have been terminated on the same date, which under the circumstances they cannot testify for each other.

To support his submission the Learned Counsel cited the case of **National Agriculture and Corporation v. Mwibandon Village Commission and others,** [1985] TLR 88. He added that the respondents did not prove their case because only PW1 testified. He thus urged the court to grant the application.

Responding to the application Mr. Ferdinand learned counsel prayed to adopt the respondents counter affidavit to form part of his submission. As

to the first ground he responded that the evidence of the respondents available in the CMA records prove that the respondents were employees of the applicant as testified by all witnesses.

As to the second ground, it was submitted that there is no proof that the applicant employed sub-contractors therefore, such ground lacks merit.

Regarding the last ground Mr. Ferdinand strongly submitted that unfair termination was proved in this case. He stated that exhibit D1 proves that it was not a sale agreement as the said agreement is not signed, it has no company seal and there is no board resolution. He further contended that in the disputed agreement does not show who were directors. He therefore prayed for the application to be dismissed. He added that the cases cited by the applicant's counsel are distinguishable.

Rejoining Mr. Kobas insisted that the respondents did not prove any of the elements provided under section 61 of LIA. As to other grounds he reiterated his submissions in chief.

After considering the parties submissions, records, as well as relevant laws. I find the court is called upon to determine the following issues; *whether the respondents were employees of the applicant, whether the*

respondents were fairly terminated from employment and what reliefs are the parties entitled.

On the first issue, as to whether the respondents were employees of the applicant, which is denied strongly disputing the fact that the respondents were his employees as opposed to the arbitrator's findings. The determinant factors of employment relationship between employer/employee are provided under section 61 of LIA as correctly submitted by Mr. Kobas. 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 person 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 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 in employer/employee relationship and in case they do not exist such dispute lacks qualification to be a labour dispute. The above tests will be examined relating to the circumstance of this case.

In proving all the factors, the respondents persuaded this court to rely on the evidence adduced by their witnesses. PW1, Iddi Yusuph testified that he had six months employment contract with the applicant however, the alleged contract was not tendered at the CMA. PW2 testified that she had food business at the applicant's premise and she used to see the respondents working at the applicant.

As for PW3, he testified that he was a contractor at the applicant's office however he did not tender any document to prove his assertion. The CMA records shows further that all the witnesses testified at the CMA were not in the list of the complainants attached with CMA F1. Based on the respondent's evidence alone which is not corroborated with any documentary proof, unlike the Arbitrator, I am of the view that the respondents failed to prove they were employed by the applicant.

As indicated in the analysis of the respondents' evidence above, they did not prosecute their case. What the respondents did is contrary to the required procedures. In any case parties to the case must first prove their case thereafter witnesses will be called upon to support evidence of a party. It is crystal clear each respondent had to prove his or her case none should testified on behalf of others. This is contrary to Rule 25 of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67 of 2007 which require parties to prove their respective cases. That being the position it is my view that the respondents failed to prosecute and prove their claims at the CMA as correctly contested by the applicant.

Even if the court was to rely on the alleged witnesses' evidence, in my view their evidence is not sufficient to establish the employment relationship between the parties.

The applicant tendered the sale agreement (exhibit D1) which shows that in 2018 the applicant's company was sold to the persons known as Fetouh Ahmed Abouelfetouh Ahamed and Abdallah Sadiki Ramadhani. In the said agreement it is not shown that the respondents as employees of the applicant were transferred to the latter owner. Having considered the respondents contention on the sale agreement, with due respect to the relevant submission, the contentions should have been raised at the trial when dealing with admission of the relevant document but not at this stage.

On the second issue, since the first issue is answered against the respondents, it is my view that termination of employment was not proved in this case. As stated above, the respondents failed to establish the employer-employee relationship. It follows therefore that there must proof existence of contract of employment first before considering whether it was terminated or not. In this case, there is no proof that the same exists. Termination cannot be considered.

As to the last issue of reliefs, following the findings of unfair termination the arbitrator awarded the respondents 12 months' salary, 4 days' notice and a certificate of service. In my view, on the basis of the above findings the respondents are not entitled to the reliefs awarded. In the result, as

it is found that the employment relationship was not established in this case, I find the present application has merit. Consequently, the Arbitrator's decision is hereby quashed and set aside. No order for costs.

A.K. Rwizile

JUDGE

22.12.2021