IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LABOUR REVISION NO. 05 OF 2022

(Arising from the Award of the Commission for Mediation and Arbitration of Dodoma in the Labour Dispute No. CMA/DOD/82/2014)

ANDENDEKISYE MWAKINYAKA..... APPLICANT

VERSUS

DODOMA CITY COUNCIL..... RESPONDENT

RULING

20/3/2023 & 20/6/2023

KHALFAN, J.

The applicant has filed before this Court the application for revision under Rule 91(1) (a) & (b), (2)(c), (4) (a) & (b) of the Employment and Labour Relations Act, [Cap 366 R.E 2019] (the 'ELRA') and Rule 24(1),(2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c) & (d); Rule 28(1)(c) & (e) and Rule 50 of the Labour Courts Rules, GN No. 106 of 2007. In this application, the applicant is moving this Court to call and revise the decision and Award as well as to quash and set aside the proceedings of the Commission for Mediation and Arbitration of Dodoma ('CMA') dated 26th day of February, 2020 in the dispute No. CMA/DOD/82/2014. The applicant also seeks for

the order of cost and any other relief that this Honourable Court may deem fit and just to grant.

The application is supported by the applicant's affidavit whereas the respondent opposed the application through counter affidavit.

The background of this dispute as it appears in the record is that the applicant lodged a labour complaint to CMA claiming unfair termination by the respondent. It was asserted by the applicant that in March, 2009 he was employed by the respondent who was named as CDA as attendant as he was attending the garden in the house of the Vice President and his salary was TZS 120,000/=.

The applicant claimed that in the course of employment, he sustained injury hence he was admitted in Dodoma General Hospital for almost 12 weeks. That, after recovery, he reported to his duty station but his supervisor rejected to receive him because he did not notify the office of his condition. He therefore contended that his termination was unfair as he was not given an opportunity to defend himself and the reasons for termination are unknown. He thus prayed to be reinstated to his employment and be paid his salaries.

The respondent, on his part through his witnesses, DW1 and DW2, countered the applicant's complaint that the applicant was not an

employee of the then the Capital Development Authority (CDA) but a casual labourer who was working in the house of the Vice President but his work ended because the contract of the respondent to take care of environment of the houses of public leaders was terminated. He added that there was no any notice that the applicant sustained injury in the cause of employment. Therefore, it is the respondent's contention that the applicant's employment was not terminated.

CMA, having heard the evidence adduced by both sides, found that the applicant was the employee of the respondent but there was no proof that he was unfairly terminated. Therefore, CMA dismissed the dispute accordingly hence this application for revision.

The application for revision was argued by way of written submission whereby the applicant through the service of Mr. Erick Christopher, learned Advocate, filed his submission in support of the revision and the respondents also filed a reply submission in opposition of the revision through the service of Mr. Ilambona S. Mahuba, learned State Attorney.

The applicant, through his submission, argued that it was wrong for the CMA to conclude that the applicant failed to prove if he was unfairly terminated while the applicant told the Commission that his termination was orally made and therefore it was the duty of the respondent to prove

that applicant was not terminated unfairly. The case of **Kaizilege and Kemebos High School vs Esau Ndyetabula,** Revision No. 11 of 2020, High Court at Bukoba stated that the burden of proof on fairness of termination lies upon the employer was referred to.

Further, it was argued that the applicant's employment cannot be termed as employment for specific task but employment of unspecified period/permanent considering the duration the applicant worked with the respondent from 2009 to 2014. Sections 14, 15(1) & (6) and 19(2) of ELRA were cited to cement the proposition stating that the failure of the applicant to prove that the term of employment was for specific task means that it was not of such nature but was for unspecified period/permanent.

Additionally, the respondent's averment that the applicant's employment ended because his work ended with the termination of their contract on taking care of the environment in the houses of public leaders is not proved. Therefore, this Court was urged to weigh the evidence of both parties pursuant to the case of **Hemedi Saidi vs Mohamedi Mbilu** [1984] TLR 113.

Turning to the available remedies, the applicant averred that the Court should consider the remedies under section 40 of the ELRA. That,

the applicant be awarded compensation of 24 months' salary plus one month salary in lieu of notice and any other terminal benefits such as severance pay.

Having submitted so, the applicant prayed this Court to allow the application for revision and be granted the reliefs sought.

The respondent argued that the applicant did not produce enough evidence for unfair termination to warrant unfair termination benefits. The case of **Said Seleman and 13 Others vs A-one Product and Buttlers Ltd**, Revision No. 890 of 2018, High Court, Labour Division at Dar es Salaam was cited while restating the provision of section 60(2)(a) of the Labour Institution Act, No. 7 of 2004 which states that the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct.

On the issue of salary of the applicant, the respondent contended that the payment to labourers as it was the case with the applicant, was TZS 3,000/= per day as he had no formal employment, hence the allegation of unfair termination is misconceived. It was further contended that the claim that the applicant sustained injury in the course of employment is immaterial and not proved.

The respondent also contended that section 39 of the ELRA which imposes a burden on the employer to prove that termination was fair is not applicable to this matter since there is no evidence produced on termination.

On the benefit payable, the respondent cited Section 35 of ELRA which states the circumstances of paying employment benefit of which the applicant does not fit in because there is no proof that the applicant was an employee of the defunct CDA, now the respondent.

The respondents therefore prayed this Court to dismiss the application for revision for want of merit and uphold CMA Award.

Having heard the rival submission of both parties, I find two crucial issues for determination by this Court. The first issue is whether there was employer-employee relationship between the parties. The second issue is what relief parties are entitled to.

Starting with the first issue, section 4 (a) & (b) of ELRA shall be referred to illustrate the meaning of an employee:

4."Employee" means an individual who—
(a) has entered into a contract of employment; or
(b) has entered into any other contract under which—
i. the individual undertakes to work personally for the other party to the contract; and

ii. the other party is not a client or customer of any profession, business, or undertaking carried on by the individual;

In the light of the above provision, the absence of formal written contract of employment does not give a final conclusion that a person is not an employee since a person who works personally for other party to the contract is termed as the employee.

Moreover, section 61 of Labour Institution Act, [Cap 300 R.E 2019] provides for presumed employee, stating that:

'61. For the purposes of a 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 the 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 a person who works for an organisation, the person is a part of that organization;

(d) the person has worked for that other person for an average of at least forty-five 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 of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person'.

With the above meaning of an employee, I have keenly read the records and the Award by CMA as well as the submissions made by both parties. It is apparent that applicant and the respondent had created the employer-employee relationship as rightly decided by the CMA.

The evidence is clear that the applicant was working personally for the respondent who basically had a contract to take care of environment to the house of the Vice President. It is also apparent that the applicant was working subject to the control or direction of the respondent, was economically dependent on the respondent, and he was provided with working tools and equipment by the respondent. Also, there is no controversy on the duration of working hours.

For that reason, there is no doubt that the applicant was the employee of the respondent and the contention by the respondent that the applicant was merely a casual labourer is disregarded. This is because the respondent has not brought any proof as required by the law under section

15(6) of ELRA. The provision requires the employer to prove terms of employment. It states that:

> *'15 (6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer'.*

On the other hand, it is revealed on the record that the applicant's employment with the respondent ended because the contract of the respondent to take care of environment of the houses of public leaders was terminated. It means that pursuant to the contract, the applicant was assigned to take care of the garden in the house of the Vice President. That being the case, it is clear that the applicant's employment with the respondent was terminated. The issue now is whether the termination was fairly done. Section 37 of ELRA provides that it is unlawful for the employer to terminate employment of an employee unfairly and requires the employer to prove that termination was fair and valid. Section 37 (1) and (2) reads as follows:

> *'37 (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure'.

In the precinct of the above provision of the law, it is the duty of the employer to prove if the termination was made on valid and fair reasons. The evidence of DW2 states that the applicant was terminated from the employment because of the termination of the contract of service which the respondent was rendering to the house of public leaders including the house of the Vice President where the applicant was working. I find this reason to be reliable taking into consideration that the applicant admitted that he was working with the defunct CDA which has been transformed to Dodoma City Council (the respondent), hence the respondent's contention that contract of service ended with the defunct CDA, holds water.

On the other hand, the applicant's averment that he sustained injury in the course of employment lacks locus stand on as there is no any evidence produced to support the claim taking into consideration that the applicant himself admitted to sustain injury at 18.00 hours while his working hours

ended at 15.30 hours. This means that he had to produce tangible evidence to support his contention subject to section 110 of the Evidence Act, [Cap 6 R. E 2022] which imposes the burden of proof to the party who alleges anything in his favour.

That being the reason for the termination of the employment of the applicant, this Court is of the view that the termination of the employment of the applicant was made on the operational ground as provided under section 37 (2) (b) (ii) of the ELRA. Therefore, the termination of employment of the applicant by the respondent cannot be taken as unfair termination because the termination is based on operation ground which constitutes a fair reason of termination.

Nevertheless, the Court has to examine if the procedures for termination on operational grounds as provided under section 38(1)(a)(b) & (c) of the ELRA were followed. The section provides that:

> *'38-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall-*
>
> *(a) give notice of any intention to retrench as soon as it is contemplated;*
>
> *(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;*
>
> *(c) consult prior to retrenchment or redundancy on –*

(i) the reasons for the intended retrenchment;

(ii) any measures to avoid or minimize the intended retrenchment;

(iii) the method of selection of the employees to be retrenched;

(iv) the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments;'

Therefore, the respondent was required to observe the above procedures. It is evident from the record that the respondent did not comply with the procedures since the applicant was orally told by his supervisor that his employment had been ended because of the termination of contract of service of the respondent in the houses of public leaders. This means that, the applicant was neither served with notice of intention to retrench him, information on the intended retrenchment nor the timing of the retrenchment was communicated. For that reason, this Court is of the firm opinion that despite the fact that the termination was fair, it was procedurally unfair.

Coming to the reliefs which the parties are entitled to, the Court is persuaded by the holding of this Court in Consolidated Revision No. 370 and 430 of 2013 between **Saganga Mussa Vs. Institute of Social Work** which was referred in the case of **Kenya Kazi Security Vs Irene**

Johnson Shoo, Revision Application No. 217 of 202, High Court, Labour Division at Dar es Salaam where the Court held that:

> *'Where there is a valid reason for termination but the procedures have not been complied with, then the remedy cannot be similar as in cases where the termination was unfairly done both substantively and procedurally.'*

Thus, this Court has taken into consideration the circumstances of the matter at hand and has found that the applicant was employed under the unspecified period of time and hence section 40(1)(c) of ELRA is applicable in determining the relief available to the parties which among other remedies, directs for the award of not less than 12 months in unfair termination of employment. However, because the reason for termination of employment is held to be valid except for the procedures of termination which were not adhered to, the compensation of six months salaries is enough to remedy the applicant.

With the applicant's contention that he was being paid TZS 120,000/= salary per month, and because the respondent has not produced any evidence to disprove such averment, this Court orders the respondent to pay the applicant a total salary of six months (TZS 120,000/= per month) which makes a total of TZS 720,000/=.

Conclusively, this Court finds that the application for revision is partly meritorious and the award of the CMA is partly quashed as reasoned above. The respondent should pay the applicant six months' salary which makes a total of TZS 720,000/= for failure to follow the required procedures in terminating the employment of the applicant. No order as to costs.

Dated at **Dodoma** this 20th Day of June, 2023.

F. R. KHALFAN

JUDGE