IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 30 OF 2021

ALPHONCE MORRIS KAGOMA ..... APPLICANT

VERSUS

JOYCE SAMWEL MSIGWA..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Ubungo)

(Matalis.: Arbitrator)

Dated 23rd November, 2020

in

REF: CMA/DSM/UBN/R.2/18/9

JUDGEMENT

28th February & 14th April 2022

Rwizile, J

The applicant, filed this application asking this court to revise and set aside the decision of the Commission for Mediation and Arbitration (CMA) dated 23rd November, 2020. In his chamber summons supported by an affidavit of the applicant, this court is asked to set aside the award for being bad in law.

Factually, the applicant had a pharmacy business. He alleged to have invited the respondent to work as partners. It was so done from 2009 to

2019. When their relationship got into conflict, the respondent is alleged to have abandoned the business.

It is alleged, she then filed a labour dispute at CMA claiming for unfair termination of employment. For unfair termination, she was successfully awarded by the CMA a notice of one month, which is TZS 300,000.00, annual leave, the sum of TZS 300,000.00, severance pay for 9 years, TZS 726,923.00, compensation for 12 months equal to the sum of TZS 3,600,000.00 and overtime, an amount of TZS 103, 845.00. making the total of TZS 5,030,768.00. This award did not please the applicant hence this application, where he advanced four grounds for determination as here under;

i. *That, the arbitrator erred in law and fact for reaching to an award which is not supported by the evidence adduced during the hearing.*
ii. *That, the arbitrator erred in law and fact in holding that the respondent was the employee under section 61 of the Labour Institutions Act, Cap 300 R.E. 2019, hence unfairly terminated.*
iii. *That, the arbitrator erred in law and fact in shifting the burden of proof of the respondent under section 110(1)(2) of the Evidence Act, Cap. 6 R.E. 2019.*

iv. That, the arbitrator erred in law and fact in awarding the overtime payment without proof.

Both parties to this application were represented. Mr. Robert Kumwembe, learned Advocate appeared for the applicant, whereas the respondent was represented by Mr. Pascal Temba, Personal Representative. The matter was by way of oral hearing.

The central issue this court was asked to determine first is *whether there was an employment relationship between the parties.* In law, employment relations are governed by section 15 of the Employment and Labour Relations Act. It clearly states that the employer has to provide and keep details of the employee in writing and is required under subsection 6 of the same section to prove the disputed terms of the contract of employment. But it is as well, the employer who is cast with the duty of providing written agreement as per section 14 of the ELRA. The same section does not prevent oral contracts of employment. Having stated so, I have to state that the second ground of revision attacks the finding of the CMA for having ruled out that the respondent was an employee of the applicant.

To prove that one is an employee of another is a matter of evidence. I have therefore to say that if there is a dispute of whether one is an

employee of another, it is the duty of the employee to prove that he or she was indeed an employee. This is basically governed by the Evidence Act. As submitted by the applicant, section 110 of the Evidence Act provides that,

> *110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*

Mr. Kumwembe has submitted that there was no evidence proving the applicant employed the respondent. He argued that the arbitrator shifted the burden of proof to the applicant instead of the respondent.

It is abundantly clear that for one to be counted as the employee of another, in the absence of the written contract stipulating so, the terms under section 61 (a) to (g) of the Labour Intuitions Act, [Cap 300. R.E. 2019] must be proved. That is, there must be evidence of control, monitoring hours of work, providing with tools of work and being economically dependent of another. For ease reference section 61 provides as hereunder;

For the purposes of a labour law, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present- (a) the manner in which the person works is subject to the control or direction 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 a person who works for an organization, the person is a part of that organization; (d) the person has worked for that other person for an average of at least forty five hours per month over the last three months; (e) the person is economically dependent on the other person for whom that person works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.

Looking at the provisions of the law closely, there is a rebuttable presumption of employment if one among the stated above terms are shown. Indeed, the provisions are for both parties to state the evidence proving so. The employee has and should prove he or she was employed. If no documentary evidence, then oral evidence must be provided.

Before the commission, the evidence brought by the applicant is that the two were in partnership. When the applicant provided the capital, the respondent provided services. The respondent simply said was employed and worked for the applicant at a considered amount of 300,000.00 per month.

In my considered view, she ought to have gone further to prove how she was subjected under control of the applicant and that she economically depended on the same. In exhibit P1, which was tendered without any objection, the respondent is alleged to have left the pharmacy on 4th January 2019 by leaving the key and admitted to have taken the sum of TZS 130,000.00 which was remaining. It is on record that she did not accept the terms of this exhibit but was silent when it was tendered.

This, in my view proves, she was not an employee. If she had been one, she could not have left the shop and then take the sum of money remaining. This shows, she was not subject to control of the applicant and so section 61 did apply to her. She did not prove; she was terminated as well. Having determined the crucial issue.

It therefore follows that if there is not employment relationship, because it has not been proved, there cannot be termination. Therefore, the rest of the grounds need not detain me any longer. There was no employment

and so, it was not proper for the CMA to hold that she was terminated. She cannot therefore enjoy the terms of section 37 of the ELRA. This application therefore has merit. It is allowed. The decision of the commission is quashed and orders therefrom set aside. I make no order as to costs.

A. K. Rwizile

JUDGE

14.04.2022