IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

LABOUR REVISION NO. 27 OF 2019

(C/F CMA/ARS/ARB/90/2018)

ANGELA GERALD MANYONYI.....APPLICANT

Versus

BHUNU MBUNDI CO. LDT..... RESPONDENT

JUDGMENT

03/09/2020 & 05/11/2020

MZUNA, J.:

Angela Gerald Manyonyi (the applicant) sued Bhunu Mbundi Company Limited, the respondent herein, for unfair termination. She claimed was working with the respondent in the parking section but on 2nd January, 2008 she was terminated after attending to hospital for treatment. The Commission for Mediation and Arbitration of Arusha (CMA) dismissed her claim for unfair termination for the reasons that there was no employment relationship between the parties.

The applicant felt unhappy, hence this application for revision. It is supported by an affidavit sworn by the applicant. During the hearing, the applicant was unrepresented while Mr. Dismass Pillipo Lume represented the respondent and he swore a counter affidavit in opposition as well.

The main issue is whether the applicant was an employee of the respondent?

The background story is that the respondent was once dealing with banana wine production business. The same was suspended following the cancellation of production licence by the Tanzania Food and Drugs Authority (TFDA). Due to such cancellation, the applicant just like other casual labourers, was suspended. Production was then resumed after obtaining the required license.

The applicant says, she was employed in the parking section under the supervision of Mr. Juma Makame since 19th February, 2009. She used to receive her salary on Saturday and was also given monthly salary of Tshs 24,000/-. She claimed to be terminated by the Human Resource Officer. The gist of her complaint is that the respondent refused to receive her medical chits on the ground that she was not her employee. She insisted has the right to be paid.

For the respondent it was alleged that they engaged the applicant as a casual labourer where the need arises. That she was paid on daily basis. The respondent insisted that the applicant was neither given employment

contract nor had the evidence of monthly payment or salary slips as claimed. That she had no identity card and contract of employment as proof that indeed she was their employee. The learned counsel for the respondent relied on section 15 and section 96 of the Employment and Labour Relations Act, Act No. 6 of 2004 herein after (ELRA) to support his argument that the employee and employer have the obligation to keep the record showing the status of their relationship. He prayed for this application to be dismissed for the reasons that there is no evidence to show that the applicant was terminated from employment.

I have gone through the record in line with the applicant's affidavit in support of this application. She complained that the CMA failed to consider the evidence adduce during the arbitration. The evidence of DW1 Juma Makame Athuman, Human Resource Manager of the respondent reveals that the applicant was never employed. He testified that the respondent had only 89 employees who had been recruited by following a number of recruitment procedures. To him, the applicant never underwent any of such procedures as application for job, interview, signing of employment contract, and payment of salary on monthly basis.

The applicant said during her rejoinder submission that she used to sign in the counter book, which she asked should be tendered by the respondent. That the alleged identity cards and contract of employment were introduced recently.

The CMA in dismissing her claim relied on the provision of section 61 of the Labour Institution Act, Act No. 7 of 2004 (Act No 7/2004) which provides circumstances in which one may be presumed to be an employee in labour law regime.

Section 39 of the ELRA places a burden of proof to the employer, the respondent where there is proof concerning an unfair termination. The respondent ought to discharge the burden of proof that she was not employed by the respondent not as found by the learned Arbitrator, that the applicant was the one to cast such duty of burden of proof, the same error which the learned counsel for the respondent fell into.

This court has in numerous occasions set out the standard interpretation of section 61 of the Act No. 7 of 2004 which was used by CMA in dismissing the application. In the case of **Director Usafirishaji Africa v. Hamisi Mwakabala & 25 Others,** Labour Revision No. 291 of 2009

High Court Dar es Salaam (unreported) where Rweyemamu, J (as then she was) cited with approval in **Summit Lodge Limited v. Daniel Jeremiah Mngale,** Labour Revision No. 130 of 2018 High Court Arusha (unreported) held that:-

> *"Under the law a person who renders services to any other person including for a specific task is presumed to be an employee until the contrary is proved if one or more of the scenarios itemized under section 61 of the LIA exists."*

Having established the applicant worked for the respondent, it was subject to respondent's proof the period she worked as a casual employee if it was for a period exceeding 6 (six) months, in view of the provisions of section 35 of the ELRA read together with section 61 (a) –(g) of Act, No 7 of 2004. She ought to have been categorized as an employee in that she depended on the respondent economically, her work as well as hours of work are under control of another and was provided with tools of trade or work equipment by the other person (among others).

The law places the burden on the employer to supply such documents like employment contract and working particulars under section 15 (1) and 19 (1) of the ELRA. The applicant said the respondent introduced such

system after intervention by the Regional Commissioner. The respondent was also duty bound to tender the alleged register of 89 employees as proof that indeed the applicant was not among them. That was not done presumably with something fishy to hide. It was not also the duty of the applicant to produce one of her co-employees. Reading at page 2 of the typed award, the CMA found that:-

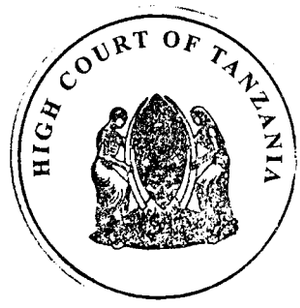
> *"...Mlalamikaji kama vibarua wengine alizuiliwa kuingia kiwandani mpaka leseni hiyo (toka TIDA) itakapopatikana lakini mara tu baada ya kufunga uzalishaji mlalamikaji alileta shauri mbele ya Tume akidai kuachishwa kazi bila sababu..."*

The above transcript shows there was retrenchment without prior consultation and engagement between the employer and employee. That was not done in our case. The allegation that the applicant was not an employee was so reached based on wrong principles of law. The respondent was duty bound to disprove the allegation by the applicant that she worked there for nine good years. It is therefore affirmatively found that the applicant was an employee of the respondent and was unfairly terminated without valid reasons and fair procedure.

The second issue is what are her entitled reliefs?

Based on the above reasons, the applicant has a right to be paid 12 months salaries as remuneration at the monthly rate of Tshs 24,000/- under section 40 (1) (c) of the ELRA due to unfair termination.

Application is allowed with no order for costs.



M. G. MZUNA,

JUDGE.

05. 11. 2020