**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**LABOUR DIVISION**
**AT ARUSHA**

**LABOUR REVISION NO. 14 OF 2018**

***(ORIGINAL/CMA/ARS/ARB/137/2017)***

**OTTELO BUSINESS CORPORATION LTD.....APPLICANT**

**VERSUS**

**BARAKA ANDREA SANGA AND 6 OTHERS.....1st RESPONDENT**
**KINANA SAMSON NANGORO.....2ND RESPONDENT**
**JAMAL SALUM LUKINDO.....3RD RESPONDENT**
**ANDREA TALALAI.....4TH RESPONDENT**
**LULE ISSA.....5TH RESPONDENT**
**SHILLA GERSON ASHERI.....6TH RESPONDENT**
**GREYSON ELIAS LAISER.....7TH RESPONDENT**

**JUDGMENT**

**Last Order.....17/03/2020**
**Judgment delivered...11/05/2020**

**GWAE, J**

The applicant, **Ottelo Business Corporation Ltd** (OBC) dealing with hunting at Loliondo has preferred this application for revision of the award of the Commission for Mediation and Arbitration of Arusha at Arusha under the provisions of the Employment and Labour Relations Act No. 6 of 2004 (Act) and Labour Court Rules, G.N. 106 of 2007 (Rules).

Initially, the respondents filed their complaints through their respective **Form No. 1** on the 29th February 2016 complaining against the applicant whom they entered into contracts of employment as their employer. The respondents commonly complained that the applicant wrongly and unfairly terminated their employment on 16th February 2016, to be more specific, that, the applicant did not comply with provisions of section 37 of the Act. They thus claimed for payment of twelve (12) months' salaries compensation and other terminal benefits, namely, one month salary in lieu of notice, annual leave of 2015 and severance pay.

On the other hands, the CMA record revealed that, applicant, when served with copies of complaints by the respondents, filed a preliminary objection to the effect that the respondents had no cause of action against him as none of them had ever been employed by him (applicant) the same stance was equally maintained in the respondent's opening statement, during arbitration and in the closing submission as well.

In its final analysis, the arbitrator (**Hon. M. Sekabela**) awarded all respondents compensation for 12 months' salaries each, all at salary rate to the tune of Tshs. 600,000/=being monthly salary each applicant making a total of Tshs. 28, 800,000/= except the 5th and 7th respondent whose salaries were rated at Tshs. 300,000/= being monthly salary (Tshs.7,200,000/=), other terminal benefits that were awarded by the Commission in favour of the respondents were one month salary in lieu of notice, severance pay and issuance of certificate of service.

Feeling dissatisfied by the award procured by the arbitrator on 28th July 2017, the applicant filed this application seeking an order of the court

revising the CMA proceedings and award and ultimately setting aside the award on the following grounds;

1. That, the Commission for not considering strong evidence exhibited by the applicant to the effect the respondents were not employees of the applicant
2. That, the Commission erred in awarding a total amount of Tshs. 37,506,000/=
3. That, the Commission erred in law for failure to explain statutory right to the applicant
4. That, the Commission erred in law for failure to evaluate evidence of both parties and give sound and justifiable reason as why it opted to decide in favour of the respondents
5. That, the Commission erred in law for neglecting the framed issues

On 17th March 2020, when this application was called on for hearing **Mr. Daud Haraka** assisted by **Godluck Peter,** both the learned advocates appeared for the applicant whilst **Miss Farida Juma,** representative of the respondents' own choice appeared and argued for all respondents

Strongly arguing for the application, Mr. Daud seriously attacked the CMA award on the following assertions**; firstly**, that the applicant's evidence sufficiently established that the respondents were not his employees, **secondly,** that, the respondents who alleged to have been issued with introductory letters by the applicant particularly Kinana who appeared as DW1 did not produce the same during hearing neither the respondents' card

were produced as exhibit except gate pass, **thirdly,** that all identity Cards and NSSF contributions cards produced and admitted by the Commission entail that, the respondents were employed by employers other than the applicant and that the CMA's award lacks basis as reason stated therein. He then urged this court to make a reference to a decision of the Court of Appeal at Dar es salaam in the case of **Mariam Rashid v. Mariam,** Civil Appeal No. 75 of 2015 (unreported) where it was held that, judgment of any court must be grounded on the evidence properly adduced by the parties during trial otherwise it is not a decision at all.

In addition to the submission by Mr. Daud, it was argued by Mr. Peter that had the respondents been employed by the applicant, the respondents would be familiar with the applicant's accountant, assistant director and cashier. Bolstering his decision, Mr. Peter cited a decision of this court (Moshi, J) in **John Allien Mganga v. The Hilton Apartments Ltd,** Labour Revision No. 29 of 2009 (unreported).

On his part, the respondents' representative strongly argued that the respondents were evidently employed by the applicant through payment of remunerations by cash and that they were monthly paid implicating they were employees. According to the personal representative, the employment status of the respondents was cemented by an employee of Kilimanjaro Airports Development Company (KADCO). Miss Farida further argued that since the applicant failed to prove if the respondents were being given peace works, it follows that the respondents were employees of the applicant and that the respondents knew the applicant's director albet they had no legal obligation of knowing the applicant's personnel.

In his rejoinder, the applicant's advocate, Daud stated that, the DW4, did not support the respondents' assertion that they were employee of the applicant and that the respondents were to prove that they were employed by the applicant as per section 60 (2) of the Labour Institutions Act No. 7 of 2004.

Having briefly given the background of this dispute between the parties and what transpired during hearing of this application, I should now turn to determination of this application by closely looking at the evidence adduced, during before CMA and the grounds for this application contained in the applicant's affidavit as intimated earlier and oral submissions by the parties.

In the **1st and 4th** ground of this application herein, having closely and keenly looked at the evidence adduced by the parties, I have observed that the respondents had neither tendered any identity cards nor any tangible documentary evidence such as employment contracts nor were termination letters that were tendered during hearing or application letters or any document relating to alleged labour relations between the applicant and respondents as employer and employees respectively.

It is further found that the applicant has sufficiently proved that, the ones who were employed by OBC had their respective identity cards such as PW1 (**Exh. P1)**, PW2 (Exh-P3), PW3 and PW4 as well as their names are in the list of the applicant's employees from 1998 -2016 (See **Exh. P2)** as opposed to the respondents. Hence it is plainly clear from the evidence on record that there is no direct evidence to the effect that, the respondents were employed by the applicant unless by making an inference by virtue of section 122 of Tanzania Evidence Act Cap 6 Revised Edition, 2002.

As it is clearly revealed by the CMA's award that the learned arbitrator decided in favour of the respondents on the ground that respondents were issued with Airport Pass by KADCO after they had been introduced by the applicant (OBC). Hence the respondents were the applicant's employees. In order to be in a safer side in determining, whether the Arbitrator's finding was evidentially grounded, it is found to be apposite to reproduce the holding of the Commission herein;

> "In ruling this issue the respondent evidence's version, is an attempt of total evasive denial that the applicant had not even at once in its lifetime to have crossed its face. However this denial turns out against herself after its own witness PW6- the KADCO official who had severally issued the applicants with cards after being introduced to his office to be the respondent's employees. This is supported by another KADCO official DW4 who also stated she used to issue the applicants with airport's identity card after an application from the respondent introducing them to be its employees....On the balance of probability in standard of proof it is found that the applicants were respondent's employees".

Since it is glaringly clear that the CMA decision is to the effect that, the respondents' were employees of the applicant on the ground that, PW6 and DW4 testified that the respondents were given or issued airport gate pass by the KADCO after the applicant had introduced them to be her employees, It is therefore found prudent to have parts of testimonies of DW4 and PW6 quoted for easy understanding;

**DW4-Balaineshy Feruz**

**Ex-In**: The complaints, I know them as they work with

OBC. We received a letter from a security manager which is an application from an applying company which requests its staffs (sic) to work at the Airport

**Cross exams**

Q: Does having an ID from KADCO requested by OBC is a sufficient evidence to mean an employee
Ans: No.
Q: Who told you that they are OBC employees?
Ans: I never said so
Q: You know nothing about the respondents' employment?
Ans: Yes
Q; Do you know Grayson Omari
Ans: No
Q: Do you know Omari Bayuni
Ans: No
Q: Do you Know Kinana
Ans: Yes
Q: Do you Selemani
Ans: Yes

**PW6-Juma Kimwaga**

Rex: Ground handling is done only by one company-Swiss AIR of recently one entity has joined Nas-Air

**Cross exams**

Q: Are you the KADCO officer?
Ans: Yes
Q: Do you issue an identity to request sent by the company or by personal requests?
Ans: Requested by the Company
Q: Therefore that identity issued will be used for an employee of the requesting company
Asn: Yes
Q: How persons sent by Ottelo identified
Ans: They are given temporary Airport pass
Q: Who performs OBC duties?

Ans: Swissport
Q: Does manpower brought responsible to Swissport or to the requesting company?
Asw: That is between Swiss and the Company itself
Q: To whom requesting companies are responsible?
Ans: KADCO

Looking at the quoted pieces of evidence above, I am persuaded by the holding of the learned arbitrator that the DW4 was an employee of KADCO as the case for the PW6. However I am made to decline upholding the finding of the Commission that, the evidence of the PW6 with effect that, the applicants were introduced by the respondents to the KADCO for issuance of the Airport Pass, I say so simply because the evidence adduced by the PW6 in relation to 'whether the applicant employed the respondents' is to the negative except that the Swiss Company dealing with cargoes at the KIA was the one who performed the OBC's duties. Going by the evidence adduced by the PW6 particularly cross examinations it is not clear who was the requesting company for the Airport Pass between the Swissport and OBC. The respondents' representative did not diligently pause her questions on this particular issue to the PW6. If it was swissport, was it necessary for the Swissport to employ on behalf of the applicant considering the fact that, the respondents, as alleged by them, were for on loading and offloading cargoes at KIA.

Also a holding by the CMA that the evidence of the DW4 supports that of PW6 is not tenable as there are contradictions thereof more so DW4 told the Commission that in order airport pass (Gate pass ID) to be issued there ought to be an application from requesting company but he had produced none except mere assertions that the applicant request for the airport pass

(IDs) in favour of the respondents, his employees but when asked if he is aware of the status of the respondents with the applicant he replied to the negative. Thus the issue whether there was existence of labour relationship between the respondents and applicant remained unanswered or unproven. In **Manager, NBC, Tarime v. Enock M. Chacha** (1993) TLR 228, where it was judicially demonstrated that;

> "It is a cardinal principal of law that in civil cases there must be proof on the balance of the probabilities. In this case, it cannot be said that the scanty evidence adduced in this Court proves in any way what is alleged in the plaint. There must be proof of the case on the standard set by law which is on the balance of the probabilities"

In our instant application, the evidence of DW4 and PW6, to my considered view, would not have been found to have proven the contentious issue that, the respondents were duly employed by the applicant since the PW4, Suleiman patently stated that the drivers used to hire their own casual labourers (persons for specific tasks) and that the PW6 did not either specifically state that the applicant employed the respondents or it was the one who introduced them (applicants) to the KADCO, the questions paused to the PW6 were too general instead of being specific in relation to the applicant and respondents for example if the applicant introduced the respondents to KADCO, or if the Swissport was acting under directions and supervision or control of the applicant or not, in relation to the respondents' employment.

Moreover, though generally it is not mandatory for an employee to know names of his employer's personnel depending on the nature of the work as in our case here where the respondents are found alleging that they were dealing with loading and offloading of cargoes at KIA yet an employee must have known his immediate superior officer or supervisor if he has a reasonable period of service as contended by the respondents who some of them testified to have been employed since, 1998, 2004 2005 etc. In **Hemedi Saidi v. Mohamedi Mbilu** (1984) TLR 113 where it was stated among other thing that:

> "In measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence; where, for undisclosed reasons".

Looking at the evidence adduced by the respondents in support of their complaints that they were employed and terminated by the applicant and the nature of their duty which was on loading and offloading cargoes at KIA the same is nothing but mere assertions as the respondents knew of no applicant's office at KIA, nor applicant's personnel or if they were employed under permanent or temporary basis, taking into account the applicant's employees are evidently issued with IDs (**Exh.P1**) and their NSSF contributions are paid accordingly and their names are enlisted thereof (**Exh. P2**)

Worse still, the identity cards produced and admitted which are bearing names of Shilla Asheri (6th respondent) indicating that it was a temporary airport pass issued on 16/02/2014 and expiry date being 16/3/2014 and another 08/4/2014 and expiry date 8/05/2014 allowing holders access to

various airport lounges and the property of the KADCO Ltd and the named Kinana (2nd respondent) issued date 16/03/2014 and expiry date being 16/4/2014 equally to Greyson (7TH respondent) (E1) while the respondents expressly stated that they were terminated on 16/2/2016, due to the nature of the work alleged performed by the respondents that is loading and offloading the KIA cargoes and duration of the pass allegedly issued for the respondents. That piece of evidence (Exh. E1) attempted to be used in establishing that the applicant employed the respondent is not cogent at all as the same is a scanty evidence to enable this court to justly and fairly determine this dispute in favour of the complainants now respondents. If the learned arbitrator assessed the evidence not in isolation he would not arrive at that conclusion as he even overlooked provisions of section 61 of the Labour Institutions Act No. 7 of 2004 which provides and quote;

> 61. For the purpose of labour, 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 the contract if any or more of the following factors is present;
>
> (a) The manner in which the person works is subject to control or direction of another person
> (b) The person's hours of work are subject to control or direction of another person
> (c) In case of a person who works at an organization, that person is a part of that organization
> (d) That, person worked for that other person for an average for 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 or renders services

(f) The person is provided with tools or work equipment by the other person

(g) The person only works or renders services for that one person

Considering the evidence on record none of the respondents had proved the above statutory factors in order a person to be recognized as an employee of that other person in terms of control or direction of the applicant, hours of work, period worked (except mere assertion) and if they were provided tools for the work assigned or if they were issued Airport Pass for only the applicant's business and other entities doing the same businesses.

The issue of determination of existence of employment relationships is a complex one, thus adjudicators are required to exercise due diligence particularly as of now given an increase of private sectors invariably also increase incidents of disguised employment relationships. To remove the complexity of an employment relationship the law under section 4 of the Act clearly stipulates who is "an employer" and who is an employee. That section has to be read together with section 61 of the Labour Institutions Act (supra) which provides for factors to be considered in presuming existence of employment relationship (See a decision of this court (**Rweyemamu, J** in **Mwita Wambura v. Zuri Haji,** Revision No. 45 of 2012 (unreported)

Had the learned arbitrator carefully assessed the evidence before him in its totality and provisions of section 60 (2) and 61 of the Labour Institutions Act No. 7 of 2004 as well as section 4 of the Act No. 6 of 2004, he could have not reached that conclusion. Allowing these types of

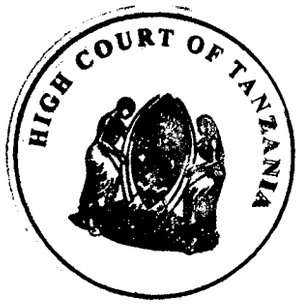
complaints shall obviously yield unnecessarily complaints against innocent employers in our judicial systems.

For the foregoing reasons, this application is **not** without merit, the same is granted. The arbitral award is hereby revised and set aside. Each party to bear its own costs of this application and those in the CMA

It is so ordered

***M. R. Gwae,***
***Judge***
***11/05/2020***

Right of Appeal explained




***M. R. Gwae,***
***Judge***
***11/05/2020***