IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

(ARISING FROM LABOUR DISPUTE NO. CMA/DSM/KIN/26112/08/69)

REVISION NO. 968 OF 2019

AIDAN AMON.....APPLICANT

VERSUS

MWANANCHI COMMUNICATION LTD..... RESPONDENT

JUDGMENT

27th September & 13th October 2021

Rwizile, J.

AIDAN AMON has lodged this application for revision against the award of the Commission for Mediation and Arbitration in respect of Labour Dispute No. CMA/DSM/KIN/26112/08/69. The applicant is seeking revision for the following orders:

1. That this Hon. Court be pleased to call and revise the proceedings and subsequent award of the Commission for Mediation and Arbitration at Dar es salaam in the Labour Dispute No. CMA/DSM/KIN/26112/08/69, decision made by the Arbitrator Hon. Massay.

2. That the Honourable Court be pleased to revise and set aside the decision of the arbitrator as it was granted with error and with misconception of the law.
3. Any other relief to be granted as the Honourable Court deems fit and just to grant.

The application is supported by the applicant's affidavit. Paragraph 9 of the affidavit contains four grounds for determination stated as follows;

i. That the Honourable arbitrator did not determine the contractual relationship between the applicant and the respondent in a form of retainership.
ii. That he overlooked evidence adduced during trial by the applicant which was sufficient to establish an employer and employee relationship between the applicant and the respondent.
iii. That proper legal procedure was not followed by the respondent in terminating the applicant's contract of employment.
iv. That the onus of proof that termination was fair has never been discharged by the respondent.

It has been stated that the applicant and respondent signed a contract for retainership for one year starting from 1st August 2006 to 31st July 2007 as a Freelance Advertising Officer. On contract expiry, the respondent opted not to renew the contract with the applicant. Dissatisfied with the respondent's decision, the applicant referred the matter to the Commission. The same decided the matter in favour of the respondent. The dispute was dismissed for having no merit. Actually, the Commission was of the view that there was no employer- employee relationship. The applicant was aggrieved hence this application.

The applicant appeared in person, whereas the respondent was represented by Mr. Arbogast Mseke, learned Advocate and hearing of the application was by way of written submissions.

Supporting the application on first issue Mr. Aidan submitted that the arbitrator did not determine the contractual relationship between the applicant and the respondent in a form of retainership. He stated that the arbitrator, only considered payment of a commission of Tsh 100,000/= as a retainer fee per month. He submitted, the applicant's evidence and clause 3 of the agreement providing for leave were left undiscussed. He therefore held the view that other factors that

established the existence of employer-employee relationship were left out.

On the second ground, the applicant submitted that the arbitrator overlooked evidence about leave, reporting to his employer on daily basis. This resulted to failure of establishing the existence of employer-employee relation.

On the last issue Mr. Aidan submitted that the arbitrator never considered both aspects of unfair termination including fairness and validity of the reason as well as the procedure in implementing applicant's termination. Surprisingly, he submitted, the arbitrator directed his mind on one issue as to whether the applicant had employment relationship with the respondent. He concluded that he left other issues undetermined. He thus prayed for the CMA award to be set aside.

Replying to the application regarding the first issue Mr. Arbogast submitted that apart from other claims including unfair termination and unpaid commission amount of Tzs 93,493,866.70, having the dispute regarding the nature of the contract, he was of the view that it was correct for the same to be addressed first by the Commission

before determining other issues, as the contract was for service therefore could not be adjudicated by the CMA.

The Counsel submitted that exhibit D2 which is an agreement, state that the applicant was hired as Freelance Advertising Officer (FAO) and this is justified by his modality of payment of 10 to 15 percent as a commission for any advertise outsourced and paid for. On that basis he was of the view that Section 61 of the Employment and Labour Relations Act, [Cap 366 R.E 2019] is relevant in determining this dispute.

The respondent Counsel argued that the respondent was not responsible in supplying working tools including telephone, letters and fax costs. No training was offered to the applicant, which means there was no direct control in executing duties for the employer-employee relationship to be established. Bolstering his application, he cited the case of **Fleelance Advertising Officer (FAO) namely James Majura v. Mwananchi Communications Limited,** Revision No. 130 of 2013, High Court of Tanzania, at Dar es salaam (unreported). He was of the firm opinion that the contract was for service therefore the applicant's claims do not fall within the ambit of unfair termination.

It was further argued that assuming that the contract between the applicant and the respondent was of service under a fixed term of one year, according to exhibit D3, the respondent informed the applicant of her intention not to renew the contract, since it had expired as per Rule 4(2) (3) of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007.

The applicant therefore was duty bound to prove if there was expectation of renewal, which was not honoured by the applicant at Commission.

Regarding claims of commission to be payable, the counsel submitted that the applicant is duty bound to prove that payment of the commission was made by the customer into the respondent's account. No such evidence adduced by the applicant. This means, it was submitted, there no such proof. In rejoinder the applicant reiterated his submission in chief.

Having considered parties submissions and the record, this court finds it worth to determine two issues. The issues are as follows; -

i) Whether there was employer employee relationship?

ii) To what reliefs parties are entitled to?

In addressing the first issue this court find worth to refer to section 14(1) of the ELRA. It provides for types of employment contracts

recognized by the law; as a contract for unspecified period of time, a contract for a specific period of time for professionals and managerial cadre and a contract for a specific task. From the above, it is settled that jurisdiction of labour Court and CMA is reserved to labour disputes which include all types of employment contracts where there is employer-employee relationship. Therefore, any contract without employer-employee relationship, this court has no jurisdiction to handle. On the basis, one has to differentiate between a contract of service and a contract for service.

Having the disputed fact of an employer-employee relationship determined by the types of contracts entered by the parties, the relevant provision is section 61 of the Labour Institutions Act which provides that; -

> *'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.'

It is a principle of law that, for an employer-employee relationship to be established, atleast one of the above-mentioned factors should be proved.

Turning to this application, the applicant was employed under a contract of freelance advertising officer (FAO) as evidenced by exhibit D-2. It shows that the applicant was neither supplied with working tools nor paid monthly salary in order to establish economic dependence. Under clause 4 and 7 of the contract, it is provided very

clearly that the applicant was responsible for working tools and his payment was in terms of commission. No salary was paid to him. In the circumstance therefore, I am of the view that the applicant's contract was for service. It does not fall under the scope of section 61 of the Labour Institutions Act, as was discussed in the case of case of **Bashiri Mohamed v Markit Suport Ltd,** Lab. Div, DSM, Revision No. 205 of 2011, it was held that: -

> *"... the contract for service is another category which does not create employment relationship, it refers to independent contractors..."*

Having found that the applicant was working as independent advertiser where the manner of doing his work, time of work and working tools were controlled by himself, and receiving commission, it safe to hold that he did not acquire the status of being respondent's employee. Therefore, the Commission rightly held that there was no employment relationship between the parties. The first issue, relates with the second one, are therefore held merit less. It follows, there could be no termination without employment relationship as held above. The rest of the grounds are baseless. It is

for this reason, that I dismiss the application. I make no order as to the costs.

It is so ordered.

AK. Rwizile

JUDGE

13.10. 2021