IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION No. 04 OF 2021

(C/f the decision and Award of the Commission for Mediation and Arbitration at Arusha, Labour Dispute No. CMA/MNR/BBT/03/2020)

HAMIR ESTATE.....APPELLANT

VERSUS

JUMA QWARAY.....RESPONDENT

JUDGMENT

02nd June & 21st July 2022

TIGANGA, J

In this application, Hamir Estate, hereinafter referred to "the Applicant" moved this court by the Notice of Application, chamber summons and the affidavit sworn by Surendra Orendra who introduced himself as the Principal officer of the applicant. He moved the court under sections 91(1)(a), 91(2)(c) and 94(1),(b)(i) of the Employment and Labour Relations Act No.6 of 2004 and rule 24(1), 24(2),(a),(b),(c),(d),(e) and (f) as well as rule 24(3),(a),(b),(c),(d) and (e) of Labour Court Rules GN. No. 106 of 2007, applying for the following reliefs.

i. That, this court be pleased to call for the record in CMA/MNR/BBT/03/2020 dated 11th January 2021 whose copy was served on the applicant on the 15th January 2021.

ii. That, this court be pleased to find that there were errors material to the merits of the subject matter before the Commission for Mediation and Arbitration involving injustice.

iii. That, this court be pleased to find that the Commission erred in entertaining a complaint without regard to the fact that, there was no proof of existence of an employment contract.

iv. That, this court be pleased to hold that the Commission failed to properly asses and evaluate the evidence before it, leading to wrong conclusions.

v. That, the court be pleased to revise the proceedings, set aside the arbitration award and make such order(s) as it deems fit.

The brief background of this dispute is that, the dispute between the applicant and the respondent emanates from the employer's act of stopping the respondent from working without giving reasons. The respondent has been working for the applicant as farm worker for quite sometimes. Being aggrieved by the employer's act which he termed as unfair termination, he

decided to file a complaint before the Commission for Mediation and Arbitration, hereinafter, the CMA, complaining for unfair termination of his employment contract by the applicant.

The complaint was filed and heard before the Commission for Mediation and Arbitration which sat at Arusha, the CMA, which made the findings that, the employer's allegation that he had no employment contract with the respondent is unjustifiable because what amounts to employment contract is as provided under section 61 of the Labour Institutions Act, Act No. 7 of 2004, which define what amounts to an employment contract.

The CMA relying on the above position of the law found that, there were employer - employee relationship between the applicant and the respondent. Having so found, the CMA further evaluated the evidence of both parties and realized that, there was unfair termination of the employment contract between the parties, as a result, the CMA awarded the respondent a total of Tsh. 1,080,000/=

Having been aggrieved with that award, the applicant decided to challenge it by filing this application seeking for revision. The application was opposed by the respondent by filing the notice of opposition and the counter

affidavit which was affirmed by the respondent. In that counter affidavit, the respondent deposed that, he was employed by the applicant and was unfairly terminated. It is also his evidence in the counter affidavit that, the applicant failed to prove that he terminated the applicant fairly.

Hearing of this revision was conducted by way of written submissions which were filed according to the schedule. In his submission in chief, the Counsel for the applicant submitted in support of paragraphs 3, 4, 5 and 6 of the applicant's affidavit that, the respondent had no employment contract but rather served as a casual labourer at the applicant's farm. While pursuant to paragraph 4 of the applicant affidavit he submitted that since the respondent has never been employed, it is obvious that he could not be terminated. Arguing in support of paragraph 5 of the affidavit he submitted that, during the hearing at the CMA, the respondent tendered exhibit P1 which is a daily pay card commonly known as noma, showing that, he was paid daily, while in respect of paragraph 6, the applicant alleges that, it was not right for the CMA to act upon exhibit P1 and believe that, the respondent was a contractual employee of the applicant.

The applicant's Counsel further submitted that, it was not proper for the trial Arbitrator to hold that, the informal arrangement between the applicant

and respondent was a formal employment contract as it was clear from the records of the CMA that, the applicant and respondent arrangements were on daily basis.

He further stated that, it was not right for the trial Arbitrator to rely on exhibit P1 and decide that there was employer-employee relationship because the particular exhibit does not prove the continuity of the said employment. In his view, exhibit P1 only proves that on each day when the employer had work to assign the respondent, he used to come and work and was paid after the work he was assigned.

He further submitted that, it was not proper for the trial Arbitrator to rely on section 61 of the Labour Institutions Act, (supra) because the said relationship between applicant and respondent is not by all standard an employment relationship.

The Learned Counsel for the applicant further submitted that, it was not proper for the learned Arbitrator to award compensation to the respondent as there was no unfair termination on the part of the employee. Thus, it is therefore clear that, award of the CMA is tainted.

In reply, the Counsel submitted that the respondent herein was an employee of the applicant on monthly basis and had never in any way worked for daily term basis. The respondent was an employee within the meaning of section 61 of Labour Institutions Act (supra). He further submitted that, under that provision, the position is that, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, the issue that the employee was employed on the daily bases hold no water since there is no employment contract on daily basis.

He further submitted that, the applicant enjoyed the service from the respondent from 2010 to 2019, therefore, exhibit P1 is a proof that there was continuity of the employment because the payments were in continuous manner. He further submitted that, it was proper for the trial Arbitrator to rely on section 61 of the Labour Institutions Act, [Cap 300 R: E 2019] because determination as to whether the respondent was the applicant's employee was necessary before dealing with an issue as to whether there was unfair termination or not.

He further submitted that, there is no such informal arrangements of employment between the applicant and the respondent because the

respondent has worked consecutively for the applicant since the year 2010 to 2019 when he was terminated without adherence to the required procedures.

The counsel for the respondent marked the end of his reply submission by defining who is a casual labourer, he referred Blacks Law Dictionary which defined casual labourer as follows; *"A Casual Labourer is a temporary or part time employment to perform various services."*

There was no rejoinder submission filed by the applicant, hence the reply submissions marked the closure of the Parties' arguments. In deciding this case, of course after passing through the records, the application and the submissions made by the parties in support of or against the application, I find one possible main issue for determination, that is, whether the CMA was justified to award the respondent on the basis of unfair termination?

Beside that issue, there are other issues derived from the grounds of revision. In endeavor to determine the matter, I will start with an issue pertaining the employment status of the respondent, that is whether the respondent was in the employment of the applicant? While the respondent contends that he was employed by the applicant, the applicant disputes to

have employed him. This issue is not novel at this stage, it was raised by the applicant before the CMA, but in deciding it, the CMA held that there was employer employee relationship between the applicant and the respondent. In so deciding, the CMA made reference to and relied on section 61 of Labour Institutions Act, [Cap 300 R: E 2019], which I find important to restate as I do hereunder;

> *"For the purpose of labour law, a person who works for, 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 one 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 a person, who works for an organization, the person is part of that organization,*
> *d) The person has worked for the 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 other person works,*
> *f) The person is provided with the tools of trade or work equipment by the other person, or*

g) The person only works for or renders service to another person."

This being the position of the law, looking at the phraseology of the provision, an employee needs to allege and prove that he worked to the employer, or rendered service on account of the said employer regardless of the form of the contract if any, and having proved the presence of at least **one** of the factors, not necessarily all, which are stipulated under section 61 (a) - (g) of the Labour Institutions Act, [Cap 300 R: E 2019] he is deemed to be an employee. Having so proved at least one of those factors, then it is presumed that he was employed by the alleged employer. It is a principle of law that invocation of presumption shifts the burden of proof from one party to the opposing party in a court of law. In this case, after the respondent had invoked the presumption, then it was the duty of the applicant to rebut it by leading evidence to the contrary.

In this case, my carefully perusal of the record, has not come across the evidence lead by the applicant proving to the contrary, thereby rebutting the presumption. In other way, in line with the above position, I subscribe to the findings of the CMA that, there was employment relationship between

the applicant and the respondent, despite the fact that the employment contract was not in a written form.

I hold so because the evidence on record is very much in support of the findings. For instance, at page 4 of the CMA's typed proceedings the applicant had this to say;

> *"Mlalamikaji alianza kazi kama kibarua na tarehe 29/01/2011 shamba lilichomwa moto hivyo kazi zote zilisimama, baada ya hapo mwaka 2017 shamba lilianza kazi ila Mlalamikaji hakuwepo kazini alikuwa anakuja na kuondoka na kulipwa kutegemea na kazi aliyokuwa anafanya hivyo alikuwa mtumishi wa kuja na kuondoka."*

Which literally mean, the complainant started to work as casual labourer, on 29/01/2011 the farm was burnt, therefore all work stopped, thereafter in 2017, the farm started but the complainant was not at work, he was coming and going back home, and his payment depended on the work he did there he was not a permanent employee, he was coming and going back home.

Not only that evidence, but also the witness during the examination in chief before CMA at page 11 the first paragraph of the typed proceedings when he was asked as to whether he knew the respondent, he replied that;

"Ndiyo, ni msimamizi wa ulinzi wa Hamiri Estate ila mimi niliacha kazi mwaka 2017 nikamuacha yeye kazini."

Which literally mean that, the respondent was the security guards' supervisor, but I resigned in the year 2017, and left him working. The above reply of the applicant's witness before the CMA also corroborates the evidence that the respondent was an employee of the applicant as all these facts were not meaningfully disproved by evidence from the applicant.

From the above findings, it is my considered view that despite the absence of a written employment contract between the applicant and the respondent, the employer and employee relationship existed between them as from the evidence on record the applicant has always been paying the respondent the salary which per month was a total of Tsh 90,000/= as the respondent was being paid daily at the rate of Ths.3000/=. That said, it is my considered view that, being in employment relation ship, the employer i.e the applicant, was supposed to follow procedure in terminating the employment of the employee, i.e the respondent.

I now turn to the issue raised by this court as a foundation for the reasoning as to whether CMA was justified to award the respondent on basis of unfair termination.

In deciding on this issue, the record of the trial CMA will be of assistance. It is on record that, the respondent's employment contract was terminated on 15th March 2019, as stated by the respondent himself at page 8 of the typed proceedings of the CMA at the 5th paragraph, and he even stated the reasons for his termination as follows;

> *"Kazi niliachishwa tarehe 15/03/2019 sababu nilikuwa nimemdai Bosi na kukamata ng'ombe za wananchi na kuwaachia bila sababu"*

Which literally means that, I was terminated on 15/03/2019 on the reasons that, I had claimed from my boss and for having unreasonably released the cows which were attached from the members of the community. That evidence was also not disputed by the applicant, apart from asking the respondent the question as to whether he has an employment contract, the issue which this court has already discussed and determined herein above.

The records show that, the applicant terminated the respondent's employment contract without observing the legal procedures. the record does not show that the applicant proved before the CMA the fact that he has terminated the respondent's employment contract fairly as to disprove the respondent's allegation that he was unfairly terminated. In law, matters of

termination are regulated by section 37(2), (a), (b), (c) of the Employment and Labour Relations Act, [Cap 366 R: E 2019] which for purposes of clarity is hereby reproduced that;

> *"Termination of an employment by an Employer is unfair if the Employer fails to prove that;*
>
> *a) That termination is valid*
>
> *b) That the reason is fair reason*
>
> *i. related to the employee's conduct, capacity or compatibility;*
>
> *ii. or based on the operational requirements of the employer, and*
>
> *(c) that the employment was terminated in accordance with a fair procedure."*

With regards to fair termination of an employment contract it was also held by this court in **Stamili M. Emmanuel vs. Omega Nitro (T) Ltd,** Lab. Div., DSM, Revision No. 213 of 2014, dated 10/04/2015, Aboud, J. that;

> *"It is the established principle that for the termination of employment to be considered fair, it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment"*

Under section 39 of the Employment and Labour Relations Act, Supra, the burden of proof in any proceedings concerning unfair termination of an employee by an employer, is vested on the employer who shall prove that, the termination is fair. Which means the applicant was duty bound to prove the fairness of the termination, in terms of the reasons and procedure.

Having reviewed the record and the materials before me, it is my considered view that, the employer has failed not only to give valid reasons for terminating the respondent but also to convince this court that the termination of the respondent was fair. The applicant ended up shifting the goal posts by unjustifiably alleging that the respondent was not his employee but rather a casual laborer who was paid on the daily basis, the allegation which was found baseless by this court as previously stated.

In line with the above position, it is my considered view that since the applicant has failed to prove that he terminated the respondent's employment contract fairly, a conclusion that the termination was not fair is appropriate. The duty of employer is also shown under rule 9 of the Employment and Labour Relations (Code of Good Practice), G.N. No. 42 of 2007 which provides that;

"An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination."

The same GN, under rule 13 provides for the requirement to conduct the disciplinary hearing before terminating an employment contract. In this case no disciplinary hearing was conducted and the case does not fall under the exception provided under rule 11, therefore the procedure of terminating the employee was not complied with as well. The failure to comply with such legal requirements is fatal and renders the employer's act unfair. In this case it has infringed the respondent's right to be heard before the termination of his employment contract. That said, the appellant's revision application is hereby dismissed for lacking merit, the Commission for Mediation and Arbitration award is hereby upheld.

It is accordingly ordered

DATED at **ARUSHA** this 21th day of July 2022.

J.C. TIGANGA

JUDGE.