

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 103 OF 2022**

*(Arising from an Award issued on 1/3/2022 by Hon. Makanyaga A.A, Arbitrator, in Labour dispute No.*

*CMA/DSM/KIN/241/21/112/21 at Kinondoni).*

**MUSSA ATHUMANI MMBAGA ..... APPLICANT**

**VERSUS**

**ELIZABETH SHAURI ULOMI ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 27/09/2022  
Date of judgment: 29/09/2022*

**B. E. K. Mganga, J.**

On 22<sup>nd</sup> July 2021, Mussa Athuman Mmbaga, the herein applicant filed Labour dispute No. CMA/DSM/KIN/241/21/112/21 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni claiming to be paid (i) TZS 1,500,000/= being salary arrears, (ii) TZS 250,000/=one monthly salary in lieu of Notice, (iii) TZS 6,000,000/=being 24 months'

salary compensation for unfair termination all amounting to TZS 7,750,000/=.

It happened that respondent did not enter appearance, as a result an order was issued the dispute to be heard ex parte. Before adducing evidence, five issues were drafted namely, (i) whether there was employment relationship between the applicant and the respondent, (ii) whether applicant was terminated, (iii) whether there was valid reason for termination, (iv) whether procedure for termination was adhered to, and (v) what are the reliefs each party is entitled to.

In the bid to prove his case, applicant gave evidence as PW1 and did not call any other witness. Having heard evidence of the applicant, on 1<sup>st</sup> March 2022, Hon. Makanyaga A.A, Arbitrator, issued an award that there was no employment relationship between the parties and dismissed the dispute filed by the applicant.

Aggrieved with the said award, on 11<sup>th</sup> April 2022 applicant filed this application for revision. In his affidavit in support of the application, applicant raised three grounds namely: -

- 1. That the Arbitrator erred in holding that there was no employment relationship between the parties while there was undisputed evidence clearly showing that applicant was employed by the respondent.*

- 2. That the Arbitrator erred in not holding that applicant was unfairly terminated.*
- 3. That the Arbitrator failed to properly examine and analyze evidence adduced by the applicant.*

On the other hand, respondent filed her counter affidavit to oppose the application.

When the application was called on for hearing, Shundi Murutu, learned advocate appeared and argued for and on behalf of the applicant while Hamisi Katundu, advocate appeared and argued for and on behalf of the respondent.

Arguing in favour of the application, Shundi Mrutu, Advocate for the applicant submitted generally that the arbitrator erred in holding that there was no employment relationship between applicant and respondent. Counsel submitted that there were SMS communications showing that applicant was demanding to be paid salary arrears. Counsel went on that there was no written contract of the parties to show that they had employment relation but relied on the provision of section 61 of the Labour Institutions Act [Cap. 300 R.E. 2019] and argue that there was employment relationship between the parties. Counsel submitted that applicant was a driver driving the respondent to and from Office and that

applicant was being paid salary. Counsel for the applicant submitted further that there is no evidence to contradict what was testified by the applicant because the dispute was heard exparte. Murutu was of the firm opinion that both oral evidence and documentary evidence proved that applicant was an employee of the respondent. Counsel for the applicant therefore prayed that the application be allowed, and applicant be granted reliefs prayed in the CMA F1.

Responding to submissions by counsel for the applicant, Hamisi Katundu, learned Advocate for the respondent, submitted that there was no employment relationship between the parties. Counsel for the respondent submitted further that applicant did not prove that he was given a motor vehicle to drive the respondent and he was paid salary by the respondent. Counsel for the respondent went on that it was not stated as for how long applicant worked for the respondent. Counsel for the respondent also submitted that applicant did not tender even a driving license to prove that he is a driver. Mr. Katundu concluded his submissions by praying that the application be dismissed.

In rejoinder, Murutu, learned advocate for the applicant submitted that applicant started to work with the respondent on 10<sup>th</sup> June 2020 and

that he was paid TZS 250,000/= as monthly salary. Counsel submitted that applicant was terminated on 29<sup>th</sup> June 2021 after claiming his salary arrears. It was submission by counsel for the applicant that driving license is not a proof of employment relationship between the parties.

I have examined and carefully considered evidence on the CMA record and submissions of the parties, and I am of the view that applicant did not prove that he was employed by the respondent. I have read evidence of the applicant (PW1) and find that it fell short to prove existence of employment relationship between the two. In his evidence, applicant (PW1) testified *inter alia* that his employment with the respondent started on 18<sup>th</sup> June 2020 after he was introduced to the respondent by a friend who resides in Sikonge. Applicant testified further that he was promised by the respondent to be employed in the company the respondent was working. It was evidence of the applicant that he was paid salary from June 2020 to January 2021. It was evidence of the applicant (PW1) that in February 2021, the respondent told him to stop working on ground that the later was travelling and that since then, he did not drive the respondent.

In his evidence, applicant (PW1) did not testify *inter-alia* as for how many hours or days he was working for the respondent in every work and whether he was under the control of the respondent or not for the provisions of section 61 of the Labour Institutions Act [Cap. 300 R.E.2019] to be invoked. It is a trite law that he who alleges must prove. It is my considered view that applicant had a duty to prove by evidence that he was employed by the respondent. On who has a burden of proof see the case of [\*Barelia Karangirangi vs Asteria Nyalambwa\*](#), Civil Appeal No. 237 of 2015 [2019] TZCA 51, [\*Registered Trustees of Joy in the Harvest vs Hamza K. Sungura\*](#), Civil Appeal No. 149 of 2017 [2021] TZCA 139, [\*Ikizu Secondary School vs Sarawe Village Council\*](#), Civil Appeal No. 163 of 2016 [2018] TZCA 387, [\*Godfrey Sayi vs Anna Siame Legal Representative of the Late Mary Mndolwa\*](#), Civil Application No. 190 of 2017 [2021] TZCA 361 to mention but a few. It was only after discharge of that burden; the burden could have shifted to the respondent to fairness of termination.

It was submitted by counsel for the applicant that there were SMS showing that applicant was demanding to be paid salary arrears. With due respect to counsel for the applicant, there is no evidence on record

showing that applicant tendered SMS as evidence showing that he was claiming salary arrears from the respondent. That is submissions from the bar hence not evidence.

It was argued by counsel for the respondent that that applicant did not tender a driving license to prove that he was employed by the respondent. I agree with counsel for the applicant that a driving license alone has nothing to do with the application at hand because the said license could have not proved employment relationship between the parties. I am of that view because not all driving license bearers are employees of the respondent. What was required is tangible evidence to prove that applicant was employed by the respondent, of which, evidence is wanting.

It was submitted on behalf of the applicant that evidence adduced by the applicant was uncontradicted simply because the dispute was heard ex parte. There is assumption that in every matter heard ex parte the party must succeed due to absence of evidence from the other side. That assumption, which appear to be a position by counsel for the applicant, in my view, is wrong. Whether it is ex parte hearing or not, a party is bound to adduce evidence which the court can assess and reach a conclusion that

the matter was proved at the balance of probabilities. In my scrutiny of evidence on record, I find that applicant did not prove the case to the required standard.

For the foregoing, I uphold the CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 29<sup>th</sup> September 2022.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 29<sup>th</sup> September 2022 in chambers in the presence of Mussa Athuman Mmbaga, Applicant but in the absence of the respondent.



B. E. K. Mganga  
**JUDGE**