IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 503 OF 2021

GM DEWJI AND CO. LTD ..... APPLICANT

VERSUS

MATHIAS JOHN MWIMBILIZYE.....1st RESPONDENT

ASIA AMIRI HOJA.....2nd RESPONDENT

HALIMA AHMED DINGO.....3rd RESPONDENT

RAMADHAN HAMISSI RASHID.....4th RESPONDENT

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

(Johnson, Arbitrator)

Dated 17th November, 2021

in

REF: CMA/DSM/ILL/R631/15/003/21

JUDGEMENT

16th June & 28th July 2022

Rwizile J

The applicant GM DEWJI AND CO. LTD has asked this Court to call for records and revise an award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILL/R631/15/003/21 dated 17th November 2021

It can be factually stated that Mathias John, 1st respondent is a legal representative of John Mathias Mwimbilizye, now deceased, while the 2nd

and 3rd respondents are administrators of the estate of the late Salimu Awadhi and Isaya Katala, respectively and Ramadhani Khamisi-4th respondent who were employed by the respondent as drivers and assistant drivers in the respondent's vehicle (Truck) Number T. 873 BZA and T. 501 CCZ (Trailer). They were assigned to transport coal from Kyela to Tanga Cement Company. Before travelling, the driver is alleged to have reported defects in the car brake system. The respondent, insisted to go on the trip, with promise that, on return the problem would be fixed.

Unfortunately, an accident occurred at Kyela due to brake failure on 25th February, 2014 where John Mathias Mwimbilizye, Salim Sad Awadhi, Isaya Katala died instantly while Ramadhani Rashidi survived the accident but was left seriously injured. After burials of the deceased, administrators were appointed. They thus filed dispute at CMA, claiming for compensation of TZS 550,000,000.00, that is 150, 000,000.00TZS for loss of lives of the 1st, 2nd and 3rd respondent's relatives each, who were employed by the applicant, and for injury of the 4th respondent.

After a hearing, the CMA found the applicant vicariously liable for negligence and awarded compensation for loss of life of three individuals, the sum of TZS 30,000,000.00 each and TZS 10,000, 000.00TZS for injury

of the 4th respondent. The applicant believing the dispute was not proved, filed this application in protest.

Applicants were represented by Mr. Godwin Ernest Ndonde personal representative, while the respondent had the service of its principal officer one Charles Tibekebuka. The application was supported by the applicant's affidavit and supplementary affidavit sworn by Charles Tibekebuka,

Grounds for revision raised are as follows: -

i. *The honourable arbitrator erred in law by holding that the accident was a result of the applicant's failure to repair the vehicle in the absence of any fact that the said vehicle had any problem as alleged by the respondents.*
ii. *That the honourable arbitrator erred in fact and law by holding that the applicant is liable on tort without regard that the employment contract relationship between the 2nd and 3rd respondents and the applicant was not established by the respondents.*
iii. *The honourable arbitrator erred in law and in fact by concluding that the respondents were entitled to damages without regard that their claims ought to be filed under the province of the insurance cover.*

iv. It was an error on the point of law for the arbitrator to conclude that the 4th respondent was involved in the road accident without any proof of injury and the police report.

In oral arguments before this court, Mr. Tibekebuka submitted on the first ground that the motor vehicle had no problem before the accident occurred as exhibit D1 (vehicle inspection report). He stated that there was no evidence to prove that the said car had any defect. He said, the respondents alleged and so were to prove the allegation as provided under section 110 of the Evidence Act [CAP. 6 R.E. 2019]. Further, it was argued, that as exhibit D3, particulars of the accident show, it was an act beyond the driver's control and that the arbitrator's findings had no proof. In his view, the respondent's evidence produced was a hearsay.

He continued to comment that even if it were found that the motor vehicle had defects as alleged, the driver could not have accepted to endanger his life and the alleged passengers by driving it.

Further, he stated that, since the defect was known before the journey, the accident was therefore self-made and the respondents had no right to claim for compensation. It was his view that there was no evidence

proving other respondents except the 1st respondent were employed by the applicant.

On the second ground, he submitted that "he who alleges must prove". To him, for the 2nd, 3rd and 4th respondents, there were no evidence to prove that they were employees of the applicant. He stated that the 4th respondent does not qualify to be an employee of the applicant. He did not depend on the applicant to earn his living. He did not prove before the CMA, if the applicant had control over him or if he was guided by any rules of employment by the applicant's office.

He submitted that for the 4th respondent, if at all he was, as claimed to be mechanical personnel, there were no evidence produced to prove the same. He stated that, he proved that he was not employed by the applicant, he was employed orally through Saidi and Hussein and that he was paid his salary through a driver of the lorry. The applicant holds the view that the 2nd, 3rd and 4th respondents, were not known to her as employees. It was submitted further that there was no sufficient proof to that effect.

On the third ground, it was the applicants' submission that, the accident was not due to negligence. Exhibit D4, a motor vehicle claim form shows,

immediately after the accident the injured were given a motor vehicle claim form for claims of compensation. He argued, the 1st, 2nd and 3rd respondents as their names appeared in D2, D1 and D4 did not opt to channel their claims to the applicant's insurer.

Further, he argued, it is trite law that before resorting to claims in court, a claimant is supposed to exhaust available remedies first.

Submitting on the fourth ground, it was stated that the 4th respondent was not in the list of the names involved in the accident. He as well argued that the 4th respondent did not produce a medical report or PF3 despite alleging to have been hospitalised after the accident. He finalized by stating that the 4th respondent was neither the applicant's employee nor involved in the accident. He prayed, the application be allowed.

In replying, Mr. Ndonde stated that Ramadhani Hamis Rashidi and Isaya Katala were the employees of the applicant under a contract of specific task as provided for under section 14 of The Employment and Labour Relations Act [CAP. 366 R.E. 2019]. On February, 2014, he added, the 1st respondent arrived in Mbeya and found Ramadhani Hamisi Rashidi with customers who wanted to transport materials to Tanga. The 1st

respondent, he said, reported the brake issue to the administration of the company in Dar es Salaam and advised, it should be fixed first.

Mr. Ndonde said, the respondent under her manager, told them to proceed with the journey to Tanga and when they return the motor vehicle will be fixed. He continued arguing that as they left, when on the way the accident occurred claiming lives and an injury.

In his view, the accident was due to negligence for failure to repair it before going to Mbeya. Following those incidents, the administrators and the 4th respondent started to follow-up for damages for the deceased who died at work.

Despite all suffering, he argued, the respondents were not assisted by the applicant. This is what led the respondents on 30th December 2014 to go to the employment officers as exhibit P3 shows. His argument was further that, on 19th November 2014, they filed a dispute with CMA for damages under section 88(1)(ii) of the Employment and Labour relations Act [CAP. 366 R.E. 2019]. Lastly, for the respondent, it was prayed, the application be dismissed.

In a rejoinder Mr. Tibekebuka argued that the respondents in their reply did not respond to the issues raised. He stated that none of the legal

issues was challenged and/or responded to. He therefore meant, the same were in admission. Finally, he reiterated what was stated in the submission in chief.

Having considered submissions of the parties, I think, I have to decide if the applicant has provided sufficient reasons for this court to interfere with the decision of the CMA.

On the first issue, whether it was proper to hold that the accident was a result of the applicant's failure to repair the motor vehicle. In law and practice, proof of the accident and its causes is a question of fact. It therefore needs proof from the responsible authorities. For instance, to support the fact, the report on the accident was tendered. It was admitted as D3 (Particulars of Road Accident – Final Report). It is clear from the same, that the accident was caused by reasons out of control of the driver.

Pw1 testified that the accident was not caused by the 1st respondent's negligence. An allegation that the accident occurred due to failure of its brakes is also to be backed by evidence.

It has always been the case that when the accident occurs as in this case, the motor vehicle should be inspected. Inspection is done by a motor vehicle inspector. In this, Vehicle Inspection Report was tendered as

exhibit D1. The same does not suggest that the cause of accident was by failure of the motor vehicle brake system. Taking exhibits D1 and D3, the final report on the accident and an inspection report together, there is no proof that the accident was due to failure of brake system and therefore it was not proved that the accident was due to negligence of the deceased. The 1st ground therefore has merit.

Dealing with the second ground, it has been stated that the 2nd and 3rd respondents were not employees of the applicant. This is indeed true, they were not employees of the applicant, neither did they so claim. It is noted here that they were joined in the proceedings as administrators of the estate of the late Salim Awadhi and Isaya Katala. But for them to benefit in this case in that capacity, they have to prove that their deceased relatives were employees of the applicant, which the applicant has denied.

In proving that the two were employed by the applicant, there ought to be some documentary evidence or other clear and convincing evidence, may be from the fellow employees showing that before they passed away, they were so employed.

I think perhaps, the terms of section 14 of the Employment and Labour relations Act and section 61 of The Labour Relations Act [CAP. 300 R.E.

2019] were to be complied with. Having measured the evidence in totality, I do not see proof that the two deceased persons were employees of the applicant.

It was not enough in my view, for 2nd and 3rd respondents to simply say, their deceased relatives worked with the applicant. The second ground therefore has merit as well.

The third ground is very simple to determine. In law, damages are awarded in tort when there is breach of duty. Exhibits D1, D2 and D3 proved that the accident occurred. But the same did not prove that it was due to the applicant's negligence. I do not see how the applicant may be liable in tort. This ground has no merit too. But since the applicant has no dispute that the respondents were in the applicant's motor vehicle as passengers. Compensation to the deceased's estate may be done under other schemes such as third-party insurance which was proved existed as per exhibit D4.

On the last issue, the 4th respondent himself stated that he was involved in the car accident and then hospitalized. But he did not prove the same by producing evidence at CMA. In the untyped testimony below, he stated: -

"Q. kwanini hukutoa kielelezo chochote kuthibitisha hayo usemayo

A. vipo vielelezo vyangu kuwa nilipata maumivu kifuani na kichwani vipo hospitalini

Q. hospitalini ulitoka lini

A. 2014

Q. Ripoti ya kuumwa kwako ulipewa lini

A. 15/3/2014

Q. Hadi leo 17/6/21 hiyo ripoti ipo wapi, maana haipo mbele ya tume

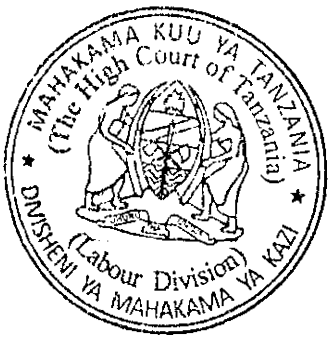
A. Kwasababu nimetokea msibani kufika hapa

Q. Lakini tarehe ya kesi hii leo mlielezwa tangu awali na kuelezwa kuleta Ushahidi wenu kweli si kweli

A. kweli"

In all, the 4th respondent did not prove he was involved in an accident, if he did, he did not prove the extent of injury which could be the basis of claims. But still, there is no proof that compensation as I held before was not possible under other schemes.

For the foregoing reasons, I agree with the applicant that this application has merit. It is allowed. The CMA award is quashed and orders therefrom set aside. I order no costs to either party.



A.K. Rwizile

JUDGE

28.07.2022