IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

(ARISING FROM LABOUR DISPUTE NO. CMA/DSM/KIN/606/2020/320)

REVISION NO. 434 OF 2021

BETWEEN

GODFREY T. BAIJUKYA.....APPLICANT

VERSUS

THE OPULENT HOTEL GROUP.....RESPONDENT

JUDGMENT

27th June 2022 & 05th July 2022

K. T. R. MTEULE, J.

The applicant filed the present application challenging the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/606/2020/320 dated 20/7/2021 in Dar es Salaam at Kinondoni. The dispute arose out of the following context. The applicant and the Respondent engaged into an oral contract where the Applicant was contracted to work as a clerk of works in construction works from 2011 up to 28th March 2020. Their contractual relationship ended in 2020 when the Respondent stopped constructions works, due to what is alleged to be shortage of work due to pandemic disease (Corona Virus). The applicant, treating the

stoppage of the service as termination, referred the matter to the CMA claiming that he was employed by the respondent on monthly payment. In his view, at the time when his service ended, he had already acquired a status of being an employee. At the CMA, the Applicant claimed to have been unfairly terminated both substantively and procedurally. The Respondent disputed to have been in employment relationship with the Applicant. According to the Respondent, her contract with the applicant was not of employer - employee relationship, but it was a contract of consultancy since the Applicant used to be paid in terms of invoice and not salary.

The CMA found that there was no employer - employee relationship between the parties and dismissed the Applicant's complaint in its entirety.

Aggrieved by the CMA's award the applicant filed the present application praying for the following orders:-

1. That, may the Honourable Court be pleased to call for records and revise the proceedings of the Commission for Mediation and Arbitration at Dar es Salaam Ilala in the Labour Dispute No. CMA/DSM/KIN/606/2020/320 and set aside the award delivered

on 20th July 2021 by Hon. Msina H.H arbitrator and received by the applicant on 23rd July 2021.

2. That, may this Honorable Court be pleases to grant costs of the case.
3. That, any other relief (s) and/or order (s) that the Honourable Court may deem fit to grant.

The Application is supported by applicant's affidavit where at Paragraph 11, three grounds of the revision have been listed. Among the respective three grounds, the 1st and the 3rd seem to focus on consideration and evaluation of evidence. By paraphrasing, the 1st and the 3rd grounds combined, it is asserted by the Applicant that the Hon. Arbitrator erred in law and fact in failing to consider, analyze and evaluate the evidence of the applicant in finding whether the applicant was employed by the respondent or not. In the second legal issue, it is asserted that the Hon. Arbitrator erred in law and fact for failure to analyze all the important issues in determining the application before her. In short, the grounds of revision are:-

i. Whether the Hon. Arbitrator erred in law and fact in failing to consider, analyze and evaluate the evidence of the applicant in

finding whether the applicant was employed by the respondent or not.

ii. Hon. Arbitrator erred in law and fact for failure to analyze all the important issues in determining the application before her

On hearing, the Applicant enjoyed the legal service of Mr. Sostenes Kato, Advocate whereas the Respondent was represented by Mr. George Shayo, Advocate. The hearing of the application was by way of written submissions.

Arguing in support of the first ground as to whether the applicant was employed by the respondent Mr. Kato referring to Exhibit D-3 (Payment Invoices), submitted that since the applicant was employed and paid monthly salary, the arbitrator was wrong in holding that there was no employer - employee relationship basing on the difference in salary payment. He supported the argument with the fact that the Respondent used to deduct the salaries in case of Applicant's absenteeism, contrary to Section 61 of the Labour Institutions Act, Cap 300 R.E 2019. Mr. Kato referred this Court to the case of **Marco Komezi v. SDV Trausam,** Revision No. 9 of 2011, High Court of Tanzania, Labour Division, at Dar es Salaam.

Mr. Kato asserted that the arbitrator failed to consider the evidence of the admitted Exhibits. He named the relevant documents to be Exhibit AP1 (applicant's application letter), Exhibit AP2 (reminding letter on other benefits including leave) and Exhibit AP3 (A document recognize applicant as one of the members of the respondent management). In his view, failure to consider all these documents including invoice paid from 2011 to 2020 which could enable the arbitrator in establishing the truth of the matter, the arbitrator arrived at a wrong decision. He added that what arbitrator did is against to Section 61(c) of the Labour Institution Act, Cap 300 R.E 2019 which recognize the applicant as a part of Organization. Supporting his position, he cited the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited,** C.A.T, TRL 2006 at page 343.

On the second issue regarding issues framed in the CMA, Mr. Kato submitted that at the Commission, four issues were framed, but the arbitrator used the first issue in making decision while disregarding the remaining issues contrary to **Rule 27 (3) of the Labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2007**. He thus prayed for the application to be granted.

In reply, Mr. Shayo supported the holding of the arbitrator that the applicant was not employed by the respondent since he was contracted as an independent consultant as a clerk of work. He added that the applicant being a professional in building construction who was never supervised nor directed on how to perform his duties by the respondent, with no fixed salary of an employee where payment varied depending on the work performed or accomplished then the applicant did not qualify to be an employee.

Mr. Shayo challenged the applicant's justification of employment based on the grounds of deductions done in the salary for the days of absence. In his view, parties herein are not covered by **Section 61 of the Labour Institution Act, Cap 300 R.E 2019** which guides the presumption as to who is an employee.

Mr. Shayo referred to the applicant's testimony in the CMA that he rendered services to one Joseph Linza, AZARA Limited, the respondent and Staywell Limited, in all mentioned and stated that the applicant was never given job description, confirmation letter and that he was paid after raising invoices hence whatever he was doing was not based on employee's duties.

In respect of the third issue, Mr. Shayo argued that the mere allegation that exhibits were not considered by the arbitrator in making decision cannot stand since all exhibits were considered. He referred to the CMA award at page 3, 4 and 5.

Regarding arbitrator's error in addressing the framed issues, Mr. Shayo submitted that the arbitrator was right in using first issue in drawing judgement as the same dispose of the matter after being answered in negativity as agreed by the parties in framing issues and this is justified by the arbitrator in his award at page 1 and 2.

The Applicant filed rejoinder which is accordingly considered in this judgment.

Having considered parties submissions and the CMA record this Court find worth to determine two issues. The issues are as follows:-

i) Whether there was employer employee relationship?

ii) If the answer in first question is answered positively, then the next question is, was the applicant's termination substantively and procedurally fair?

iii) To what reliefs parties are entitled to?

In addressing the first issue as to whether there was employee employer relationship amongst the parties, I will resolve the 1st and the 3rd issues framed in the affidavit in combination. The applicant blamed improper consideration and analysis of evidence which misdirected the arbitrator.

What constitute an employer-employee relationship is well explained by **Section 61 of the Labour Institutions Act** which provides:-

> *'Section 61. 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.'

From the above cited provision, it is a principle of law that, the above-mentioned factors need to be disproved to refute an employer-employee relationship.

Employment contract needs to be distinguished from non-employment contracts. Scholars and case laws make a distinction of employment contract from other contracts by the terms "contract for service" and a contract of service." The latter connotes employment contract. In **Bashiri Mohamed Vs. Markit Support Ltd.,** Lab. Div, DSM, Revision No. 205 of 2011, it was held:-

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

Turning back to this application it is apparent that parties did not have a written contract but an oral contract. However, the nature of

the works as explained in the evidence indicates that the applicant was contracted as a consultant and it is undisputed that he was neither supplied with working tools nor being paid monthly salary to establish economic dependence. It is evident according to **DW1 and Exhibit D2** that the applicant was responsible for the working tools and his payment was in term of invoices and not salary, basing on terms of their oral contract. The invoices raised by the Applicant were attached with **Exhibit D2**. This means, parties had to be bounded by the terms of their oral contract which are reflected in the nature of the work performed by the Applicant.

From the above position, I am of the view that the applicant having been engaged to perform assignments as a contractor, his contract was for service and not of service. As well having found that the applicant was working as an independent consultant where the working manner, time and working tools were controlled by himself and where his payment was by a way of invoices as per **Exhibit D-3 (payment invoices)**, therefore the Applicant cannot acquire the status of being the respondent's employee.

I could not find relevance in the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited,** C.A.T,

TRL 2006 at page 343 which was cited by the applicant. What was in question in that case was a document which was not admitted as exhibit while in this application exhibits were admitted at the CMA to disprove employment relationship amongst the parties.

In this respect, the contract between the Applicant and the respondent does not fall under the scope of **Section 61 of the Labour Institutions Act**. It does not create an employee employer relationship. The first issue as to **whether there was employer employee relationship** is therefore answered in the negative.

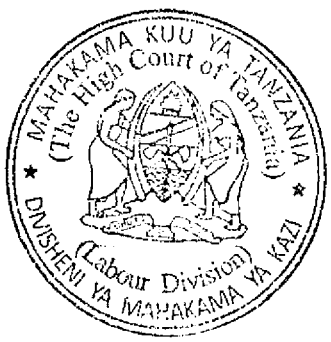
With regards to the applicant's argument that the arbitrator left out unattended issues, I am concerned with the issue of jurisdiction. It is my finding that since this matter do not fall under the ambit of employment disputes, this Court and CMA do not have jurisdiction to entertain it. For that reason, it was right for the arbitrator to dispose the matter by using the first issue alone as the same goes to the jurisdiction of the Court.

Having answered the 1st issue in the negative where no employment contract among the parties has been confirmed and that the CMA lacked jurisdiction in the matter, I see no reason to go further to

consider the second issue as to whether the applicant's termination was substantively and procedurally fair. There can be no termination where there is no employment relationship.

It is for the above reason I dismiss the application and uphold the Arbitrator's award. I give no order as to the cost. It is so ordered.

Dated at Dar es Salaam this 05th day of July, 2022.



KATARINA REVOCATI MTEULE
JUDGE
05/07/2022