IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 72 OF 2022

GEOFREY RAMON MTWEVE ..... 1st APPLICANT

ALEX W. MUNISI ..... 2ND APPLICANT

VERSUS

DIANAROSE SPARE PARTS LIMITED..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni) ***(Nyagaya: Arbitrator)*** *dated 31st Day of January 2022 in Labour Dispute No. CMA/DSM/UBG/105/20*

JUDGEMENT

K. T. R. MTEULE, J

07th October 2022 & 24th October 2022

Being dissatisfied with the award of the Commission for Mediation and Arbitration of Dar es Salaam, Ubungo, [herein after to be referred to as CMA], the applicants filed this application under **Sections 91(1)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]; Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007** and any other enabling provisions of the law, praying for the orders of this court in the following terms:-

1. This Honourable Court be pleased call for the records of the CMA for revision on correctness, propriety and legality of the CMA arbitral award and the proceedings originated from

dispute No. CMA/DSM/UBG/105/20 by Hon. Nyagaya, P. Arbitrator of the Commission.

2. Any other relief that deemed fit and just to be granted by this Honourable Court.

A brief sequence of facts leading to this application is extracted from CMA record and parties' sworn statements. The above-mentioned labour dispute was referred to the CMA where the applicants claimed to have worked with the respondent in different periods, the fist applicant from 27th August 2009 and from year 2008 for the second applicant under an alleged oral contract. They further claimed that the respondent unfairly terminated their employment on 05th September 2020 when the respondent demanded them to sign a one-year fixed term contract and after their questioning on the status of their previous time of employment. On what the applicants claimed to be unfair termination, they referred the matter to the CMA claiming for unfair termination and other terminal benefits to the Tune of TZS 14,400,000.00.

In the CMA the respondent disputed to have ever employed the applicants. The respondent claimed that the applicants worked casually on a specific task arrangement and payment used to be made for that particular assignment only. According to her opening statement, the respondent wanted to offer a formal employment to the applicants but

they declined the offer and stopped to take any assignment. The respondent denied to have ever terminated the employment contract with the applicants claiming that such a contract has never existed.

At the CMA, the arbitrator found no employment relationship between the parties and held that the applicants were just casual workers. The application was dismissed. The applicants being aggrieved with the award, preferred this application.

Along with the Chamber summons, the affidavit of the applicants was filed, in which after elucidating the chronological events leading to this application, asserted that, in the CMA, the evidence was not properly evaluated by the arbitrator in composing the award. In the affidavit, the applicants claimed to be paid their terminal benefits resulting from unfair termination and underpaid salary in accordance with the wage Order of 2013 for a driver in a firm of transportation. The applicants advanced three grounds of revision as stated at paragraph 4 of the affidavit which can be paraphrased as follows; -

a) Whether the honourable arbitrator correct in evaluating the evidence before him.

b) Whether the honourable arbitrator was proper to place a burden of proof to the applicants.

c) Whether the honourable arbitrator was proper in holding that the applicants was casual labours without any exhibit from the respondent to justify it.

The respondent filed her counter affidavit sworn by one Mashauri Mussa Mchele, the Respondent's Human Resource Manager where all the material facts were disputed. The deponent of the counter affidavit maintained that the respondent never had an employment relationship with the applicants.

In this application parties enjoyed legal services. The applicants were represented by Mr. Lusekelo Samson, Personal Representative, whereas the Respondent was represented by Mr. Datius Faustine, Advocate.

The matter was disposed of by a way of oral submissions, whereby Mr. Lusekelo for the Applicant condensed the three issues to form one, as to **whether it was appropriate for the arbitrator to place a burden of proof upon the applicants in absence of records of employment from the employer**. Mr. Lusekelo submitted that under **Section 14 (2) of the Employment and labour Relations Act, Cap 366 R.E 2019 (CAP 366)**, a contract with an employee shall be in writing and under **Section 15 (1)** the employer has a duty to supply the information to the employee.

Mr. Lusekelo submitted that it was not disputed that the applicants were working as drivers of trucks owned by the Respondents in and outside the country and they were being paid by the respondent. He referred to **Section 61 (a) (b) (c) (d) (e) (f) and (g) of the Labour Institutions Act, Cap 300, R.E 2019**, which in his view, directs circumstances under which the Court may establish employer - employee relationship.

Mr. Lusekelo submitted that it is apparent that the arbitrator erred because the burden of proof of existence of employment relationship lies on the employer but in this matter the employer denied existence of any employment relationship. Supporting his position, Mr. Lusekelo cited the case of **Kundan Sigh Construction Co. Ltd vs. Sohan Lal Sigh,** Revision No. 31 of 2013, High Court of Tanzania, Labour Revision, at Dar es salaam, (unreported). He submitted further that in the CMA they issued a notice to produce but nothing was brought.

According to Lusekelo, it was neither disputed in the CMA that the applicants worked with the respondent, nor was it disputed that the applicants were driving respondents' cars and getting paid by the respondent. He stated that the respondent did not bring the records to prove the kind of relationship they had.

Mr. Lusekelo finalized that the arbitrator did not have any valid reason of not agreeing with the applicants' claims thus prayed for the application to be allowed.

In reply Mr. Datius Faustine Advocate referring to Section **60 (1) of the Labour Institutions Act** which assigns the burden of prove to the employer to keep valid and accurate record and to prove compliance with any other law. He stated that it is apparent that in the CMA, the employer proved that there was no employment relationship between the applicants and the respondent. He cited page 4 of the CMA decision where it is recorded that the applicant DW1 Mashauri Mussa Mchele testified that the recruitment of the applicants depended on the availability of consignments where a driver was assigned to do particular transportation on a payment of allowance. He further referred to the statement of PW1 on cross examination testifying that he used to be paid TZS. 300,000/= when they start the journey and on arrival in Kongo, got 300 USD. In his view, this statement supports the evidence of DW1 who testified that the applicants were being paid allowance and not salaries. In his view, the employer proved his case that the relationship between the applicants and the respondent was for specific tasks and not a continuously to create employment relationship.

Mr. Faustine submitted further that the CMA properly evaluated exhibits A1 and A2 as indicated at page 6 of the award which the applicants tendered in a bid to prove their employment relationship. He supported the arbitrator's finding that those exhibits do not prove employer employee relationship. He made further reference to page 3 of CMA decision where the applicants told the CMA that they had been offered one year contract which was admitted as exhibit A3, but the applicants refused to sign it before payment of previous contracts.

Mr. Faustine interpreted **Section 15 of the Employment and Labour Relation Act, Cap 366 R.E 2019** as not applicable in this matter because the evaluation of facts in the CMA shows that employment relationship in accordance with that section was not there.

In rejoinder Mr. Lusekeslo reiterated his submission in chief but emphasized that the applicants were not casual laborers.

Having considered parties submissions and their sworn statements together with the CMA record, I draw up two issues for determination which are **whether the applicants have provided sufficient grounds for this Court to revise the CMA award** and secondly **to what reliefs parties are entitled.**

In addressing the above issues, the grounds identified in the affidavit will be considered in consolidation done by the respondent to find out as

to whether there was an employer employee relationship between applicants and respondent. In the CMA, the arbitrator found that the applicant was not employed by the respondent, but he was a casual worker.

The law provides for different types of employment contracts. **(See Section 14 (1) of Cap 366).** The section recognizes employment contracts to include 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 provision it is well known that the jurisdiction of labour Court and CMA is ousted from determining disputes arising from normal contracts but reserved to all types of employment contracts mentioned above having an employer-employee relationship. Therefore, any contract without employer-employee relationship is considered as a normal contract but not an employment contract.

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 Cap 300 of 2019 R.E,** which provides that:-

> *"**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's 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.'

From the above cited provision, it is a principle of law that, for an employer-employee relationship to be established, the above-mentioned factors should not be taken in isolation. In this application it's undisputed that parties had oral contract under which transportation of goods was being made within and outside Tanzania. As to whether the above contract sufficiently established employee – employer relationship

between the parties, one or more of the factors enumerated under **Section 61 of Cap 300** must be proved. The arbitrator examined Exhibit A1 and Exhibit A2 and found that none of them proved existence of any of the above factors.

Having gone through the record of the CMA, I have noted that DW1 testified that the engagement of the applicants depended on the availability of consignments where a driver was assigned to transport goods on a payment of allowance. Further to that, PW1 on cross examination testified that he used to be paid TZS. 300,000/= when they start the journey and on arrival in Congo, they got paid 300 USD. I as well couldn't find this to be sufficient evidence to prove existence of the factors in **Section 61 of Cap 300.**

Mr. Lusekelo tried to establish that since it was the respondent who had a duty to prove the existence of the contract under **Section 15 (1) of Cap 366** which places upon the employer a duty to keep record and supply the information to the employee, then he had a duty to prove.

In my view, since the parties had oral contract, the application of **Section 15 of the ELRA, Cap 366 R.E 2019** regarding the duty to keep employment records and allegation that the applicant had a duty to prove could not have been better complied with in absence of written contract. As well since the employer denied to have employment

relationship with the applicants, he could not have record of such employment. In my view, the burden must shift to he who alleges in circumstances like this. Although the employer has a duty to keep the record, and prove the employment record there could be no way under which such a record could have been kept regarding oral contract with no employment relationship. The burden of prove in employment of contract lies on the employer when it is already established to have employment relation in existence. This applies when existence of termination of employment is already established. Otherwise, the duty to prove a matter where the existence of employment is disputed must rest on the person who alleges in accordance with **Section 110 of the Evidence Act, Cap 6 R.E 2019.**

Since there was already a testimony that the applicants were engaged under oral contract, how the salary was being paid becomes the prove of the party who alleges as per **Section 110 of the Evidence Act**, supra. The applicants had a duty to provide evidence to prove the factors enumerated in **Section 61 of Cap 300** to counter the evidence of the employer that he was not employed by the respondent.

In such circumstances since the mode of payment is the only evidence available which show that the applicants were used to be paid in terms of allowance and not salary as supported by the evidence of PW1 and

DW1 then the applicants could not claim that there was employer employee relationship with the respondent unless a better particulars and evidence is provided to substantiate it.

Regarding the allegation that the evidence tendered before CMA was not properly evaluated, it is apparent that the only available evidence of the applicant in Exhibit A1 and A2 was considered by the arbitrator and found to be not sufficient to establish employer employee relationship. I agree with the arbitrator. Under the oral contract Exhibit A1 and A2 do not show that neither applicants were supplied with working tools nor being paid monthly salary in order to establish economic dependence. How the applicants were being working under the direction of the respondent was not proved. Not even evidence adduced to show that the applicants were part of the organization. There was no evidence on how many hours did the applicants worked for a month. In such circumstance I am of the view that it is not sufficiently proved that there was employment contract between the parties. In my view, the arbitrator was correct to have found the labour dispute not sufficiently proved.

From the foregoing analysis, the main issue as to whether there are sufficient grounds to revise and set aside the CMA award is answered negatively.

Regarding reliefs, since the first issue is answered negatively, then I find that the available remedy is a dismissal of this application for revision and upholding of the CMA award.

For that reason, it is my holding that, the application for revision has no merit. The application is hereby dismissed, and I hereby uphold the CMA award. Each party to take care of its own cost. It is so ordered.

Dated at Dar es salaam this 24th Day of October 2022

KATARINA REVOCATI MTEULE

JUDGE

24/10/2022