IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 437 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. REF: CMA/DSM/KIN/273/150/21, Mpulla, U.N.: Arbitrator, Dated 07th November, 2022)

MAUREEN MENGÓRIKI ..... APPLICANT

VERSUS

NOEL ESTATE CO. LTD ..... RESPONDENT

JUDGEMENT

14th – 20th June, 2023

OPIYO, J

The applicant being dissatisfied with the award of the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/DSM/KIN/273/150/21 delivered by hon. Mpulla, U.N. (Arbitrator) on 07th November, 2022 filed for this application for revision so as for this court to revise and set aside the said award. The application was supported by the applicant's affidavit having the following grounds: -

1. *That, whether it is legally correct for the honourable arbitrator to dismiss the dispute for lack of merit that was preferred by the complainant challenging unfair termination.*
2. *That, the arbitrator erred in law and fact by reaching a conclusion that there were no any employment relations between the parties.*

3. *That, whether it was proper for the arbitrator to directing himself that there is nonexistence of an oral contract of employment between the parties.*
4. *That, whether it was proper of the honourable arbitrator to ignore and failed to consider the employment identification card tendered by the applicant and admitted by the commission a document that was never disputed or reported by the respondent nor proved that the identity card was forged.*
5. *That, whether it was correct for the honourable arbitrator to direct himself that the complainant (applicant herein) is not sure of what she was claiming for and her position in the company as she clearly stated under testimony that she was an operation manager and not a director as stated in the opening statement that was due to slip of the pen.*
6. *That, the honourable arbitrator erred in law and in fact by bias evaluation of evidence and ignoring evidence adduced by the applicant without any reasons.*

Historically; the applicant alleged that she was employed orally by the respondent as Operation Manager since July, 2016 until 20th July, 2021 when she was verbally terminated. She then filed for a labour dispute at CMA claiming for 24 months salaries as a compensation for unfair termination, 60 months' salary arrears, leave, one month in lieu of notice, severance pay for 5 years, termination letter and clean certificate of service. The matter was heard and the award was in favour of the respondent hence the rise of this application.

The matter was heard by way of written submission whereby both parties were represented by Learned Advocates. Mr. Faraji Mangula appeared for the applicant and both Mr. Lwijiso Ndelwa and Innocent Paulos Mwelelwa was for the respondent.

Mr. Mangula first submitted that there was an oral contract between the parties and the applicant was issued an identity card (exhibit P1) for easy identification to their clients. He added that the identity card was not objected at CMA. For that he supported his point by referring to the case of **Makubi Dogani vs Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (unreported) at page 15 for an exhibit which was admitted without any objection is proved to have not be objected. He stated further that the aapplicant was never subject any disciplinary action in the company. For him since the respondent did not object to admissibility of the identity card shows that they know it but decided to misuse their will by denying it.

Second, he submitted that the respondent denial to have issued the identity card is an afterthought as may be the Managing Director has hard feelings due to misunderstanding in his marriage with the applicant since they were husband and wife. For him the trial commission ought to have

to dig further that the relationship between the applicant and respondent has nothing to do with marriage conflicts. He added that the respondent even so admitted under oath that the signature in the identity card is his and letter stated that it was scanned. For him if the applicant had forged, the respondent was at liberty to institute criminal proceedings against her as well as civil proceedings but he did not. He added that all the accusation are without any proof and so he submitted that there was employer employee relationship between the applicant and the respondent.

Mr. Mangula further submitted that the arbitrator's words that it is the first time to experience oral contract are wrong because there has been a case similar to this in this court where the Court allowed the Application for revision based on oral contract bot only those of which the employee works outside Tanzania. He supported his point by referring to the case of **Agness Nkwabi and Another vs Ngeme Magembe,** Revision No. 580 of 2019 (unreported) At page 3. He also referred the same case of **Agness Nkwabi and Another vs Ngeme Magembe** (supra) at page 7 which stated that records are supposed to be kept by the employer even if the employee was paid under daily basis. He then prayed for the reliefs of the applicant to be granted as the first point proves that there was

employer employee relationship between the applicant and the respondent.

He then submitted the second and third issues together by stating that are answered from the pleadings itself that the applicant was employed as Operation Manager since July 2016 and the dispute arose in July 2021 when she was told by junior staff one Mr. Yunas Tom Mushi (DW2) as direct order from the Managing Director to quit all her duties and thereafter in communicating with the management the efforts were in vain. He added that the award itself says that the applicant was terminated by a junior staff and was indirectly blessed by the Managing Director who willingly refused to pick calls of the applicant and that there is no valid reasons advanced for such unlawful termination. And the procedure to terminate was not followed.

He continued that the section 37(1) of The Employment and Labour Relations Act [CAP. 366 R.E. 2019] prohibits termination of employment unfairly. He stated further that section 37(2)(a) of CAP. 366 R.E 2019 provide that for a termination to be fair there must be a valid reason and section 37(2)(c) of CAP. 366 R.E 2019 provides for fair procedure to be followed by the employer in terminating the employment. He then submitted that the above mandatory provisions of the law have been

violated by the respondent and the remedies available are under provision of section 40(1)(c) of CAP. 366 R.E. 2019 which is to pay compensation to the employee of not less than twelve months remunerations.

He added that section 39 of CAP. 366 R.E. 2019 provides for the employer to prove that the termination proceedings were fair. For him termination was unfair as the employer had no valid reasons. He then cited section 41(1)(b)(ii) of CAP. 366 R.E. 2019 which provides on terminated on notice, section 41(5) of CAP. 366 R.E. 2019 which provides on payment instead of notice, section 42(1) of CAP 366 R.E. 2019 which provides on severance pay and section 44(2) of CAP. 366 R.E. 2019 which provides for certificate of service.

He submitted further that the arbitrator was biased by used the word "alleged" when referring the testimony of the applicant but did not use that word anywhere the testimony of the respondent's witnesses. For him it was as if the arbitrator right from the beginning was ready to dismiss the complaint for not believing the applicant testimony under oath. To support his point, he referred the case of **Godson Dan Kimaro vs The Republic,** Criminal Appeal No. 54 of 2019 at page 8 (unreported). He

added that the trial tribunal did not provide any reason for not believing the applicant as credible and truthful witness under oath.

He further submitted that the arbitrator erred in law and in fact by directing himself that the applicant is not sure of what she is claiming for and her position in the company as she clearly stated under testimony that she was an operation manager and not a Director as stated in the opening statement that was due to slip of the pen. He stated that at page 10 to 11 of the Award the arbitrator ignored what the applicant testified under oath. He then prayed this application to be allowed and to be paid TZS. 36,000,000/= being 24 months salaries as compensation, TZS. 90,000,000/= being 60 months' salary arrears, TZS. 1,500,000/= being leave pay, TZS. 1,500,000/= being severance pay, be given a termination letter and clean certificate of service. He then added by the respondent by not cross examine about exhibit P1 meant admission of it. To support his point, he referred to the case **Kilanya General Supplies Limited and Other vs CRDB Bank Limited and 2 Others,** Civil Appeal No. 1 of 2018 at page 17 (unreported).

In reply advocates for the respondent submitted that the arbitrator correctly analysed and considered all evidence adduced in holding that

there was no employment relationship between the applicant and the respondent. They then cited section 61 of the Labour Institutions Act [CAP. 300 R.E 2019] which provides for the relationship between the employer and employee and referred to the case of **Alphonce Morris Kagoma vs Joyce Samwel Msigwa,** Revision No. 30 of 2021 at page 4 which held that terms of section 61(a) to (g) of CAP. 300 R.E. 2019 has to be proved.

They submitted further that the evidence adduced before the CMA shows that there was no employment relationship. They added first, there was no evidence to show that the applicant was under the control of the respondent as required by 61(a) of Cap 300 R.E 2019 ("the Act'). They submitted that as the applicant stated that she did not have a job description as she did not print the same, she did not mention her daily work obligations and she did not state her reporting line.

They stated secondly, the applicant did not prove that she was economically dependent on the respondent as required by section 61(b) of the Act. They stated that the applicant claimed that she did not receive salaries for 60 months and that she never inquired about the same. on their opinion it defeats the logic for an employee to keep working without demanding payment for 60 months.

Thirdly, they continued that there was no evidence showing that the applicant was part of the organization as mandated by section 61(c) of the Act. They stated the applicant admitted that she does not have proof of any work she performed. On their view, since the applicant stated that she was the respondent's Operations Manager she ought to have tendered evidence of the work she was instructed to perform since 2016 but she did not know the date she was employed and her name was not in the register book (exhibit D5) or even so she did not know the names of any other employees of the respondent.

Fourthly, they submitted that there is no evidence to prove that the applicant worked for an average of 45 hours over the last three months for the respondent as mandated by section 61(d) of the Act as exhibit D4 shows that the applicant was in Arusha living with her parents while the respondent's business was not in Arusha.

Fifth, they added that there is no evidence that the applicant's hours of work were controlled by the respondent as required by section 61(b) Act and Sixth, that the applicant admitted that she was never supplied with working tools by the respondent as required by section 61 (f) of the Act.

Advocates for the respondents submitted further that, the burden of proof was on the applicant to prove that she was an employee but she failed to

prove. They supported their point by referring to the case of **Hamidu Abdallah Mbekae & 11 Others v Be Forward Tanzania Co. Ltd**, Civil Appeal No. 380 of 2019, CAT at page 8 which held the burden of proof was on the employees.

They continued that, there was no oral employment contract between the parties. They cemented their point by referring to the case of **Alphonce Morris Kagoma v Joyce Samwel Msigwa** (supra) at page 4 which held that in the absence of the written contract, the terms under section 61 (a) to (g) of CAP. 300 R.E 2019 must be proved. On their opinion since the respondent stated that there was an oral contract of employment it was her duty to prove.

They added that contrary as submitted by Mr. Mangula on what is stipulated under section 15 (1) of CAP. 366 R.E. 2019 which places upon the employer a duty to keep record and supply the information to the employee while the principle of the law is that the duty to produce records of employment does not exist where there is an allegation of oral contract of employment. On their view since the respondent denied employing the applicant it was the duty of the applicant to prove the existence of such oral contract of employment. To support their point, they referred the case of **Geofrey Ramon Mtweve & Another v Dianarose Spare**

Parts Limited, Labour Revision 72 Of 2022) 2022 at page 10. They then stated that the case of **Agness Nkwabi and Another v Ngeme Magembe** (supra) is not relevant because another respondent admitted not to have kept the records of her employee and there was proof that the employee was paid salaries daily while in the instant matter there is no any employment relationship as such there can be no applicant's employment records.

They further submitted that the arbitrator correctly held that exhibit P1 is not proof of employment despite being admitted without the respondent's objection. They added that it is an established principle that admission of a document without objection does not mean its contents have been proved. They supported their point by referring to the case of **Narcis Rukyebesha Mbarara vs Equity Bank Tanzania Limited & Another,** Civil Appeal No. 04 of 2022, CAT at page 13. They then stated that the case referred by Mr. Mangula of **Makubi Dogani vs Ngodongo Maganga** (supra) was issued on 21st August 2020 and so it is not a recent decision and hence should not be followed and on their view the decision to be followed is the case of **Narcis Rukyebesha Mbarara v. Equity Bank Tanzania Limited & Another** (Supra) which was issued on 24th February 2023. To support their point, they referred to the case of

Mantra (Tanzania) Limited v The Commissioner General, Tanzania Revenue Authority, Civil Appeal no. 430 of 2020 on page 17 which held that in case of conflicting decisions, the more recent one has to be followed.

Moreover, the advocates for the respondent submitted that, it is the principle of the law that an identity card by itself does not establish the existence of an employment contract as was held in cases of **Abdallah Mbekac & 11 Others v Be Forward Tanzania Co. Ltd,** Civil Appeal No. 380 of 2019, CAT at page 10 and **Gilbert Peter Kimbi and 16 Others v Tanzanite Africa,** Ltd Labour Revision 32 of 2020 page 7.

They again submitted that the exhibit P1 is doubtful in the front page it mentions that the applicant was the Operations Manager while the back-page states that the applicant is a member of the company. On their view it raises doubts as to the authenticity of this Exhibit. That, at the hearing, the applicant stated that she does not remember when the identity card was issued to her and that she obtained the same from the printing company which has the signature of the respondent's managing director. For them, this proves that Exhibit P1 was not issued by the respondent and that the applicant admitted that she had access to DW1's signature as his wife, for that it was possible for her to make the said identity card.

They further argued that the arbitrator correctly held that the applicant was not sure of what she was claiming and her position in the company because in the opening statement the applicant stated that she was the director of the respondent together with other directors of the company and during the hearing the applicant stated that she was Operations Manager and in Exhibit D4 the applicant listed the respondent as one of the matrimonial properties allegedly gifted to her on the wedding day. They added that, the argument that it was a slip of the pen for the opening statement to state that the applicant was the director of the respondent is lame and an afterthought. They then stated that, the arbitrator correctly refused to believe the applicant's evidence as the case of **Godson Dan Kimaro v R. Criminal Appeal No. 54 of 2019** on page 8-11 cited by the applicants held.

They continued that the submission that the arbitrator was biased because of the use of the word alleged when referring to the testimony of the applicant is meritless. They added that before the CMA the applicant did not prove the existence of an employment relationship. For them the use of the word alleged was warranted.

They proceeded to submitted that the proceedings on 5th April 2022 shows that PW1 was cross-examined on whether she had access to the signature of DW1 and how he obtained Exhibit P1, therefore the case of **Kilanya General Supplies Limited and Another v CRDB Bank Pic & 2 Others** (supra) is not relevant. They added that the applicant did not cross-examine DW1 on the contents of exhibit D4 in which paragraph 2 states that the applicant was living in Arusha since August 2020 and hence she was not employed by the respondent.

The advocates for the respondents submitted further that, since the first issue was answered in negative that there was no employment relationship it follows that there was no termination of employment and so the provisions of section 37 of the Employment and Labour Relations Act [Cap 366 R.E 2019] are not applicable. They added further that it was the applicant's duty to prove that she was terminated orally. To support that they referred to cases of **Ally Abbas Pembe vs Bhogal Estate Ltd,** Revision No. 806 of 2019 at page 12 and **Said Selemani and 13 Others vs A-One Product and Battlers Ltd**, Revision No. 890 of 2018 (High Court Labour Division at Dar es Salaam.

They continued that the applicant stated that she was terminated orally by a volunteer one Mushi, the one who she did not know his full name.

they contend that termination notice must be issued by a person with authority and so a volunteer cannot possess such powers and that for the applicant statement that she tried to call the managing director of the respondent she neither tendered the records of such calls nor mention the number of the managing directors of the respondent.

They added, inspite DW1 denial having instructed any volunteer to terminate the applicant, Mr. Yunas Mushi (DW2) also stated that he was never sent by DW1 to terminate the applicant and the applicant did not cross-examine DW2 on whether he was sent by DW2 to terminate the applicant. for them impliedly the applicant admitted that there was no termination of employment. To support their point, they referred to the case of **Kilanya General Supplies Limited and Another v CRDB Bank Pic & 2 Others** Civil Appeal No. 1 of 2018 on page 17.

Regarding reliefs, they submitted that since there was no employment relationship, the applicant is not entitled to any of the reliefs mentioned in CMA F1. The applicant's prayer for payment of TZS. 90,000,000/- being salary arrears for 60 months is also unattainable. This is because the same is time barred in terms of Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007. Such dispute ought to have been referred to CMA within sixty days from the date when the dispute

arose. They then prayed for dismissal of the application and uphold the CMA award.

In re-joining, Mr. Mangula submitted that all grounds for revision were submitted in answering the first issue, and were never abandoned but were all submitted at once. He then reiterated what has been stated in the submission in chief concerning the identity card. On the issue of conflicting decisions, he referred to the case of **NBC v. Sinzo Bakwila** (1978) LRT at page 38, **Stephen Masatu Wasira vs Joseph Sinde Warioba and The Attorney General** (1999) TLR at page 334 and in the case of **Dr. Ally Shabhay vs Tanga Bohava Jamat** (1997) at page 305.

His further submission is that, the applicant was under control of the employer, the hours or her work were under control of the employer, she was part of the organization as her identity card shows and she has worked for average of 45 hours over the last three months for the respondent. That she was as well economically dependent to the employer that is why after termination she was demanding her rights. He continued stating that even though the law limits her to place her complaint within 60 days what it means only salary for 60 days can be paid since the dispute arose on 20/07/2021 and filed her dispute on

30/07/2023. He then admitted that, the rest of accrued salaries are time barred by law, but the rest of the benefits are within the ambit of law. He submitted further that the applicant was rendering services per employer's tools such as the identity card and that the employer was entitled to issue contracts and job descriptions to employees regardless of the contract they had which was oral. He concluded by stating that each case must be decided on its own material facts even the test in matrimonial proceedings and labour matter are different. To support his point, he referred the case of **Mashaka Athumani ©Makamna vs The Republic**, Criminal Appeal No. 107 of 2020 at page 8 (unreported). He then reiterated what was prayed in the submission in chief.

After perusal of parties' submissions and CMA records, this court has found the issue to be determined are of whether there was employer-employee relationship between the applicant and the respondent which was unfairly terminated and to what reliefs are parties entitled thereto.

The advocate for the applicant stated that the applicant was the employee of the respondent as they had oral contract. Whereas the respondent through her advocates disputed the same by stating that there is no employer-employee relationship between the applicant and the respondent for various reasons they enumerated above.

Having gone through the CMA records, I have found that DW1 stating that the applicant was not the employee of the respondent but rather his wife. The applicant tendered exhibit P1, applicant's identity card, proving that she was the employee of the respondent. The exhibit P1 shows that it was issued by the respondent as it bears its name, it also has applicants name and at the back of it reads: -

"NOEL ESTATE COMPANY LIMITED

This is to certify that the bearer of this ID Card is member of the

NOEL ESTATE COMPANY LIMITED.

If found kindly send to the address shown below

P. O. Box 36164, Dar es Salaam – TANZANIA.

Cell: +255 762 167 300, +255 658 167 300.

E-mail: noelestatecompany@yahoo.com/ ligatesande@gmail.com "

DW1 during cross examination stated he does not recognise the exhibit P1 as he did not issue it and the signature to it is a photocopy. And that he could not complain anywhere earlier about its authenticity as he found out about it and seen on the hearing date. He could not complain about what he did not know. On perusal of CMA records I have not found any list of the documents which that was to be used by the applicant during trial. That means the applicant did not file such a list while it is the must before hearing in terms of rule 29(3)(g) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 which require

submitting a list of all the documents that are material and relevant to the application. The absence of the list does not only mean the applicant first did not only comply with the rule but also denied the chance to the respondent to prepare her defence. It was therefore, wrongly admitted as its presentation did not go in accordance to the law. Also, as the same was disputed at CMA, it is expunged and this court will not consider it in its findings.

The above expunged exhibit P1 was the only document that allegedly connected the applicant to the respondent. being expunged leaves the applicant with no proof whatsoever of her employment with the respondent. Section 61 of the Labour Institution Act [CAP. 300 R.E. 2019] provides that:-

" 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 organization, the person is a part of that organization;

(d) The person has worked for that person for an average of at least forty-five hours per months 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."

On going through CMA records there is no document which shows what have been stipulated in the provision of section 61 above. No document ever crossed hands between the two that could help the court to connect them. Records also shows reveals contradictions on the applicant's work position with the in the opening statement, the applicant stated that she was one of the directors while during hearing she stated that she was an operation manager and say that what she stated in the opening statement was a slip of the pen. If at all this is a serious slip to turn a blind eye to.

Moreover, we agree that it was indeed a slip of a pen, then, it was expected she stand firm to prove that she was indeed operational manager. However, looking at Exhibit D5 which is a register book tendered by DW1 shows the attendance of the workers of the respondent

but the applicant is not in the list. If she had been the employee for over 60 months to the time of filing the application, at least her name could be seen in the attendance list. For not beeng in exhibit D5 shows she never attended the work place of her alleged employer.

Furthermore, one Mushi whom the applicant alleged to be terminated her under the instruction of DW1 did not recognise her as his co-worker and she did not know his full name, which was weird as a co-worker worse still the applicant did not bring any witness among the co-workers to prove to court if they knew her as their co-worker.

Another thing which leaves the applicants' case unproven is the fact that she stated that since she was allegedly employed on year 2016 to the day, and allegedly terminated on year 2021 she had never been paid her salaries. Even though her advocate while re-joining admitted that 59 months' salary arrears claimed were time barred and remained only with only two month's salaries, still the court is left with a puzzle if the applicant was ever employed by the respondent. How can an employee work for five years in the company without being paid, and without claiming anywhere? This leaves the court with no proof of the agreed payment,

i.e. what was a monthly pay, if at all. the above circumstances leaves applicant not to have met the criteria of being employee as stipulated under section 61 above. The employment relationship has to be proved with the factors provided under section 61 above, which the applicant failed miserably to. In the case of **Mwita Wambura V. Zuri Haji**, Revision Application No. 42/2012 at Mwanza, LCD 2014 Part II page 182, it was held that: -

> *"There are a number of common factors running through which can aid a decision maker in determining existence of an employment relation. These principles are among others; (a) defining employment relationship by looking at parties' roles, considering matters among others; dependency; subordination, direction, supervision and control of services rendered; (b) principle of primacy of facts looking at what was actually agreed and performed by each of the parties; and (c) use of burden of proof."*

From the above, the applicant's employment remains a mere allegation as correctly argued by the arbitrator. This is because, so far, the applicant's allegation that she was employed by the respondent and terminated by her, remained unproven. Its failure amounts to an allegation. As the respondent denied to have employed the applicant,

the burden of proof shifted to the applicant to prove their employer-employee relationship. The applicant herein has failed that so to prove as correctly found by arbitrator. I therefore find no reason to fault the arbitrator's findings. Consequently the application is hereby dismissed for lack of merits. And since this is the labour matter, I order no costs.

M. P. OPIYO

JUDGE

20/06/2023