IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 76 OF 2021

BETWEEN

ROSE GARDEN ..... APPLICANT

VERSUS

CHRISPIN GEORGE MREMA ..... 1ST RESPONDENT

CONSTATINO HILAL LUOGA ..... 2ND RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The respondents alleged to have been employed by the applicant as Cookers since March 2008, on the other hand, the applicant denies to have ever employed the respondents. The alleged dispute between the parties arose on 16th October, 2019 when the respondents were allegedly stopped by the applicant to continue with their employment after they raised the claim of employment contracts and salary increments. Aggrieved by the applicant's decision the respondents referred the matter to the Commission for Mediation and Arbitration (CMA) praying for employment contract, leave allowance, that they be allowed to enter in the work premises and to be paid their salaries while waiting for CMA's decision. The CMA considered evidence of both parties and found the respondents' claims to have merit and awarded them all

the reliefs prayed. In addition to the reliefs awarded, the Arbitrator also ordered the applicant to pay the respondents salaries of Tshs. 150,000/= in accordance with the salary indicated in the Minimum Wage Order, G.N No. 196 of 2013.

Being dissatisfied by the CMA's decision the applicant filed the present application on the following grounds: -

i. That the Arbitrator erred in law and in fact by admitting a photocopy of the attendance register purported to be the applicant's employee's attendance contrary to the requirements of section 66 of the Evidence Act, CAP 6 RE 2019 ('TEA').

ii. That the Arbitrator erred in law and in fact by admitting a photocopy of the attendance register and further relying on it while the same was tendered by a legally incompetent person.

iii. That the Arbitrator erred in law and in fact by relying on the improperly admitted attendance register without proof that the same was the applicant's attendance register.

iv. That the Arbitrator erred in law and in fact in weighing the evidence adduced by the respondent on balance of probability especially by holding that the improperly admitted attendance

register belongs to the applicant simply because the DW1 recognised one Bazil appearing in the said register.

v. That the Arbitrator erred in law and in fact by holding that the respondents were employed by the applicant while the said respondent names do not appear to the said improperly admitted and highly disputed attendance register purported to belong to the applicant.

vi. That the Arbitrator erred in fact and in law by wrongly interpreting the provision of section 15 (6) of the Employment and Labour Relations Act [CAP 366 RE 2019] ('ELRA') to mean that, the burden of proof on existence of employment relationship lies on the employer (applicant).

vii. That the Arbitrator erred in law and fact by ordering the applicant to pay the accrued arrears of respondent's salary calculated basing on the minimum wage order, 2013 from 2013 to 2020.

viii. That the Arbitrator erred in law and fact by computing statutory compensation basing on the minimum wages stipulated in the minimum wages order 2013 contrary to the law that requires the

same to be computed basing on the last gross salary received by the employee.

ix. That the Honourable Commission erred in law and in fact by holding that, one Constantino Hilal Luoga was the employee of the applicant and further awarding him Tshs. 7,140,000/= while he did not testify in court to prove his claims and allegation against the applicant.

x. That the Arbitrator erred in law and in fact by ordering the applicant to issue formal employment contract to the respondents while he has no such powers and/or legal back up.

xi. That the Arbitrator erred in law and in fact by ordering the applicant to reinstate the respondents without loss of remuneration while they were not employed by the applicant.

The application was preferred under the provisions of S.91(1)(a) and (2)(b)(c) and Section 94(1)(b)(i) and 4 (a) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 (ELRA); Rule 28(1)(c)(d) and (e) and Rule 24(1), (2)(a) (b)(c)(d),(e) (f) and (3) (a),(b),(c),(d) of the Labour Court Rules, 2007 GN. No. 106 of 2007("the Rules") . In his Chamber Summons the applicant prays for the following orders:-

1. This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration at Dar es Salaam in the labour Dispute No. CMA/DSM/KIN/821/19 which was delivered on 20/11/2020 by Honourable Arbitrator G.P. Migireand served to the Applicant on the 14th day of January, 2021.
2. This Honourable Court after setting aside the said Award be pleased to determine the matter and /or dispute in the manner it considers appropriate.
3. Any other relief(s) the Honourable Court deems just and equitable to grant.

The application was supported by an affidavit of Mr. Franco Mhena, learned Counsel authorised to depone the facts in the affidavit. In this court, the applicant was represented by Mr. Geoffrey Joseph Lugomo, learned advocate while the respondents were represented by Mr. Madaraka Ngwije, Personal Representative from CHODAWU. The application was disposed by way of written submissions.

Submitting on the first ground, Mr. Mhena submitted that the Arbitrator arrived to his decision basing on exhibit A1 and A2 which were photocopies tendered by the first respondent, purported to be the attendance register of the applicant's employee's attendance. He argued

that the exhibits were secondary evidence and that the admission was contrary to Section 66 of Evidence Act, Cap. 06 R.E 2019 ("TEA"). He added that secondary evidence is admissible in exception circumstances as it is provided under section 67 and 68 of TEA which were not adhered in this case.

Regarding the second ground, Mr. Mhena submitted that the first respondent was not competent witness to tender the photocopies of the attendance register and that the overriding principle on admissibility of evidence were laid down by the court in the case of **Arusha City Council and Another v. M/S Mic (T) Limited, Civil Case No. 45 of 2018**, High Court District Registry, at Dar es Salaam (unreported). Mr. Mhena submitted further that the respondent was not a competent witness to tender the purported attendance register as he did not meet the procedures stipulated under Rule 27 of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 (GN 64/2007).

As to the third and fourth grounds of revision Mr. Mhena submitted that since the applicant rejected ownership of the purported attendance register, then the respondents had a burden to prove that the same belongs to her. He stated that the nature of the evidence being attendance register, the same can be fabricated considering the

fact that DW1 testified for the applicant that they do not have attendance register or finger print machine for attendance.

Coming to the fifth ground Mr. Mhena submitted that the Arbitrator erred to decide that the respondents were employees of the applicant relying on the attendance register while the said evidence was not listed as list of documents to be relied upon neither prayed to be added as list of additional documents and that the applicant was not served with the same.

Arguing on the sixth ground, the counsel argued that section 15 (6) of ELRA comes into play only if there is a dispute on a certain term and condition of the employment contract and not when there is a dispute of employer-employee relationship. He insisted that the issue to be determined was the existence of employer-employee relationship between the parties. He further submitted that the factors to consider in establishing the existence of employment relationship are stipulated under section 61 of the Labour Institutions Act, [CAP 300 RE 2019] ('LIA'). He added that the factors were also restated in the case of **Ismail Mussa Athuman v. Lake Oil Ltd, (Revision No. 86 of 2019) [2020] TZHCLD 18 (27 March 2020)** in which there was no proof of employment relationship between the parties.

Coming to the seventh ground Mr. Mhena argued that the compensation for unpaid salaries is always for 60 days as it is the time limit to refer such nature of dispute. He stated that the claims were instituted at the CMA for more than 60 days without an application for condonation. He stated that the Arbitrator errored the respondents to be compensated with the unpaid salaries from 2013 to 2020 contrary to the respondents claims where they pleaded salaries from 16/10/2019 which was the alleged date of termination. Mr. Mhena went on to submit that the Arbitrator had no jurisdiction to order payment of respondents' arrears of salaries as per the Minimum Wage Order, 2013. He stated that such jurisdiction is exclusively vested to the District or Resident Magistrate Courts as it is provided under section 41 (3) of LIA.

Regarding the eighth ground Mr. Mhena submitted that computation of the terminal benefits and compensation should be at the rate the employee was earning at the time of termination of his employment. He stated that the Arbitrator erroneously awarded the respondents at the rate salary of Tshs. 150,000/= while their salary was Tshs. 90,000/=. To support his submission, he cited the case of **Kinondoni Municipal Council v. Rupia Said and 107 others, [2014] LCCD 117**. The counsel added that the minimum wage of

employees in bar and restaurants is Tshs 130,000/= as per paragraph (d) (g) of the Second Schedule of the Labour Institutions Wage Order, 2013.

Coming to the ninth ground, Mr. Mhena submitted that the second respondent did not give his testimony or evidence at the CMA. He stated that he failed to prove his case pursuant to section 110 of TEA. To support his submission, he cited the case of **Dorothy Mgoni v. Yapi Markezi Co. Ltd**, Labour Revision No. 649 of 2019, at Dar es salaam (unreported). He insisted that the second respondent did not discharge his duty to prove his case. He added that the letter of one respondent authorizing the other to represent him does not give mandate the other to testify on his behalf.

Regarding the tenth ground Mr. Mhena submitted that the powers of the Arbitrator in remedies for unfair termination are only limited to section 40 of ELRA. He stated that the Arbitrator was wrong to order the applicant to issue formal employment contracts to the respondents.

Turning to the last ground Mr. Mhena submitted that the remedy of reinstatement is only ordered when it is proved that the employees concerned were unfairly terminated from employment. He stated that in this case the Arbitrator wrongly ordered reinstatement while there was

no employer/employee relationship. In the upshot the counsel urged the court to revise and set aside the CMA's award.

Responding to the submissions, Mr. Ngwije generally submitted that the Arbitrator properly awarded the respondents by considering the evidence on record. He stated that the cases cited by the applicant's counsel are distinguishable to the case at hand. He therefore urged the court to dismiss the application for revision for want of merit.

After considering the parties submissions, the CMA and court records as well as relevant laws the court will proceed to determine the grounds for revision as raised by the applicant. Generally, the first to fifth grounds challenges the admissibility of the attendance register (exhibit A1 & A2) therefore, the relevant grounds will be jointly determined.

The applicant is alleging that the Arbitrator wrongly admitted the photocopied attendance registers contrary to the law and procedures of admitting secondary evidence The contested exhibits were tendered to prove the employment relationship between the applicant and the respondents. Having gone through the CMA's proceedings of 21/10/2020 when the contested exhibits were tendered during the testimony of the first respondent, the applicant, through his counsel Mr. Haji Litete, was

present at the CMA and did not at all challenge the admissibility of the same. Even when he was afforded the right to cross examine, the Learned Counsel did not say a word neither did he question the admissibility nor test the authenticity of the contested exhibits.

It is trite law in exercising its revisionary power, this court is limited to what transpired on the record. Unfortunately, the question of admissibility of the contested exhibits was not tabled before the CMA, it cannot be raised at this stage because admissibility of exhibits is an issue of the trial court to determine. It may be raised at this stage only when it was so raised duing arbitration and the court could analyse the reasons for admitting an exhibit that was contested admission. In the absence of such record, I cannot determine the issue. Therefore the ground stands as an afterthought.

As to the sixth ground that the Arbitrator erred in fact and in law by wrongly interpreting the provision of section 15 (6) ELRA to impose the burden of proof of employment relationship to the employer; the applicant's counsel strongly submitted that the Arbitrator wrongly relied to the relevant provision. For easy of reference, I hereunder reproduce the relevant provision: -

"Section 15 (6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment in subsection (1) shall be on the employer."

The wording of the provision quoted above is unambiguous. In the application at hand, after the applicant has claimed that the respondents are not his employees, the only burden the respondents had is to prove the existence of employment relationship between them which they did. Therefore, since they proved the alleged existence, pursuant to the provision above, it was the duty of the applicant to prove the particulars of the respondent's employment hence the Arbitrator properly relied on the relevant provisions.

Turning to the seventh and eighth grounds, in these grounds I join hands with Mr. Mhena's argument that the Arbitrator wrongly awarded the accrued arrears of respondent's salary calculated basing on the minimum wage order, 2013 from 2013 to 2020. This is so because first; the respondents did not pray for the awarded arrears in the CMA F1 which initiates disputes at the CMA. Second; the CMA had no jurisdiction

to award the said arrears as it is provided under section 41 (3) of LIA which is to the effect that: -

> *"Section 41 (3) Any worker who has been paid wages below the prescribed minimum wage may apply to the District Court or Resident Magistrates' Court for the recovery of the amount by which the worker was underpaid."*

Basing on the relevant provision of the law, the Arbitrator had no jurisdiction to award the same. Thus, that part of the award is hereby set aside.

Turning to the ninth ground that the Arbitrator wrongly awarded the second respondent while he did not prove his case, it is the requirement of the law each part to prove his/her own case. However, in the case at hand the respondents had similar claims, they were both employed as Cookers, had the same salary and were all terminated on the same date. Under such circumstances and given the spirit of labor laws, to have expeditious disposal of matters and since the first respondent tendered exhibits which also bare the name of the second respondent, the claims were also proved for both parties.

Regarding the tenth ground, the applicant is challenging the Arbitrator's order to issue written contracts to the respondents. It is my view that following the findings that the employment relationship between the parties has been established, the Arbitrator was right to issue the order. Undisputed so, as provided under section 14 (2) of ELRA, it is the requirement of the law that employment contracts be in writing hence the applicant should comply with the law.

I am aware that, as provided under section 46 (1) of LIA, it is the duty of the Labour officers to issue compliance order in case where any provision of the law has not been complied with. However, in the circumstances of this case where employment contract was also one of the prayers of the respondents, I do not think the Arbitrator's order was beyond the powers vested to him. On such findings such ground also lacks merits.

Turning to the last ground whereby the applicant is challenging the Arbitrator's order to reinstate the respondents. After it has been established that the parties had employment relationship and the applicant unfairly locked out the respondents from employment, I find the order of reinstating the respondents to their employment positions is

justifiable under the law as the applicant has failed to prove any fair reason for their termination apart from disowning them.

On those findings, I find the present application to have some extent of merits as explained above. The order of the CMA awarding the respondents their accrued arrears salary calculated basing on the minimum wage order, 2013 from 2013 to 2020 is hereby set aside. The remaining part of the award is hereby upheld save in paying the respondents there leave allowances, the respondents should be paid on the rate of salary they were receiving before termination and not otherwise.

It is so ordered.

Dated at Dar es Salaam this 13th day of May, 2022.

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S.M. MAGHIMBI
JUDGE