IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KEREFU, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 188 OF 2018

M/S MKURUGENZI NOWU ENG.....APPELLANT

VERSUS

GODFREY M. MPEZYA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Division), at Dar es Salaam)

(Nyerere, J.)

dated the 17th day of August, 2018
in
Revision No. 451 of 2016

JUDGMENT OF THE COURT

15th & 23rd September, 2021.

KEREFU, J.A.:

In this appeal, the appellant, M/S MKURUGENZI NOWU ENG (the Company) is faulting the decision of the High Court of Tanzania (Labour Division) in Labour Revision No. 451 of 2016. In that revision, the High Court (Nyerere, J.) upheld the decision of the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. CMA/DSM/KIN/R.532/14/188 (the Labour Dispute) which was in favour of the respondent.

The material facts of the matter obtained from the record of appeal giving rise to the current appeal indicate that, before the CMA, the respondent who testified as PW1 alleged that, in 1993 he was employed by one Peter Marisha Daat (DWI) as a driver at a monthly salary of TZS 650,000.00 until 19th September, 2014 when his employment was unfairly terminated. It was the testimony of the respondent that for all that period he was not given any contract of employment despite the fact that he persistently requested for the same from DW1 without success. Therefore, to prove that he was employed by DW1, the respondent tendered various exhibits including photographs showing him with a motor vehicle, alleged to belong to DW1, together with DW1 and DW1's family members in various locations and occassions. The respondent stated that the reason for his termination was triggered by his act of asking for annual leave for the year 2013 and 2014. He stated that after the said unfair termination, he approached the organization which is protecting and defending rights of domestic workers known as Conservation Hotels and Domestic Workers Union (CHODAWU). That, CHODAWU tried to solve the matter but failed, hence he decided to institute a labour dispute against the appellant herein

before the CMA as indicated above. The CHODAWU representative represented him before the CMA.

The testimonies of Deus Dedit Dati (PW2) and Philemon Mnyaga Juma (PW3) supported what was testified by PW1 that they witnessed him working for DW1 and the Company.

On his part, DW1 strongly disputed that the respondent was neither employed by him nor the Company. DW1 contended further that PW1 could not have been employed by the Company in 1993 because at that time the said Company was not in existence. He testified further that, the Company was established and registered in 1999 and to prove that fact, he tendered a certificate of incorporation No. 38537. He thus challenged the labour dispute instituted by PW1 against the Company that there was no any employment relationship between the two.

DW1, however, stated that the respondent was employed by his wife one Sabena Peter Marisha (DW2) as a domestic servant in a position of a driver. He stated further that, in that capacity, PW1 used to drive his children to school and back home, taking his wife for shopping and other domestic assignments. DW1 further testified that, at some point, PW1 requested for financial assistance to start business and he gave him TZS

3,000,000.00 and DW2 gave him TZS 2,000,000.00. DW2 supported the testimony of DW1 and clarified that she is the one who employed PW1 as a driver and a domestic worker to drive her motor vehicle and to take her children to and from school together with other domestic assignments. DW2 added that, on top of the said TZS 5,000,000.00, in 2014 she gave PW1 TZS 40,000.00 to renew his business licence. She thus insisted that, if there are any claims related with the PW1's employment, she is the one responsible and a proper person to be sued.

Having heard the parties, the CMA, though made a finding that there was no employment contract between the appellant and the respondent, invoked the provisions of section 61 of the Labour Institutions Act, No. 7 of 2004 (Labour Institution Act) and decided that there was presumed employer/employee relationship between them. That, the respondent was doing both, the domestic work and the Company's assignments. As such, the CMA found that the respondent is entitled to the following reliefs:

(a) One month notice pay at TZS 650,000.00;
(b) Annual leave TZS 650,000.00;
(c) Terminal benefits at the tune of TZS 1,750,000.00; and
(d) Compensation for unfair termination TZS 7,000,000.00.

Therefore, the CMA ordered the appellant to pay the respondent a total sum of TZS 10,850,000.00.

Aggrieved, the appellant lodged a revision application at the High Court challenging the CMA's award. The said application was heard *exparte* as the respondent did not enter appearance. Having heard the argument from the appellant, the High Court (Nyerere, J.) though at page 154 of the record of the appeal also found that there was no contract of any nature between the parties herein, upheld the decision of the CMA by stating that the respondent was an employee of the appellant and that the appellant unfairly and unprocedurally terminated the respondent.

Still dissatisfied, the appellant lodged the current appeal. In the memorandum of appeal, the appellant has preferred seven grounds of complaint. However, for the reasons which will be apparent shortly, we do not deem appropriate, for the purpose of this judgment, to reproduce them herein.

At the hearing of the appeal, the appellant had the services of Messrs. Evold Mushi and Godfrey Ngassa, both learned advocates, whereas the respondent appeared in person without legal representation. It is

noteworthy that both parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal in compliance with Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which they sought to adopt at the hearing to form part of their oral submissions.

However, prior to the commencement of the hearing of the appeal on merit, the Court brought to the attention of the learned counsel for the appellant the provisions of section 57 of the Labour Institution Act and requested him to address it as to whether the grounds of appeal lodged by the appellant are based on legal points as required by that provision.

In response, Mr. Mushi admitted that the second, third, fourth fifth and sixth grounds of appeal are all based on facts and thus they do not deserve the attention of this Court. As such, Mr. Mushi prayed to abandon the said grounds and argue only the first and the seventh grounds of appeal. The said grounds are to the effect that: -

(1) *The learned High Court Judge erred in law in concluding that although there is no contract of any nature between the appellant and the respondent there was contract under presumption which had no any supporting legal basis;*

(2) *The learned High Court Judge erred in law by failing to consider the point of law that the arbitral proceedings before the CMA was nullity as neither party referred the matter for arbitration contrary to the provisions of section 86 (7) (b) (i) of the Employment and Labour Relations Act of 2004.*

Submitting in support of the first ground, Mr. Mushi faulted the learned High Court Judge for having erroneously interpreted and wrongly applied the provisions of section 61 of the Labour Institution Act in this matter. He clarified that the said section is applicable in a labour dispute where the employer/employee relationship between the parties is not certain. It was the strong argument of Mr. Mushi that since the respondent himself testified that he was employed by DW1 and DW2 the wife of DW1 admitted to that fact and there was no any element which created employment contract under presumption on the part of the appellant, then section 61 was not applicable in the circumstances.

Mr. Mushi contended further that, after having found that there was no contract of any nature between the appellant and the respondent, the first appellate court was supposed to end the matter there and direct the respondent to institute a labour dispute against the appropriate employer.

In conclusion and on the strength of his arguments, Mr. Mushi urged us to allow the appeal, nullify the decisions of both, the CMA and the first appellate court with no order as to costs.

In response, the respondent resisted the appeal. Disputing what was submitted by Mr. Mushi, the respondent argued that the CMA and the first appellate court correctly and extensively analyzed the evidence on record and properly applied the provisions of section 61 of the Labour Institute Act together with ILO standards and there is nothing to be faulted. It was his further argument that since before the CMA the appellant admitted that he had employment relationships with the respondent, the existence of a written employment contract as the appellant seems to suggest, was not a necessary condition. As such, the respondent urged us to dismiss the appeal for lack of merit.

In a brief rejoinder, Mr. Mushi reiterated what he submitted earlier and insisted for the appeal to be allowed.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we wish to start by reiterating a settled principle that, this being a second appeal, the Court should rarely interfere with the concurrent findings of the

lower courts on the facts unless there has been a misapprehension of evidence occasioning miscarriage of justice or violation of a principle of law or procedure. See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported). Specifically, in **Wankuru Mwita** (supra) the Court stated that: -

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

We shall be guided by the above principle in disposing this appeal.

Starting with the first ground, there is no doubt that it raises an issue of wrong interpretation and application of section 61 of the Labour Institutions Act by the CMA and the first appellate court. The said section,

among others, provides a number of factors to be considered in determining who is an employee. For the sake of clarity, the said section provides that:

> *"For the purpose of labour law, a person who works for, or renders services to any other person is presumed, until the contrary is proved to be an employee, regardless of the form of 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 person who works for an organization, the person is a part of that organization;*
>
> *(d) the person has worked for that other person for an average of at least 45 hours per month over the last three months;*
>
> *(e) the person is economically dependent on the other person for whom that person works and or renders services; or*
>
> *(f) the person only works for or renders service to one person.*

In the light of the above cited provisions, it is clear that the same is applicable when there is question of presumption as to who is an employee. Now, in the instance case, as correctly argued by Mr. Mushi, there was no dispute as to who was the employee, because in his testimony, the respondent, although he instituted his case against the appellant, but he clearly stated that he was employed by Mr. Peter Daat (DWI) in 1993 as a driver. On the other hand, DW1, although disputed that he was not the one who employed him, he testified that, the respondent was employed by his wife (DW2) as a driver and a domestic worker. Furthermore, in her evidence, DW2 admitted to that fact and she also clearly testified that she is the one who employed the respondent and responsible for his claims. For better appreciation of what exactly was testified by PW1 and DW2 before the CMA on their employment relationship, we take the liberty of reproducing their testimonies herein below. At page 70 of the record of appeal the respondent in his own words testified in chief that: -

> *"Qn: Kazi ulianza lini?*
> *Ans: Nilianza kazi kwa Bw. Peter Daat tarehe sikumbuki mwaka 1993.*
> *Qn: Kazi gani?*

Ans: Udereva

Qn, Mshahara?

Ans: Tshs 650,000/=".

Our literal translation of the above extract is as follows: -

"Qn: When were you employed?

Ans: I do not remember the date, but I was employed by Mr. Peter Daat in 1993.

Qn: At which position?

Ans: Driver

Qn, Salary?

Ans: Tshs 650,000/=".

Upon being cross examined as to whether he had any other employer apart from Mr. Peter Daati, the respondent testified that: -

"Qn; Eleza Tume mwajiri wako ni nani?

Ans: Peter Daat.

Qn: Mbali na Peter Daat, je kuna mwingine?

Ans: Hakuna."

The literal translation of the above extract is as follows: -

"Qn: Can you please explain to the CMA who was your employer?

Ans: Peter Daat.

Qn: Apart from Peter Daat, do you have any other employer?

Ans: No."

Then, DW2 at pages 104 and 106 of the same record when asked on her relationship with the respondent testified that: -

Qn: Hebu ielezee Tume unamfahamu vip mlalamikaji?

Ans: Namfahamu Godfrey Mathew Mpezya wakati huo nilikuwa naishi Sinza nilikuwa nahitaji mtu wa kuendesha gari kupeleka watoto shule. Hivyo mwaka 1993 aliletwa kwangu ili afanye kibarua cha kuendesha gari na makubaliano yetu ni kwamba anapeleka Watoto shule halafu anaenda kupaki kijiweni ambapo anabeba mizigo na kazi itakayopatikana.

"Qn. Hebu elezea Tume hayo makubaliano mlikubaliana mwaka gani?

Ans: 1993.

Qn: Hebu ielezee Tume ulikuwa unatumia utaratibu gani wa malipo?

Ans: Ni kwamba jioni anaporudi kinachopatikana nagawa nusu kiasi kinachobaki kinawekwa kwa ajili ya mafuta ya gari kesho yake.

Qn. Hebu eleza hayo makubaliano yalikuwa kati ya nani na nani?

Ans: Kati ya mimi Sabena P.M. Daati na Godfrey M. Mpezya (Dereva wakati huo)...

Qn: Ungekuwa na madai yeyote juu ya hayo makubaliano?... Nani angestahili kudaiwa?

Ans: Ni mimi Sabena P.M. Daat ningestahili kudaiwa.

The literal translation of the above extract is as follows: -

Qn: Please explain to the CMA how do you know the complainant?

Ans: I know Godfrey Mathew Mpezya as by that time when I was living at Sinza, I was looking for someone to drive my motor vehicle and take my chlldren to school. So, in 1993 the complainant was brought to me for that purpose. Our agreement was that he drove the children to school and then he used the car for business.

"Qn. Please explain to the CMA when did you enter into that agreement?

Ans: In 1993.

Qn: Please explain to the CMA the procedure used for payment?

Ans: In the evening, after the said business, I divide the profit in half and the remaining balance is kept for fuel of the following day.

Qn. The agreement was between who?

Ans: It was between me, Sabena P.M. Daat and Godfrey M. Mpezya (the driver by that time)...
Qn: Do you have any claim on that agreement?...Who is accountable/responsible?
Ans: I Sabena P.M. Daat, I am the one accountable and responsible for the respondent's claims.

From the above extracts, we are in agreement with Mr. Mushi that, since in their evidence PW1, DW1 and DW2 indicated clearly that DW2 was the employer of the respondent, it was improper for the CMA and the first appellate court to invoke the provisions of section 61 of the Labour Institutions Act.

We have further observed that, there was also a misapprehension of evidence by the CMA. We say so, because, at the earliest possible, and upon being served with the CMA Form No. 1 filed by the respondent, in his defence found at page 38 of the record, the appellant clearly indicated that he was surprised to note that the respondent had instituted a labour dispute against the Company while it was clear that he was not an employee of the same. After perusing the entire record, it is clear to us that there was a clear confusion before the CMA between the appellant as a company and DW1 in his personal capacity. This can be easily seen in

the decision of the CMA, that although DW1 was not sued by the respondent in his personal capacity as intimated above, in its decision, the CMA extensively referred to DW1 as the appellant herein. This can be evidenced at page 117 of the record of appeal, where after considering the factors enumerated under section 61 of the Labour Institutions Act, the CMA concluded that: -

> *"Kwa kuangalia vipengele vyote vilivyotajwa ni wazi kabisa mlalamikaji alikuwa mfanyakazi wa mlalamikiwa kwanl alishiriki kufanya kazi na alipewa vifaa vya kufanyia kazi ambalo ni gari la mlalamikiwa. Ijapokuwa mlalamikiwa anakataa kuwa si mwajiriwa wa kampuni ila kwa mazingira ya Ushahidi uliotolewa mbele ya Tume ni kuwa mtu huyu aliwajibika katika sehemu mbili kama kazi yake ilivyomtaka yaani kwa kufuata maamuzi ya mwajiri wake ambapo allwajibika katika shughuli za nyumbani na ofisini (kampuni)...Hii in maana kuwa katika shauri hili mazingira yake yanaonekana kuwa mlalamikiwa alikuwa akiwajibika katika kumsimamia mlalamikaji na hivyo kupelekea uwepo wa mahusiano ya kiajira baina yao. Ni wazi kabisa hasa pale shahidi Peter Daat na mkewe Sabena alipokiri kuwa mlalamikiwa walikuwa wakimtumia katika shughuli mbalimbali yaani kazi na kumlipa."*

The literal translation of the above paragraph is as follows: -

> *"Considering all factors mentioned, it is quite clear that the complainant was an employee of the respondent as he participated in the work and was given the working equipment which is the respondent's vehicle. Although the respondent denies that the complainant is not an employee of the company but in the context of the evidence presented before the Commission, the complainant worked for the respondent at home and in the office. This means that in this case, the circumstances indicate that the respondent was responsible for supervising the complainant and thus leading to the existence of employment relations between them. It is very clear especially when witnesses Peter Daat and his wife Sabena admitted that the respondent was using the complainant in various activities, i.e work and paying him."*

Having considered the above conclusion of the CMA, it is our settled view that, it was improper and a misdirection on the part of the CMA to make reference to DW1 as the appellant and proceeded to issue orders against the appellant, who according to the evidence on record was wrongly sued by the respondent as an employer. It is also clear that

although DW1 and DW2 were also found by the CMA to be responsible with the employment of the respondent, they were not parties to the case.

Since the issue of parties to the case is fundamental and central in all proceedings, the CMA was expected to note that, DW1 who was mentioned by the respondent as his employer was not a party to the suit. It was therefore improper for the CMA to proceed with the labour dispute which had indicated a wrong party to the dispute. As such, having been informed by the respondent, in his evidence, that his employer was DW1 and not the appellant, the wrongly instituted labour dispute against the appellant was supposed to end there and the respondent be advised to take necessary steps and institute his dispute against the proper party.

We are mindful of the fact that in his submission, the respondent argued that, since DW1 orally admitted before the CMA to have employed him, then the decision of the CMA and that of the first appellant court were correct as the existence of a written employment contract was not a necessary condition. With respect, we are unable to agree with him on this matter, because DW1 was not a party to the case. As indicated above, the issue of parties to the case is a legal and central matter in all proceedings.

Therefore, the act of the respondent suing a wrong party had affected the entire trial as it goes to the root of the matter.

It is unfortunate that the first appellate court did not detect the said irregularity as it also fell into the same trap, as although it found that there was no contract of any nature between the parties, it erroneously upheld the decision of the CMA and also proceeded to issue orders against DW1 and DW2 despite the fact that they were not parties to the case.

It is our considered view that had the first appellate court considered the said crucial legal issue, would not have upheld the decision of the CMA which was improper on account of the reasons stated above. In the circumstances, we find the first ground of appeal to have merit. Since the finding on this ground suffices to dispose of the appeal, the need of considering the other remaining ground of appeal does not arise.

In the premises, we find that the proceedings before the CMA and the first appellate court were vitiated. As a result, we have no option other than to nullify the entire proceedings of the CMA and quash the award and set aside the subsequent orders thereto. We also nullify the proceedings of the first appellate court and quash its respective decision and subsequent orders as they stemmed from nullity proceedings. The respondent is at

liberty to institute his labour dispute against a proper party in accordance with the law.

In the event and for the foregoing reasons, we find merit in the appeal and allow it. Considering that this is a labour related matter, we make no order as to costs.

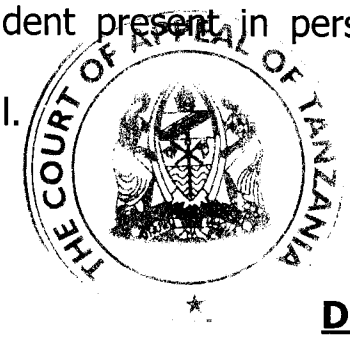
DATED at **DAR ES SALAAM** this 21st day of September, 2021.

S. A. LILA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of September, 2021 in the presence of Mr. Godfrey Ngassa, learned counsel for the appellant and respondent present in person is hereby certified as a true copy of the original.



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL