IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LABOUR REVISIOIN NO. 02 OF 2020

(Originating from Labour Dispute No. CMA/MZ/ILEM/588-597/2017/113/2019).

SAHARA MEDIA GROUP LIMITED .....APPLICANT

VERSUS

BIDYA JOHN AND 9 OTHERS ..... RESPONDENTS

JUDGMENT

Date of the last order: 29/1/2021
Date of judgment: 01/3/2021

F. K. MANYANDA, J

This Court is moved under section 91 (1) (a) (b), 2 (a) and (b) and (i) of the Employment and Labour Relation Act, 2004, Act No. 6 of 2004, Rule 24 (1), (2) (a), (b), (c), (d) (e) and (f) and (3) (a), (b), (c) and (d) and section 28 (i) (c) of the Labour Court Rules, GN No. 106 of 2007 to grant the following orders that: -

(i) The Honourable Labour Court be pleased to revise and set aside the award in Labour Dispute No. CMA/MZ/ILEM/588-597-

693/2017/113/2018 of the CMA at Mwanza delivered in favour of the Respondents on 17th December, 2019 on the ground that the arbitrator exercised its jurisdiction illegally and with material irregularity hence injustice was occasioned on the party of the Applicant.

(ii) Any other relief this Honourable Court deems just and fair be granted.

The application is supported with an affidavit sworn by Raphael Shillatu which together with other records gives the background of this matter as follows.;

The Applicant runs a business of media broadcasting through television channel known as Star TV. The Respondents were among the artists who participated in some artistic programmes know as Star Dram which were broadcasted by the Applicant television. The dispute can be explained that, some years back the Respondents were accommodated by the Applicant to practice and record their artistic recordings which the Applicant broadcasted. When it turned sour between, the Applicant sacked them off. It was a contention of the Applicant that the Respondents were just invited at her premises for practice. On the other hand the Respondents contend that they

were employed by the Applicant as artists whereby they practiced and recorded their work at the premises of the Applicant. Further that their work recordings were broadcasted by the Applicant in turn he was to pay them salaries and provided them with working tools such as cameras.

As a result of the conflict the Respondents filed a complaint in the Commission for Mediation and Arbitration, hereafter referred to as the CMA. The Respondent in the CMA complained against unfair termination and prayed to be reinstated without loss of remuneration during the period of so termination.

The CMA decided in favour of the Respondents. However, the CMA did not order re-institution due to the circumstances of this matter where the employer had already replaced the employees. Instead, the CMA ordered the Applicant to pay compensation the Respondents a total of Tsh 96,600,000/=being Tsh 9,600,000/= to each.

This decision and the order aggrieved the Applicant hence has come to this Court for revision on grounds stated in paragraph 9 of the affidavit that:-

(i) Whether the arbitrator properly considered and analyzed the evidence adduced by both parties.

(ii) Whether it was proper to the arbitrator to issue on award in too general terms.

(iii) Whether it was proper for the arbitrator to award compensation on matters that were not prayed for an CMA FI.

(iv) Whether the arbitrator properly interpreted and applied the labour laws while making its decision.

(v) Whether the arbitrator was supposed to draw adverse inference on the part of the Respondents by failing to call one Mary Mwabaka to testify for them.

(vi) Whether the decision of the arbitrator based on the evidence he manufactured for himself and the same which was made on biasness in justified in law, and

(vii) Whether the Respondents proved their case to the standard required by the law.

Hearing of this revision was ordered to be argued by way of written submissions. The submissions by the Applicant were drawn and filed by Mr. Boniface Sariro, learned Advocate while the submissions by the Respondents were drawn and filed by an unknown officer from Adolos Law Chambers. Mr. Sariro abandoned issue No. 2.

It was the contentions by Mr. Sariro in issue number one that the Arbitrator failed to make proper analysis of the evidence of both sides. The evidence of the Applicant was that the respondents were not employees but were invitees to do their comedy exercises. He referred to a case **Hussein Idd and Another vs Republic** [1986] TLR 166 where the Court held that failure to consider defence case is fatal.

In issue No. 3 Mr. Sariro argued that it was wrong for the Arbitrator to award compensation, a prayer which was not among those requested by the Respondents. The Respondents prayed for reinstatement and not otherwise. He cited the case of **SDV TRANSMI (T) Ltd vs Faustine L. Mugwe,** Rev No. 227 of 2016 (unreported) where it was held that the Mediator or

Arbitrators have no power to alter the referral form prayers. He also referred to the case of **Precision Air Service Ltd vs Edward Munamu** Rev. No. 125 of 2008 (unreported) where the Court supported the Arbitrator of not awarding prayers no pleaded in the referral form.

He distinguished the case of **Msafiri Busagi vs Sandvick Mining and Construction (T) Ltd** used by the CMA on that Msafiri's case concerned incidental prayers not discretional prayers.

In regard to issue No. 4 Mr. Sariro challenged the CMA for improper interpretation and application of Labour Laws in that he substituted prayers on reinstatement with that of compensation uncontained in the CMA Form 1. He was of the view that the interpretation that Mary Mwabaka's conducts makes the Applicant vicariously liable is misinterpretation of law. He added that the dispute which was referred to the CMA was termination under section 88 (1)(b)(ii) of the Employment and Labour Relation Act (ELRA) [Cap 366 R. E. 2019] not tort.

Mr. Sariro also argued that since the Respondents were not his employees, he was not duty bound to keep their records under section 15

(5) of Cap 366. He invited this Court to revise the finding of the Arbitrator as it occasioned injustice due to failure of properly interpreting and applying the law in the light of the case of **March L. Lumanija and Another vs Tanganyika Bus Service Co. Ltd Rev.** No. 223 of 2008 (unreported).

In regard to issue number 5 the complaint was on failure by the Arbitrator to draw an adverse inference on ommision to summon Mary Mwabuka whom the Respondents relied heavily. Alleging that she was working on behalf of the Applicant. He referred to the case of **Azizi Abdallah vs Republic** [1991] TLR 71 where Court held that it is a prima facie duty for a party call a witness who has material facts and is within reach otherwise where no reasonable cause is not summoned, the Court may draw an inference adverse against the concerned party.

Lastly Mr. Sariro argued issues 6 and 7 jointly that it is a complaint by the Applicant the CMA manufactured some evidence which were not testified so by the Applicant. He gave an example that Raphael Shillatu never testified that Applicant promised employment to whoever performed better in the exercise.

On their side the Respondents first of all argued in support of the raised preliminary objection on point of law that this Court has not properly moved for citing a wrong provision of law. It was argued that the proper provision ought either to be either Section 91(1) or 91(1)(b) of the ELRA. The Applicant cited both section 91 (1)(a) and 91(1)(b). while section 91(1)(a) provided for applications wishing to deal with the verdict of the CMA for rectification of errors on the face of it, section 91(1)(b) provides for applications with unlimited complaints. Due to this irregularity the Respondents invited this Court to struck out the application for none citation of proper or specific law.

The Applicant did not address the preliminary objection at all. Nevertheless failure by the Applicant to address the preliminary objection does not preclude this Court from determining the same.

As it can be seen the objection is based on citation of both applicable and none applicable law. In my view so long as the Applicant cited both applicable law and the none applicable law it is upon this Court to take the correct applicable law and apply the same. I say so because this approach will nor prejudice the parties. I am not alone to take such approach. My

Lord Honourable Mwambegele, J (as then was) in the case of **Dabenco Enterprises Ltd vs Triat East Africa Ltd**, Misc Commercial Cause No. 11 of 2015 (unreported) held **intralia** that: -

> *"At this juncture I pause to observe that there is a difference between citing and pegging an application on wrong provision of the law on the one hand and citing an improper provision (s) of the law on the other hand in that in the latter, the improperly cited provision can be ignored and the Court proceed to act on the proper one, whereas in the former the application is rendered incompetent.* "

Now as I have stated above, the irregularity is curable and no injustice is occasioned to the parties.

Back to the submissions in reply by the Respondents. In regard to issue one it was contended by the Respondents that the CMA considered the defence case of the Applicant adequately. The Respondents cited relevant parts of the evidence which supports the finding of the CMA.

As regards the issue number 3, the Respondents argued that CMA F-1 filed by them was for reinstatement but the CMA verdict was that the

same had discretion to grant *"nafuu nyingine yoyote"* (any other relief) and awarded compensation which suited the circumstances of the case. The Respondent argued further that section 40 of the ELRA has three subsections each giving an alternative remedy namely reinstatement, re-engagement and paying compensation respectively. The Respondents distinguished all the cited cases by the Applicant.

In respect of the issue number 4 the Respondents submitted disputing the duty of summoning the said Mary Mwambaka contending that the duty lied with the Applicant because she knew her and supplied all working tools to them through her and being the channel Manager terminated the activities. They concluded that Section 88 (i) (b) (ii) empowered the CMA to handle torts. The said Mary Mwabaka acted on behalf of the Applicant who became vicariously liable.

Lastly the Respondents rested their case by leaving it to the court as for fabrication or otherwise of the evidence at the CMA because the same is what was recorded.

Those were the submissions by the parties. I will start with the first issue in which the complaint is whether or not the Respondents were employees of the Applicant hence, their termination was unfair.

In this issue it is petinent to re-appraise the evidence of both sides and then see how the CMA analyzed the same.

Briefly it was the case of the Applicant that Raphael Shillatu, the only witness for the Applicant, was responsible with employment affair as a Human Resources Officer. His testimony is to the effect that the procedure for employing artists, the employer announces vacancies and conducts interview and successful ones are employed after passing six months of probation.

That the Respondents who were then complainants never applied for employment he was informed by the Channel Manager one Mary Mwabaka that the Respondents requested for a place of practicing artistic exercises and were allowed usually those who seem to qualify are employed.

He testified further that the Applicant never entered into any contract of employment with the Respondents and never paid them anything.

Further, in 2017 the Applicant stopped the Respondents from exercising their practices thereat as he had employed other groups such as Futuhi and Mahanjam.

In cross examination he recognized Mary Mwabaka as a Channel Manager who was a go between the Applicant and the Respondents. The payment of Tsh 100,000/= to each of the Respondents was for fare assistance. He conceded that the Respondents were given other assistances such as transport to work and back to their homes and given subsidized food. He also conceded that the Respondents made profit to the Applicant just like other artist groups like Futuhi which were employed.

In re examination in chief this witness identified one artist known as Ummy.

On the other side the Respondents evidence through two witnesses namely Maria Ghalifa, DW1, and Ibrahim Katikiro, DW2, was to the effect that their group was employed by the Applicant on 7/4/2015. This was after its members each one successfully performing an interview. They were given a duty of performing artistic work and record the same. They were given six months of probation. Their works were broadcasted by the

Applicant. They used working tools given to them by the Applicant. They were not paid any salary though were promised to be paid Tsh 400,000/= per month. Mary Mwabaka was their Channel Manager from the Applicant and promised to follow up their salaries. At one time she collected their passport photographs for employment purposes. On 20/7/2016 were stopped from their work by Mary Mwabaka and directed by the said Mary Mwabaka to stay home. Ultimately were paid Tsh 100,000/= each.

In cross examination DW2 stated that Mary Mwabaka employed them on behalf of the Applicant and there was no any re-examination.

Now that is the summary of the evidence from both sides. What did the CMA say when analyzing the same in respect of the issue that whether there was employment relationship between the Applicant and the Respondent. The CMA examined the evidence of both sides on existence or otherwise of any contract of employment and found that there was such a relationship.

The CMA stated this in the following words:-

" kwa hiyo baada ya kutoa ufafanuzi na tathmini toshelezi, baada ya kupitia Ushahidi wa wadaawa kwa msingi wa kifungu cha 61 cha Sheria ya Taasisi za Kazi, Namba 7 ya 2004, sambamba na mwongozo wa sheria kwa kadiri nilivyoainisha hapo awali, ninaamua kwamba kulikuwa na mahusiano ya kiajiri kati ya wadaawa kwani walalamikaji walikuwa waajiriwa halali wa mlalamikiwa kwa mkataba wa mdomo na kwa masharti ya muda usio na ukomo kuanzia tarehe 7/4/2015 hadi tarehe 20/7/2016".

Literally means that the CMA after critically analyzing the evidence from both parties and applying the relevant law found that there existed an employment relationship between them, therefore the Respondents were employees of the Applicant under oral contract of employment for unlimited term from 07/4/2015 to 20/7/2016.

The analysis of the evidence started with those matters which were found not in dispute between the parties as demonstrated at page 11 as follows:-

(i) The Respondents started working on 7/4/2015

(ii) The Respondents were terminated from working on 20/7/2016 where Mary Mwabaka directed them to stay home.

(iii) The Respondents work was to produce artistic works which were broadcasted by the Applicant.

(iv) In doing their works the Respondents used working tools from the Applicant and were provided with transport to and from work place and were given subsidized food.

In order to arrive to these undisputed facts, the CMA analyzed the evidence of both sides.

Then, the CMA analyzed the evidence in controversy of both sides. At page 23, the CMA remarked that the Applicant refuted existence of any contract of employment and insisted that Mary Mwabaka had no mandate to act on behalf of the Applicant but looking the evidence of the Respondent was that they were employed as such.

What was the evidence of the Respondent, the CMA made reference to the testimonies of P1, DW1 and DW2 on the issue of "**role of Mary Mwabaka"** which was to the effect that PW1 knew Mary Mwabaka that she was the channel Manager, she is the one who informed them (Applicant)that

the Respondents wanted a place of exercise. He was so informed by Mary Mwabaka in 2016. DW1 they worked since July 2015 to 2016 without payment of any salary but Mary Mwabaka promised them that she would follow up for their salaries after stopping them from work. She promised to follow their salaries because the Applicant sold his continental decoders as a result of the Respondents work hence, he got profits. Mary Mwabaka assured them that they will be given written employment contracts after six months. Mary Mwabaka was the Channel Manager and she took the matter of our employment to Osoro who was responsible with our employment and Mary Mwabaka was the boss of the Respondents.

DW2 stated in regard to Mary Mwabaka that she participate at an interview which comprised of 33 participants, he was called by Mary Mwabaka that she was a successful candidate in the interview and was required to report at work, they were told if their work would be broadcasted they will be paid a salary of Tsh 400,000/= per month. On 20/7/2016 Mary Mwabaka requested them to stop going to work and stay at home. To wait for their salaries. Mary Mwabaka was the supervisor she employed them on behalf of Sahara Media.

After analysing these pieces of evidnce the MCA went on applying the provision of section 88 (1) (b) (ii) of the ELRA that the said Mary Mwabaka was acting on behalf of Sahara Media (the Applicant) then the CMA ruled had jurisdiction to handle torts under section 88(1) (b) (ii) in respect of tortious liability, the Applicant was therefore, vicariously liable for the acts done by Mary Mwabaka.

In their submissions that the Applicant concedes that the CMA is empowered to adjudicate on tort though challenged the CMA from another angle that the matter before it was not tort, I will deal with this issue later on in this judgment.

The Applicant complaint is that the Arbitrator did not at all consider the Applicants evidence. However as explained above, it can be gleaned that the CMA considered the evidence of each party on every aspect it evaluated, then came to a conclusion that the Respondents were employed by the Applicant. After exploring the provisions of section 61 of the Labour Institution Act [Cap. 300 R. E. 2019] (LIA) and section 4 of the ELRA.

I don't see anywhere that the Arbitrator totally disregarded the evidence tendered by the Applicant. The CMA dully analyzed the evidence from both sides and arrived at a conclusion, which in my firm opinion is a correct one.

The third issue is whether it was proper for the Arbitrator to award compensation that were not prayed for in CMA- F1. The Applicant answered this issue in negative because the Respondents prayed for reinstatement, the CMA according to the Applicant, had no power to alter the prayer. The Respondents argued that the CMA has such power. The CMA ordered compensation instead of reinstatement because the provisions of section 40 of the ELRA allows. It stated: -

> " *Mwamuzi ana mamlaka ya kuamua nafuu stahiki kwa kutegemeana na mazingira mahsusi ya shauri husika.....Baada ya Tume kupitia maelezo na ushahidi wa pande zote, Tume inaona kwamba amri ya kuwarudisha kazini walalamikaji haiwezi kuwa rafiki kutokana na mazingira waliyokuwa nayo walalamikaji na kwa kuwa malalamikiwa ameieleza Tume kwamba kwa sasa ameajiri vikundi kama FUTUHI na HAHANJAM .....Tume imeamua kuwa walalamikaji walipwe fidia kutokana na kuachishwa kazi isiyo haki.*"

Literally means that the Arbitrator has discretion to grant remedy depending on the circumstances of each case. The CMA after analysis of the evidence found expedient to award compensation because re-instatement was not convenient because the employer had already employed other groups to perform the same work such as FUTUHI and MAHANJAM.

I have visited the provisions of section 40 (1) (a) (b) and (c) and found that the same provides three types of remedies which can be granted in alternative depending on the circumstances of the case, the same reads:-

"40 (1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer

(a) To reinstate the employee from the date the employee was terminate without loss of remuneration during the period that the employee was absent from work due to the unfair termination, or

(b) To re-engage the employee to any terms that the arbitrator or Court may decide, or

(c) To pay compensation to the employee of not less than twelve months remuneration".

As it can be gleaned from the provisions of section 40(1)(a),(b) and (c), the subsections are separated using the word "or" which cannotes that the provisions are applicable in alternative.

In this case the CMA decided to grant compensation, it is obvious that it decided to grant the same under section 40(1)(c) of the ELRA, even without specifying the subsections, the order is very clear. The complaint by the Applicant that the CMA decision was improper, in this aspect, for failure to specify the subsection is unfound.

The Applicant yet complained that the CMA had no power to grant compensation as the same was not prayed for in the CMA-F1. The omission is in my firm opinion, not total. In this case the CMA found that the termination of employment of the Respondent was unfair and further that reinstatement was impossible, what then was it supposed to do. It could not sit down and leave it as if there is a lacuna in our laws which is not the case, even if there was a lacuna the CMA could have applied common laws by virtue of the Judicature and Application of Laws Act. However in the instant case section 40(1 (c) takes care of the situation. The decision in the case of **SDV Transami (T) Ltd (supra)** is distinguishable. With the coming

into force the new development principles of adjudication of cases in our land which has been introduced by the written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, the principle of overriding objectives require courts to deal with cases justly and to have regard to substantive justice as opposed to being too tied up with technicalities.

In this case, it is my firm conviction, that the CMA rightly applied the provisions of section 40(1)(c) of the ELRA to grant compensation. None inclusion of the prayer in the CMA – F1 is not fatal the compensation order was the only just remedy and did not occasion miscarriage of justice, it is curable under the principle of overriding objectives.

I have already dealt with the issued of interpretation of the provisions of section 88(1)(b)(ii) above, the complaint of failure of the CMA to interprete the law in baseless. Equally the complaint that section 15(5) of the Cap. 366 was wrongly applied when the CMA observed that it was the duty of the employer to keep record of the employees, is unfound. I say so because the Applicant's complaint was based on the contention that the Respondents were not employees of the Applicant. Now that contention is found baseless

by this Court, therefore, section 15 (5) of then Cap. 366 was properly applied.

In the issue number five (5) the Applicant called upon this Court to find that the CMA erred in law and fact when failed to draw an adverse inference against the Respondents for their failure to summon Mary Mwabaka as their witness. In this contention, let me say that it is a principle of labour laws that presume that all terminations of employment are unfair, hence they put in place a new procedure of proving cases, Section 39 of the ELRA puts it clear that it is a duty of the employers to prove that the termination was fair.

In this case it was the evidence of the only witness of the Applicant one Raphael Shillatu, that he was informed by Mary Mwabaka that the Respondent requested to perfom artistic practice at the Applicant. He knew Mary Mwabaka as his co- employee. In cross examination the witness Raphael Shillatu said Mary Mwabaka was the Channel Manager. He was so informed by Mary Mwabaka in 2016.

Since PW1 was the prosecutor of the Applicants case he heard the Respondents mentioning the said Mary Mwabaka as a person who conducted an interview and later on called them to start work in 2015. The fact that Raphael Shillatu, PW1 knew about existence of the Respondent at Sahara Media in 2016, after been so told by Mary Mwabaka while the evidence in his cross examination showed that the said Mary Mwabaka was the Channel Manager and that they stated performing artistic in 2015, in my firm view, it was a duty of the Applicant to summon the said Mary Mwabaka in order to make it clear about the Respondents allegations. This is due to the fact that PW1 testified hearsay as far as his testimony concerning on whether the CMA was right or not in its decision.

Based on the analysis of the evidence above and on reasons stated, I find that the application is none meritorious in its entirety. I do hereby dismiss it with costs. The CMA award is hereby upheld. Order accordingly.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

F. K. MANYANDA
JUDGE
1/03/2021