IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATE REVISION NO. 254 OF 2022 & 260 OF 2022

CONTINENTAL RELIABLE CLEARING CO. LTD ..... APPLICANT

VERSUS

WILHAD DOMINIC KISUNDA..... 1st RESPONDENT

IBRAHIM NORMAN SALIM.....2nd RESPONDENT

ROSE NICODEMUS NCHEM.....3rd RESPONDENT

RUTH MATHEW MPUTTA.....4th RESPONDENT

(*From the decision Commission for Mediation and Arbitration of DSM at Temeke*)

(Nyangúye: Arbitrator)

Dated 22nd July, 2022

in

REF: No. CMA/DSM/TEM/441/2019/177/2019

JUDGEMENT

22nd September & 4th November 2022

Rwizile, J

This application is from the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/TEM/441/2019/177/2019. The court is asked to call for and revise the award of the CMA.

Allegedly, the respondents and the applicant had employment, relationship where the respondent worked for the applicant as casual labourers. It was further alleged that the respondents absconded from work and filed a labour dispute at the CMA claiming benefits due to unfair termination. The award was in favour of the respondents. The applicant was ordered to pay the respondents the total amount of TZS. 18,000,000.00 as compensation for unfair termination.

Both parties were not satisfied with the decision of the CMA. Two separate applications were filed, that is Revision No. 254 of 2022 and Revision No. 260 of 2022. The two applications on agreement of the parties were consolidated on 06th July, 2022.

At the hearing two issues catching both applications were framed: -

i. *Whether there was termination of employment*

ii. *Whether the arbitrator appropriately awarded damages to the parties*

The hearing proceeded orally. The applicant enjoyed services of Mr. Nehemia Geofrey Nkoko, learned Advocate while the respondent was in the service of Mr. Goodluck Lema, a Personal Representative.

Advancing arguments on the first issue, Mr. Nkoko submitted that there was no termination because it was not proved by a termination letter.

He said, there was no contract as no letter of employment was shown. It was his submission that, since the respondents left the office, they absconded, hence no unfair termination. To back up his point, he cited the case of **Bright Choice Ltd v Ramadhan Ally Abeid**, Revision No. 245 of 2021.

On the second issue Mr. Nkoko submitted that CMAF1 did not state clearly the respondents' claims and so there was no need to compensate them on the unspecified claims. He then prayed, the award to be set aside.

In reply, Mr. Lema submitted that the respondents were permanent employees of the applicant, not casual workers. In his view, there was an employment relationship between the parties as under section 14(1)(b) and (c) of Employment and Labour Relations Act [CAP. 366 R.E. 2019](ELRA) and rule 11 of Employment and Labour Relations (General) [G.N. No. 47 of 2007] where the employer has an obligation to prove employment relationship. Mr. Lema was of the view further that the respondents could not have simply left the office.

On the second issue, it was submitted that upon termination of the respondents, they were not paid any entitlements as stated under the law.

He then prayed, the award be set aside in terms of amount paid such as severance pay, leave and other legal benefits, so that they can be paid according to what they are legally entitled.

In a rejoinder, Mr.Nkoko said, the claims so prayed are not in the pleadings and should be therefore dismissed. He stated further that the CMA ought to see, if there was termination and then go to its fairness. He then reiterated what was stated in the submission in chief.

Having heard the parties, I have to determine the first issue, *whether there was termination of employment.*

Looking at the CMA records it is evident that the respondents were employed by the applicant. What proves so is exhibit P1 (respondent's identification cards) and exhibits P2, P3 and P4 (Salary Vouchers). The applicant stated that the respondents were employed as casual workers while the respondents through their personal representative stated they were permanent employees of the applicant. This is in dispute. According to section 15(5) of ELRA, the employer has to keep written records of her employees. And under section 15(6) of ELRA, the employer is cast with duty to prove terms of the contract in case they are disputed.

In the circumstances, since the applicant claimed, the respondents were casual workers, she ought to have records proving the respondents' status of employment. Failure to prove so, renders the applicant's allegation very weak. In my view, exhibits P1, P2, P3 and P4 tendered, proved that respondents were employees of the applicant as the arbitrator held.

It was alleged by the applicant that the respondents were not terminated as there is no evidence to prove so. While Mr. Lema stated that respondents were terminated and were not paid their entitlements. I have considered the submission of the parties in this crucial issue. The point to determine is whether, there is evidence that the respondents were terminated.

Pw1 testified before the CMA that he was terminated by the Human Resource officer. It was his evidence that all other respondents were terminated too. Pw2, Pw3 and Pw4 also testified and claimed were to be paid terminal benefits due to unfair termination. Usually, termination is proved by a termination letter. It is the best evidence because it specifies the terms of termination with certainty. Here, there is only oral evidence from the parties alleging termination on party of the respondents and abscondment on party of the applicant.

At law, when confronted with such a situation, the court is required to measure the evidence to find which one has more weight compared to the other. In other words, one has to have very clear and convincing evidence measured at the balance of probability. Now that it is the employer who has means to influence decisions making over the employee, she had in my view, to prove that the respondents walked away from employment. For instance, the employer has to show which steps did she take when an employee absconds. I am saying so because the employer as a matter of law, is required to keep records of her employees, as I have shown before. This may include if the employee has come to work, number of hours he or she works in a given day, week or month. The applicant therefore was to have evidence to prove so.

What the applicant has just said, is that, the respondents absconded and she tried to call their sureties(wadhamini) but were not found. When and how was that done, the evidence does not reveal. The law clearly states that termination is merited when an employee absconds from employment for atleast five days. In the event therefore, the applicant had to initiate proceedings leading to termination. If that was done, it remained for the applicant to prove.

In my considered view therefore, I am bound to hold that respondents were orally terminated as they alleged.

Having clearly held that the respondents were terminated, it follows therefore that the same were unfairly terminated. They are therefore entitled to terminal benefits. This lands me to the last contested issue.

The respondents applied for revision. They asked this court to set aside the award in terms of terminal benefits and award them accordingly. Unfair termination benefits are governed by section 40 of ELRA. The CMA, upon finding termination was unfair, the respondents were awarded benefits that deem fit in its evaluation. It was prayed in the CMAF1 that they should be paid their terminal benefits to the tune of TZS 24,000,000.00. The applicants did not however make any elaboration. The CMA only held that since the claims under the CMAF1 is not elaborate, they should be paid compensation of wages equal 12 months.

I have considered their submissions and counter submissions, it is as clear as crystal that section 40 of the ELRA provides a range of entitlements. It is, I think, the duty of the employee to specifically state which among the listed entitlements under section 40(1) (a) and (b) the employee is entitled.

But I think, application of subsection (c) of the section is a matter of law and need not be proved. It is just provided upon a finding that termination was unfair. To be paid more than 12 months, one has to establish why so. Otherwise, it remains the discretion of the CMA to deal with it.

Without clear and convincing evidence, there is no reason to order compensation for more than 12 months. Further, it has to be stated as well that subsection 2 of the same section clearly provides that an order for compensation is made in addition to, and not a substitute for any other amount to which the employee may be entitled in terms of any law or agreement.

The respondents therefore did not state what other entitlements were due in terms of law or agreement. There is no reason therefore, to disturb the CMA order in respect of the reliefs awarded.

In that respect, the two applications have no merit. They are hereby dismissed with no order as to costs.

X _____

Signed by: A.K.RWIZILE

A. K. Rwizile

JUDGE

04.11.2022