

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 370 OF 2021**

**EVERLASTING LEGAL AID FOUNDATION (E.L.A.F) ... APPLICANT**

**VERSUS**

**JUDITH ITATIRO ..... RESPONDENT**

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

(Nyagaya: Arbitrator)

Dated 30<sup>th</sup> June, 2021

in

**REF: CMA/DSM/KIN/805/384/2020**

**JUDGEMENT**

29<sup>th</sup> August & 09<sup>th</sup> September, 2022

**Rwizile, J**

The applicant asked this court to call for and examine proceedings and the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/805/384/2020, and thereby revise the same.

Historical facts behind this application are that, the respondent worked as a volunteer with the applicant as of 10<sup>th</sup> June, 2019. She was paid a stipend for transport and food at the sum TZS 250,000. Sometimes later, she was alleged to perform her duties poorly, which led to her termination.

Her termination occurred on 02<sup>nd</sup> November, 2020. The respondent filed a labour dispute at CMA claiming for unpaid salaries and compensation for unfair termination. The ward was in her favour, where the applicant was to pay her the sum of TZS 3,812, 308.00, which is compensation for 12 months. The award did not please the applicant, hence this application.

The application is supported by the affidavit advancing the following issues for determination;

- i. Whether there was a contract of service of employment executed between the applicant and the respondent.*
- ii. Whether the trial arbitrator was right to declare that the respondent was unfairly terminated.*
- iii. Whether the respondent was being paid salaries*
- iv. Whether the applicant was properly summoned to appear at the CMA.*

The applicant enjoyed services of Mr. Henry Mwangwala, learned Advocate, while the respondent appeared in person. The hearing was orally conducted. Mr. Henry had this to submit, that there was no employment contract between the parties as the respondent was a volunteer.

The learned advocate strongly argued that she was also not paid salaries as in exhibits C1, C2 and C3. To him the arbitrator erred to hold that the respondent was unfairly terminated, since a volunteer cannot be fairly terminated. He then prayed, the award be set aside.

In reply the respondent submitted that she volunteered for 3 months. On agreement that if she does well, they will employ her.

She argued that on 10<sup>th</sup> June, 2019 they were satisfied with her work and agreed to pay her TZS. 300,000.00= instead of TZS. 250,000/= per month. She also stated that on the letter of termination they referred to her as their employee and they paid salaries.

After perusal of the applicant's submission, I find the Court has been called to determine *whether there was employment relationship between the parties.*

It is clear through CMA proceedings and exhibits tendered that the applicant and the respondent had no written employment contract as under section 14(2) of The Employment and Labour Relations Act. But even in case there is no written employment contract, the law under section 61 of the Labour Relations Act [CAP. 300 R.E. 2019] provides for

the presumption as to who is an employee. One or even all of the presumption proves the employment relationship. 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.*

In the proceedings, Pw1 and Pw2 stated that the respondent was the employee of the applicant. As if that was not enough, exhibits C3 which is the letter dated 10<sup>th</sup> June, 2019 from the applicant to the respondent proves that the respondent was working with the applicant as provided under section 61(a) and (g) of CAP. 300 R.E. 2019; for easy reference: -

**"10/06/2019**

*JUDITH DEODATUS ITATIRO,*

*S.L.P 67167*

***KIGOGO-DAR ES SALAAM***

***YAH: MAOMBI YA KAZI***

*Tunapenda kukujulisha kuwa tumeridhika na utendaji wako wa kazi kwa kipindi cha miezi mitatu uliyokuwa ukifanya kazi kwa kujitolea na kuzingatia kazi za ofisi ambayo imejikita katika kutoa msaada wa kisheria na utetezi wa misingi ya Haki za Binadamu kwa kuzingatia makundi maalum hususani walemavu, wanawake, Watoto na wazee.*

*Hivyo kwa mantiki hiyo tutakuwa tunakupatia kiasi cha shilingi laki mbili 200,000/= kwa mwezi na shilingi elfu hamsini 50,000/= mwanzoni mwa mwezi ambayo kwa jumla utakuwa unapokea laki mbili na hamsini 250,000/= kwa mwezi..."*

This proves that the work done with the respondent was under the control of the applicant. Exhibit C2 which is the letter to handover different documents of the office proves that the applicant provided the respondent with equipment of work as per section 61(f) of Act; for easy reference: -

"02/11/2020

*JUDITH D. ITATIRO*

*0712 062 016*

*DA ES SALAAM*

***YAH: KUKABIDHI NYARAKA MBALIMBALI ZA OFISI  
E.L.A.F***

...

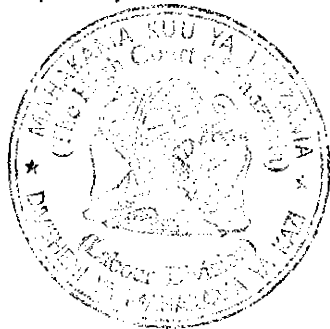
*Hii ni kukujulisha kuwa unatakiwa kukabidhi nyaraka mbalimbali za ofisi, vitu na vifaa ulivyokuwa unafanyia kazi ukiwa ni mtumishi wa taasisi hii ya msaada wa kisheria kwa nafasi yako ya ukatibu muktasi kwakuwa unaondolewa rasmi katika orodha ya watumishi wetu ..."*

The respondent, it is clear was provided with equipment for work by the applicant. Exhibit C1 which is the payment voucher/salary slip proves that the respondent was economically depending on the applicant as section 61(e) of the Act. According to the exhibits, the salary which was paid to the respondent was TZS. 250,000.00 per month as in exhibit C3.

Going by the evidence on record and the wording of the letter dated 10<sup>th</sup> June 2019, exhibit C3, it is apparent that employment relationship was

created, not only by paying a monthly salary but also approving her as a person who was volunteering for the past three months, who had worked well to deserve recategorization.

Therefore, this court finds no merit in the application. In terms of reliefs, I have meditated the nature of the applicant as legal aid institution which is working on *probono* basis and so makes no profit. I think the best compensation for unfair termination would be 6 months salaries at the tune of TZS 250,000.00 per month. Therefore, the amount of payment to the respondent is TZS 1,500,000.00, and salary arrears of one month. The total amount to be paid should be 1,750,000.00. The application is therefore partly allowed to the extent explained.



  
**A. K. Rwizile**

**JUDGE**

**09.09.2022**