IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 196 OF 2020

BETWEEN

TANZANIA POSTAL CORPORATION ..... APPLICANT

VERSUS

SIMON MJEMA ..... 1ST RESPONDENT

MRISHO JUMA ..... 2ND RESPONDENT

GERALD MWAMPOLU ..... 3RD RESPONDENT

RENATUS MHANGA ..... 4TH RESPONDENT

HASSAN SAMPA ..... 5TH RESPONDENT

HEMED MASIMIKE ..... 6TH RESPONDENT

RAJABU MASEWA ..... 7TH RESPONDENT

KELVIN HASSAN ..... 8TH RESPONDENT

DUKE MWAFYELA ..... 9TH RESPONDENT

ATHUMAN RASHIDI ..... 10TH RESPONDENT

FRANSIS CHILANGA ..... 11TH RESPONDENT

HASSAN SHESHE ..... 12TH RESPONDENT

JUDGEMENT

S.M. MAGHIMBI, J.

The Revision application beforehand moves the court to fault the award of the Commission for Mediation and Arbitration for Ilala ("CMA")

in Labour Dispute No. CMA/DSM/ILALA/R.901/17/496 which was delivered on 10th August, 2020. The application was lodged under the provisions of Section 91(1)(a),(b), 91(2),(a),(b),(c) and 94(1)(b)(i) of the employment and Labour Relations Act, No. 6 of 2004, Rules 24(1), Rule (24)(2)(a),(b),(c),(d),(e),(f) Rule 24 (3) (a), (b),(c),(d) and Rule 28 (1) (a),(c),(d) and (e) of the Labour Court Rules, GN. No. 106 of 2007. In the Chamber Summons, the applicant is seeking for the following orders:

1. That, this Honourable Court be pleased to call for and examine the legality, correctness and proprietness of the Arbitral Award issued by the Commission for Mediation and Arbitration of Dar es salaam at on 10th August, 2020 by Hon. Alfred Massay Arbitrator in Ref. No. CMA/DSM/ILALA/R.901/17/496 and Ruling in Labour Dispute No. CMA/DSM/KIN/R.142/17 by Hon. Amos, Mediator delivered on 26/10/2018 revise, quash and set aside the same on grounds that;
   (a) The Commission for Mediation and Arbitration has exercise jurisdiction not vested on it hear the Respondents complaints while the Applicant and Respondent relationship were that of Principal and Agent.

(b) That the Commission for Mediation and Arbitration has acted in illegally and without jurisdiction to Award the Respondents nine-months salary of TZS 2,727,900/= each while they were not the employee of the Applicant rather than the agents.

(c)The Commission for Mediation and Arbitration has acted in the exercise of the jurisdiction illegally to procure the CMA Award basing on the testimony of only one Respondent namely Simon Mjema.

(d) That the Honourable Commission acted illegally to condone the delay of the Respondent in Labour Dispute No. CMA/DSM/KIN/R./142/17 by Hon. Amos, Mediator delivered on 26/10/2018.

(e) That, this Honourable Court pleased to receive, admit and consider the Government Circular with Ref. No. AC/54/260/01/5 dated 19/May, 2004 titled "Utekelezaji wa Muundo wa Utumishi" and the Sera ya Menejiment katika Utumishi wa Umma Toleo la mwaka 1998 as part of the Applicant's evidence in determining the fate of the Respondents status.

(f) Any other relief(s) as this Honourable Court may deem just to grant.

The application was supported by an affidavit sworn on the 25th May, 2021 by Ms. Happy Alban Kikoga, Legal Officer of the Applicant. The application was disposed by way of written submissions, Mr. Abraham Mkenda from TUICO represented the respondent while the applicant was represented by Mr. Elias Mwenda, learned State Attorney.

Brief background of the matter is that the respondents are claiming to be the employees of the applicant employed under a fixed contract of one year since 2010 renewable upon agreement by the parties. The last agreement which is the subject of this application commenced on December, 2015 and was to end on December, 2016. It is alleged that the respondents continued to perform their duties until on 17th March, 2016 when the applicant notified them that their contracts will come to an end on 17th March, 2016. Aggrieved by the notification, the respondents referred the matter to the CMA claiming for unfair termination. After considering the evidence of both parties, the Arbitrator found that the respondents were unfairly terminated from employment and proceeded to award each respondent Tshs. 2,727,900/= as remedies for the remaining period of the contract. Being

resentful by the CMA's decision the applicant filed the present application raising the following legal issues:-

i. Whether the Honourable Arbitrator had jurisdiction to determine the dispute.

ii. Whether the Honourable Arbitrator acted illegally to hold that the respondents were the employees of the applicant and not the agents.

iii. Whether the Honourable Arbitrator was proper to award Tshs. 2,227,900/= to each respondent basing on the testimony of only one witness and other eleven (11) respondents remained unheard.

iv. Whether the Commission was correct to condone the respondent delay in Ref. CMA/DSM/KIN/R. 142/17.

Since the first ground questions the jurisdiction of the CMA the court will determine it first ahead of the rest. It was Mr. Mwenda's submission that at the CMA, DW1 testified that the respondents were agents of the applicant under one-year contracts which were admitted as exhibit D1. That the respondents were paid 10% commission which proves that they intended to enter into principal – agent relationship as reflected at exhibit D1. He submitted further that the parties herein were

governed by the principal – agent relationship provided under Section 134 of the Law of Contract Act, Cap. 345 R.E 2019 ('LCA').

Mr. Mwenda went on to submit that the respondents were acting on behalf of the applicant pursuant to Section 138 and 139 of LCA. He argued that basing on the nature of the contract, entered there was no employer – employee relationship between the parties.

In reply, Mr. Mkenda submitted that the respondents delivered service to the applicant in the capacity of employees. That their manner of service was subject to the control and direction of the applicant and that they were paid salaries and other benefits which prove that they were economically dependent on the applicant. He insisted that there was employer-employee relationship in this case.

After considering the rival submission of the parties on the issue of jurisdiction of the CMA to determine the dispute at hand, I am in agreement with the arguments advanced by Mr. Mwenda that there was no employer-employee relationship that existed between the parties. It is a trite law that for the CMA to determine a dispute of unfair termination, the employer – employee relationship must be established. The determining factors of employer-employee relationship are provided

under section 61 of the Labour Institutions Act, [CAP 300 RE 2019] ('LIA') 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."

(Emphasis is mine)

The above factors should be considered to establish the employer-employee relationship. In the application at hand, the parties entered into an agent-principal contract as evidenced by their agreed contract (exhibit D1). The respondents were assigned to be distributors of the applicant's documents to her customers. In the relevant contract though, the respondents were controlled the manner of work and they were provided with working tools, their payment was in form of the 'Commission' which depended on the work done as stated under clause 3 of the EXD1.

Further to the above, the respondents' positions in the applicant's company are unknown, apart from being stated that they were working as agents. Under such circumstance I am of the considered view that the respondents' contracts were for service and not of service recognized by the labour laws. Types of contracts recognized by the labour laws are provided under section 14 (1) of the Employment and Labour Relations Act, [CAP 366 RE 2019] of which a contract for service is not one among them. This position was held in the case of **Bashiri Mohamed Vs. Markit Support Ltd, High Court Labour Division at Dar es Salaam, Revision No. 205 of 2011, [2013] LCCD** 1 where it was held that: -

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

Therefore, having found that the contract in the matter at hand was for service and not of service, I find that the first issue has merits as the CMA lacked jurisdiction to determine the dispute tabled before it. As stated above, the CMA's jurisdiction on unfair termination disputes is limited to labour a matter where the employer-employee relationship has been established, which is not the case in the application at hand. Thus, the CMA wrongly determined the matter without having jurisdiction.

In the event, having found that the CMA lacked jurisdiction, I find the first issue is sufficient to determine this dispute. Consequently, the proceedings and subsequent award of the CMA are hereby nullified.

Dated at Dar es Salaam this 12th day of April, 2022.

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S.M. MAGHIMBI

JUDGE