IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 172 OF 2021

FLORA P. KABOGO ..... APPLICANT

VERSUS

REDAVE NURSURY & PRIMARY SCHOOL ..... RESPONDENT

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

(Abdallah: Arbitrator)

dated 06th April, 2021

in

REF: CMA/DSM/KIN/476/2019/230

JUDGEMENT

16th May & 06th July 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/476/2019/230. This Court has been asked to call for the records of the CMA for the purpose of revising the whole proceedings and the award.

In fact, it is alleged that the applicant was employed by the respondent. Their employment relationship became corrosive leading to termination of the employment in what the applicant considered as constructive

termination. It was caused by non-payment of salaries. The applicant was aggrieved, she referred the matter to the CMA. It was heard and decided in favour of the respondent. Again, dissatisfied, this application, was filed.

The application is supported by the applicant's affidavit but opposed by the counter affidavit of Levina Uiso, Principal Officer of the respondent. The applicant advanced three grounds to be considered for revision: -

i. *Whether it was legally accepted for the learned arbitrator to hold that there is no employer-employee relationship between the applicant and the respondent, while the applicant adduced the contract of employment and which was admitted by honourable arbitrator and marked as (exhibit P1).*
ii. *Whether it was legally accepted in law for the learned arbitrator to disregard the exhibit properly adduced and direct himself to the facts only known to him.*
iii. *Whether it was proper in law for the learned arbitrator to direct himself to non-issues and disregard the issues framed.*

The application was heard by way of written submissions. The applicant enjoyed services of Mr. Isaac Nassor Tasinga, learned Advocate while the respondent was represented by Mr. Isakwisa Lucas, learned Advocate.

Mr. Tasinga on the first ground submitted that the applicant was the employee of the respondent. He said, the advanced proof was the contract of employment which was admitted without any dispute by the respondent. It was his other argument that the arbitrator did not consider such evidence.

The learned counsel was of the view that the contract brought by the applicant was not implemented. But there was no any evidence to that effect, the learned advocate so commented.

Mr. Tasinga on the third ground submitted that the arbitrator misdirected himself as she failed to understand the extent the law recognizes employment relation which is provided under section 4 of Employment and Labour Relations Act [CAP. 366 R.E. 2019].

Given the floor to reply, Mr. Isakwisa submitted that the contract tendered by the applicant did not show employment relationship. He said, it was because it was not issued by the authority with power to employ. The other reason was that, the contract was signed by three different people on different dates. He further stated that the headmaster and the applicant signed the same on 11th November 2015 and the witness, the village executive officer, did it on 13th November 2015. He stated that the

arbitrator relied on section 61 of the Labour Institutions Act to come to that conclusion.

Further, it was the counsel's argument that the contract tendered by the applicant contained different terms with that of the respondent. To show that difference, it was said, the contract had no statement showing when to enter and leave the work place. He then stated that the attendance book had never been signed. And that the applicant was not under the control of the respondent.

He argued that the contract tendered by the applicant did not show the employee's rights. It was his submission that the respondent tendered a contract which complied with the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No. 42. He finally prayed for this application to be dismissed. In a rejoinder, Mr. Tasinga reiterated his submission in chief.

Having gone through the submissions, I think, the main point to determine is whether there was employment relationship between the parties. The applicant stated that, she was employed by the respondent. She had a contract tendered as exhibit P1. The law that governs employment contracts is section 14(1) and (2) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019, it provides as follows;

"14(1) A contract with an employee shall be of the following types-

(a) a contract for an unspecified period of time;

(b) a contract for a specified period of time for professionals and managerial cadre;

(c) a contract for a specific task."

"(2) A contract with an employee shall be in writing if the contract provides that the employee is to work within or outside the United Republic of Tanzania."

Based on the contract produced (exhibit P1), it shows the contract was between the respondent and the applicant. Even though it does not state the duration of the contract but shows that it was signed by both, the applicant and the representative of the respondent (the head teacher). It was therefore a permanent term contract. The evidence to prove so was given by headteacher who the respondent recognised as his former employee.

Joram Samwel Katabira was tendered for the respondent as Pw2. His evidence was to extent of identifying Pw1 as the respondent's employee. It is apparent that it is the one who signed her employment contract. This is evident in the proceedings where he stated that: -

"S. mlalamikaji unamfahamu

Jb. Ndiyo alikuwa mwajiriwa wangu yaani nilimwajiri wakati nikiwa mkuu wa shule/ malalamikiwa hapa

S. Aliajiriwa kama nani

Jb. Kazi ya ulinzi na usafi

S. Wewe ndiye ulisaini mkataba wa ajira

Jb. Ndiyo tokea 11/11/2015

S. Mshahara wake ulikuwa Tshs?

Jb. 120,000/=

S. Alikuwa anaishi wapi

Jb. Eneo la shule"

By this evidence, the contract of employment, exhibit P1, in my view, shows, the applicant proved was employed by the respondent in terms of section 14(2) of ELRA. By the parties having an employment contract they both ought to consider and respect the terms of it. In the case of **Holden Sultan Palace Zanzibar v Daniel Laizer & Another**, Civil Application No. 104 of 2004, it was held that: -

"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."

Moreover, in establishing the employment relationship, section 61 of the Labour Relations Act [CAP. 300 R.E. 2019] provides for the presumption as to who is an employee. It states: -

"For the purpose of a labour law, a person who works for, or renders service 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 organisation, the person is a part of the 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.

The applicant testified that, she was working as security guard and did cleanliness. The extract from her evidence has it all;

"S. Kazi ya usafi na ulinzi ulikuwa unafanyaje.

J. Usafi nafanya asubuhi na ulinzi usiku"

This shows the applicant was working under the control of the respondent as her employee. Her evidence matches with exhibit P1, which stated: -

2. AINA YA KAZI

Kwamba umeajiriwa kwenye nafasi ya ulinzi pamoja na kusafisha mazingira ya shule."

Also, the employment contract proves the manner in which the applicant worked was subjected to the control and directions of the respondent. This is evidenced by exhibit P1 which states: -

3. MAJUKUMU

- *Kufanya usafi eneo la ndani ya shule*
- *Kulinda thamani za shule*

NB: Endapo patatokea uharibifu wa aina yoyote ile katika eneo la shule utalazimika kutoa maelezo juu ya uharibifu huo."

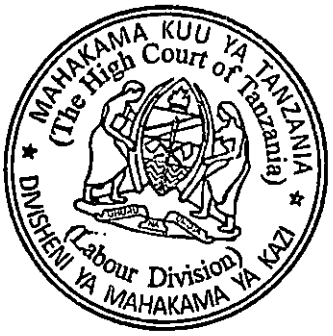
On this aspect, it proves there was an employment relationship between the applicant and the respondent. The respondent's witness, who alleged employed the applicant was also of the evidence to that effect. I therefore hold that the applicant being an employee was unfairly terminated. The decision of the CMA is faulted and therefore quashed and set aside.

On reliefs, having held that the applicant was unfairly terminated, I order the applicant to be paid as follows: -

i. Her salary arrears as prayed under the CMA Form No. 1. The sum of TZS 2,880,000.00
ii. Annual leave for one month, TZS. 120,000.00
iii. One month salary in lieu of notice which is TZS 120,000.00.
iv. Severance payment of TZS 32307.00 and,
v. Certificate of service

The respondent should pay the applicant the total amount of TZS. 3,152,307.00.

As this is a labour matter, I order no costs.



A.K. Rwizile

JUD GE

06.07.2022