

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 107 OF 2023**

*(Arising from an Award issued on 14/04/2023 by Hon. Lucia C.C, Arbitrator, in Labour dispute No. CMA/DSM/ILA/778/20/17/2022 at Ilala)*

**YOHANA THOBIAS MDEMU ..... 1<sup>ST</sup> APPLICANT**

**SADIKI SADAMU ..... 2<sup>ND</sup> APPLICANT**

**ISRAEL JOSEPH ..... 3<sup>RD</sup> APPLICANT**

**ALEX TEGA ..... 4<sup>TH</sup> APPLICANT**

**VERSUS**

**FMJ HARDWARE LIMITED ..... RESPONDENT**

**JUDGMENT**

*Date of last order: 26/06/2023*  
*Date of Judgment: 30/06/2023*

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

Brief facts of this application are that, on 16<sup>th</sup> February 2020, Yohana Thobias Mdemu, Sadiki Sadamu, Israel Joseph and Alex Tega, the herein 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicant respectively, filed Labour dispute No. CMA/DSM/ ILA/778/20/17/2022 before the Commission for Mediation and Arbitration (CMA) at Ilala against FMJ Hardware Limited, the herein

respondent. In the Referral Form (CMA F1) applicants indicated that they were claiming to be paid TZS 28,860,000/= being payment in lieu of notice, annual leave, severance pay and compensation for unfair termination. In the said CMA F1, applicant indicated further that no reason was offered by the respondent for termination of their employment and further that procedures for termination were not followed.

Having heard evidence of the parties, on 14<sup>th</sup> March 2023, Hon. Lucia Chrisantus Chacha, Arbitrator issued an award that applicants were employed for specific task and that their contracts ended on every day as they were paid on daily basis. The arbitrator therefore dismissed the dispute for want of merit.

Applicants were dissatisfied with the said award hence this application for revision. In support of the Notice of Application, applicants filed their joint affidavit. In the said joint affidavit, applicants raised four (4) issues namely: -

- 1. Whether it was lawful for the applicants to be transferred without being paid.*
- 2. Whether applicants were employees of the respondent.*
- 3. Whether applicants were entitled to be paid their entitlements before being transferred to another employer.*

*4. What are the relief(s) parties are entitled to.*

In opposing the application, respondent filled both the Notice of Opposition and the Counter Affidavit sworn by Fatina Senzota Said, her Managing Director.

When the application was called on for hearing, Mr. Sospeter Lufasinza Ng'wandu, Personal Representative, appeared and argued for and on behalf of the applicants while Ms. Doroth Mkwizu, Advocate, appeared and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Ng'wandu submitted that, applicants were employed by the respondent to off load luggage from the respondent's motor vehicle and keep them in the store and thereafter load them in motor vehicles of the respondent's customers. He submitted further that employment of the 1<sup>st</sup> and 3<sup>rd</sup> respondent commenced on 3<sup>rd</sup> April 2013 and 1<sup>st</sup> March 2011 respectively at daily pay of TZS 15,000/= payable at every hence TZS 90,000/= per week payable at every Saturday. Mr. Ng'wandu went on that, employment of the 2<sup>nd</sup> and 4<sup>th</sup> applicant commenced on 1<sup>st</sup> April 2016 and 1<sup>st</sup> February 2016 respectively, in similar terms to that of the 1<sup>st</sup> and 3<sup>rd</sup> applicants. Mr. Ng'wandu submitted further that, on 28<sup>th</sup> January 2019 respondent informed applicants that from that

date, they will be transferred to Raba Construction Company. He added that, applicants did not accept the said transfer because they wanted to know fate of their right, i.e. notice, severance pay and leave.

Arguing the 2<sup>nd</sup> issue, Mr. Ng'wandu submitted that applicants were employees of the respondent and that, they were terminated on 01<sup>st</sup> February 2019 on ground that they refused to be transferred to Raba Construction without being paid their entitlement. He added that, the said transfer was done orally. He strongly submitted that, there was employment relationship between the parties.

Arguing the 3<sup>rd</sup> issue, Mr. Ng'wandu submitted that, respondent was duty bound to pay applicants their entitlements before transferring them to the new employer.

Arguing the 4<sup>th</sup> issue, Mr. Ng'wandu submitted that, applicants are entitled to be paid as per CMA F1. He added that, it was not the duty of the applicants to prove that they were employed by the respondent. He maintained that applicants were employed for unspecified period. Mr. Ng'wandu concluded his submissions praying that the application be allowed by setting aside the CMA award.

In resisting the application, Ms. Mkwizu, learned counsel for the respondent, for obvious reason, understandably, started with the 2<sup>nd</sup> issue. Counsel for the respondent submitted that in terms of Section 110 of the Evidence Act [Cap. 6 RE. 2019], applicants were duty bound to prove that they were employees of the respondent. Counsel submitted further that, at CMA, applicants tendered a copy of a letter identifying 1<sup>st</sup> applicant as one of the residents of Bughudadi Street Mbagala area but the said document did not prove employment relationship with the respondent. She added that, there is no proof that applicants were employees of the respondent, hence, the 1<sup>st</sup> and 3<sup>rd</sup> issues died a natural death. Counsel cited the case of *Francis Eugen Polycard v. M/S Panone & Co. Ltd*, Civil Appeal No. 8 of 2019, HC(unreported) to bolster her submissions that applicants had a duty to prove employment relationship with the respondent but they failed. Counsel for the respondent concluded her submission by praying the application be dismissed for want of merit.

In rejoinder, Mr. Ng'wandu reiterated his submission in chief and maintained that applicants' employments were by oral hence there was no contract. He further submitted that, evidence of Abdalah Masoud (PW1)

collaborated evidence of the applicants that they were employees of the respondent and prayed this application be allowed.

I have examined the CMA record and considered submissions of the parties in this application and find that applicants were not employees of the respondent as it was held by the arbitrator. My conclusion is based on evidence of the parties in the CMA record as explained hereunder.

At CMA, Yohana Tobias Mdemu (PW1), the 1<sup>st</sup> applicant, testified on behalf of other applicants that they were orally employed by the respondent on various period. PW1 testified that his employment commenced on 03<sup>rd</sup> April 2013. In his own word, PW1 is recorded stating that :-

*"... Tuliajiriwa... kwa mlalamikiwa kwa mikataba ya kudumu ya mdomo. Tulikuwa tunalipwa mshahara wa siku. Kwa siku tulikuwa tunalipwa Tshs (sic) 15,000/= kila mmoja. Na usipoenda kazini hamna malipo siku hiyo."*

Translation of the above quoted paragraph is that, they were employed by the respondent orally for unspecified period contract. Their salary was on daily basis. Each was paid TZS 15,000/= daily. There was no pay for the day a person defaulted to attend at work.

In his evidence PW1 tendered a letter with Ref. No. DAR/MAL/IR3/45/2018 dated 8<sup>th</sup> November 2018 from the Prime Ministers office as exhibit P1 to show that he was an employee of the respondent. Exhibit P1 reads in part:-

*"...Mlalamikaji alieleza ofisi kuwa aliajiriwa kwa masharti ya siku kama mpakiaji kuanzia tarehe 03/5/2013 mpaka tarehe 4/10/2019 alipopata ajali akiwa kazini akitekeleza majukumu yake..."*

It is clearly from the above quoted paragraph that PW1 complained that he was employed on daily basis from 03/5/2013 to 4/10/2019 when he got an accident while at work.

PW1 further tendered a letter with Ref. No. MBG/BGD/416/2017 dated 10<sup>th</sup> July 2017 (exhibit P2) that was written by Amina William Nkinda, the leader of Bughudadi street within Mbagala Ward introducing him to the respondent. PW1 also tendered a document titled "KIKAO KATI YA MWAJIRI NA MWAJIRIWA NA WCF 27.11. 2019" (exhibit PW3) to support the case by the applicants. I should point out that the said exhibit has nothing to do with either the applicants because it relates to Abdallah Ramadhan Masudi who is not among the applicants. More so the said exhibit was wrongly tendered and admitted in evidence despite the

objection that was raised by the respondent. PW1 who tendered the said exhibit did not lay any found as to how the said letter is connected to the application at hand. Since exhibit P3 was wrongly admitted in evidence, I hereby expunge it.

I have also considered evidence of Abdallah Ramadhan Masoud(PW1) and find that briefly as he was, PW2 did not prove the claims by the applicants.

It is my view that, evidence of the applicants is unreliable for being full of contradictions. It is my view that, if at all PW1's employment with the respondent commenced in 2013 as testified, why did he seek an introduction letter (exhibit P2) in 2017. This tells all that evidence of PW1 who testified on behalf of other applicants cannot be believed. In my view, PW1 told nothing but lies hence cannot be believed. I am guided by what the court of Appeal held in the case of *Goodluck Kyando v. Republic*, [2006] T.L.R 363 that: -

*"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*



Again, in the case of *Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008*, (unreported) the Court of Appeal held: -

*"...To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc..."*

Since evidence of PW1 is full of contradictions and lies, I find that he cannot be believed. There is no any other evidence to support the case in favour of the applicant.

On the other hand, Fidelis Peter (DW1) testified that applicants were not employees of the respondent. That evidence was not shaken during cross examination.

I agree with submissions by counsel for the respondent that applicants were duty bound to prove what they alleged. It is a cardinal principle of law that he who alleges must prove. See the case of *Hemed Said v. Mohamed Mbilu [1984] TLR 113, Jaluma General Suppliers Limited vs Stanbic Bank (T) Limited, [2013] T.L.R. 269 (CA) and Barelia Karangirangi vs. Asteria Nyalwambwa, Civil Appeal No. 237*

of 2017, CAT(Unreported) and *Polycard's case* (supra). Applicants did not discharge that burden.

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

Dated at Dar es Salaam on this 30<sup>th</sup> June 2023



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

Judgment delivered on this 30<sup>th</sup> June 2023 in chambers in the presence of Sospeter Lufasinza Ng'wandu, Personal Representative of the the Applicants and Dorothy Mkwizu, Advocate for the Respondent.



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