IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 324 OF 2020

MOHAMED SAGARA .....APPLICANT

VERSUS

RASCO MOTORS (T) LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 18/08/2021

Date of Judgment: 10/09/2021

B.E.K. Mganga, J.

Mohamed Sagara, the applicant filed labour dispute No. CMA/DSM/KIN/523/19 on 8 July 2019 alleging that he was unfairly terminated by the respondent on 6th July 2019. It was alleged by the applicant that on 14th August 1988 the respondent employed him verbally as carpenter and that in 2004 his employment changed into a driver. It was further alleged by the applicant that the base of termination was discrimination and segregation after the respondent has learnt that the applicant is affected with HIV Aids. Applicant contended further that, procedure for termination was not adhered to, by the respondent. The respondent disputed to have employed the applicant arguing that their relationship was on specific contracts. That their

relations ended upon completion of the specific contract on which applicant was paid for.

Having heard evidence of the parties and their submissions, on 3rd August 2020, Ng'washi, Y, Arbitrator, issued an award in favour of the respondent holding that applicant was not an employee of the respondent. Aggrieved by the said award, applicant has thrown his second dice by making this revision application seeking to revise the said award and has advanced three as follows:-

1. *That, the Arbitrator erred both in law and facts for failing to record key testimony words and evidence of the applicant during hearing of the dispute.*
2. *That, the Arbitrator failed to reasonably assess and analyze the applicant's evidence in comparison with evidence of the respondent as a result thereof erroneously concluded that the applicant was not employee of the respondent due to absence of documentary evidence.*
3. *That, the Arbitrator erred both in law and facts for failure to give reasons for delay in delivering the award as the same was delivered after expiry of thirty days.*

In his written submissions, applicant argued ground number 1 and 2 together that the arbitrator failed to summarize evidence and arguments of the parties and record the key issues as provided for under Rule 32(3) of the Labour Institutions (Mediation and Arbitrations) Rules, GN. No. 64 of 2007. He faulted the arbitrator that, in his evidence, he testified that he was paid salaries, provided working tools

by the respondent and that his hours and work was under control and direction of the respondent. He submitted further that, he economically depended on the respondent who had power of taking disciplinary measures against him. He submitted further that all these were not disputed by the respondent and that all these are not reflected in the award. He cited section 61 of the Labour Institution Act [cap. 300 R.E. 2019] on presumption as to who is an employee and argued that, in terms of section 15(6) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] the respondent was required to justify as to why he failed to give written contract to the applicant.

Arguing these grounds of revision, counsel for the respondent submitted that the arbitrator analyzed and summarized evidence of PW1 and that of DW1 and arrived at a proper conclusion. Counsel submitted that applicant was engaged once in 2016 and was issued with an ID that was valid for only one year and expired in 2016 to collect motor vehicles from Kenya and was paid for that trip. It was submitted further that reasons were clearly given at page 7 and 8 of the award as to why applicant does was not an employee of the respondent. He went on that it was testified and proven at CMA that applicant was an independent contractor and that his relationship with the respondent was on specific

assignment of which he was paid for once concluded. He therefore prayed these grounds be dismissed.

I have gone through CMA proceedings and the award itself and find that in his testimony, applicant (pw1) did not testify that he was provided working tools by the respondent and that his hours and work was under control and direction of the respondent and that he depended economically on the respondent. Nothing was said as to whether the respondent had power to disciplinary him. He cannot now be heard to raise these issues on revision while they were not raised in his evidence. I have carefully examined the CMA record and find that there is no indication that even the nature of questions put to both Ahmed Said Abdallah (DW1) and Jumanne Sultan (DW2) under cross examination were intending to prove existence of these facts. It is my considered opinion that, these issues were raised as an afterthought. Evidence of both DW1 and Dw2 proved that applicant was not an employee of the respondent rather, he was engaged on specific contract and paid for that and their relations ended after performance of the specific task. In fact, Dw2 testified that being a carpenter like the applicant, used to work on specific contract with applicant and paid for that.

It was argued by applicant that the arbitrator erred both in law and facts for failing to record key testimony, words and evidence of the applicant during hearing of the dispute. This claim has not been proved. Always a court or tribunal record is presumed to be correct unless otherwise proved to the contrary. Nothing was brought to my attention suggesting that the record does not reflect truly what transpired at CMA. In absence of strong evidence to suggest otherwise, this court cannot lightly assume and buy an idea that the record does not reflect what transpired. Courts have been cautious to buy allegations like this one for a very good reason. That is to say, once this allegation is lightly accepted, then, every litigant who stand to lose his or her case will come with the same argument as a result there will be both endless cases and complains against judicial officers. Due to absence of strong evidence, that claim also stand to fail and dismissed.

Arguing ground 3, applicant submitted that parties made their final submissions on 23rd June 2020 and were informed that the award will be ready for collection on 23rd July 2020 but the same was delivered on 3rd August 2020 and that no reasons were assigned by the arbitrator for this delay. He cited section 88(9) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] that the award was supposed to be

delivered within 30 days from the conclusion of the hearing. He concluded his submissions by praying that the award be revised, and the respondent be ordered to pay a total of TZS 29,924,923/= covering notice pay, working days before termination, annual leave for 2018/2019, accumulated unpaid leave from 2014 to 2018 and severance pay.

Arguing this ground of revision, counsel for the respondent conceded that the award was issued 10 days late and that no reasons were assigned. He was however quick to point out that applicant has not shown how he was prejudiced by that delay and failure to give reasons for that delay. Counsel submitted that the said error was committed by the tribunal as such, respondent should not be punished for that. He prayed the court to invoke the overriding principle and decide the application on substantive justice and not on technicalities. He cited the of ***Jovet Tanzania Limited v. Bavaria N.V, Civil Application No. 207 of 2018***, CAT (unreported) to support his argument.

I have considered these rival arguments and examined the award and find as correctly conceded by counsel for the respondent that the award was issued 10 days out of the time prescribed under the law. Both the Applicant and counsel for the respondent has cited section

88(9) of Cap.366 R.E. 2019 as being the provision of the law that was contravened but the proper section is 88(11) of the same statute that require the award be issued within 30 days and reasons for that award assigned. At any rate, nothing was submitted as to how applicant was prejudiced as submitted by the respondent. In my opinion, the arbitrator was supposed to give reasons for the delay but that failure does not invalidate the award.

On the other, applicant has prayed to be paid the amount stated hereinabove but the respondent has disputed that claim. From the evidence in CMA file, there is nothing mentioned in evidence of the applicant that he was entitled for all these or any. Nothing came out in his evidence that he was not given leave etc. for him to be entitled this pay. The applicant only indicated in CMA F1 that he is entitled for these payments but did not prove them by evidence. In my view, it is not enough to claim them in the CMA F1 and think that the application has been prove at balance of probability. What is in evidence of the applicant is that, he was being paid monthly salary of TZS 140,000/=.This was disputed by the respondent in his evidence. All claims of discrimination based on sickness was not mentioned in his evidence. In my opinion, it is not enough just to state in CMA F1 that

there was discriminated without evidence being tendered. As there is no evidence on CMA record, this claim fails too. In the upshot, the application is dismissed for want of merit.

It is so ordered.

B.E.K. Mganga
JUDGE
10/09/2021