IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 866 OF 2019

BETWEEN

SANITAS HOSPITAL LIMITED.....APPLICANT

VERSUS

GOODLUCKY NYAKASELULA .....RESPONDENT

JUDGMENT

Date of last Order: 22/06/2021

Date of Judgment: 29/06/2021

A.Msafiri J,

The applicant SANITAS HOSPITAL LIMITED filed the present application seeking to revise the decision/ruling of the Commission for Mediation and Arbitration (herein to be referred to as CMA) which was delivered on 7th October 2019 in labour dispute No. CMA/DSM/KIN/R.502/18. The application is made under the provisions of Section 91(1)(a),(b),91(2)(a)(b), 91(4)(a),(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, Rules 24(1), 24(2),(a),(b),(c),(d),(e) and (f) and 24(3)(a),(b),(c),(d) and 28(1)(a)(b),(c),(d),(e) of the Labour Court Rules, 2007.

The application was supported by the affidavit of AMIRI ALLY AMEIR, the Human Resource Manager of the applicant. The respondent

GOODLUCKY NYAKASELULA challenged the application through his counter affidavit.

The background of the dispute in brief is that, the respondent was engaged by the applicant as contractor since 1st January 1997 to perform radiography activities at the applicant's Hospital. On 18th July 2018 the respondent referred the dispute to CMA on the allegation that he was unfairly terminated. The arbitration was conducted between both parties and on 7th October 2019, an arbitral award was issued in favor of the respondent in that his termination was substantively and procedurally unfair, thus the CMA proceed to award him payment of Tshs. 19,875,000/= being 12 months salaries, severance pay and notice.

The applicant aggrieved with the Award, has filed the present application to revise and set aside the CMA award of 7th October 2019. At the hearing of the application, both parties enjoyed the services of learned advocates. Mr. Elipidius Philemon appeared for the applicant whereas Ms. Lizzy Minja appeared for the respondent.

At the hearing, Mr. Elipidius prayed to adopt the affidavit of Amir Ali Ameir to form part of his submissions. In the applicant's affidavit, two grounds of revision were raised to wit;

i. *The Arbitrator erred in law and in fact for holding that the respondent had a contract of service with the applicant;*

ii. *The Arbitrator erred in law and in fact for holding that the respondent was terminated by the applicant contrary to the fact that the respondent absconded.*

In his submissions, the counsel decided to argue on two statement of legal issues which were raised in the applicant's affidavit, that is;

i. *Whether the respondent had a contract with the applicant;*

ii. *That, in alternative, even though the respondent had employment contract; whether the arbitrator was legally justified to hold that the respondent was terminated from employment by the applicant.*

Arguing on the first issue he submitted that from the appointment letter which was tendered as exhibit D1, the terms are very clear that the parties chose to enter into a contract where the respondent would be a contractor to the applicant. Clause 2 of the respondent's contract, stated that the respondent will invoice the applicant for payment for work done, and this shows that the respondent was a contractor and not an employee of the applicant.

Mr. Elipidius referred to the case of **DPP vs. Eliatosha Mrema**, 1983 (TLR) at page 28 in which the Court of Appeal held that the contract which is based on payment of commission does not constitute the contract of service.

He submitted further that, in order to determine whether the respondent was an independent contractor or not, one has to look on whether the applicant withheld Income Tax, Social Security Fund from wages paid to the respondent. He incited that, it is a settled law that if a worker is clarified as an employee, then the employer is obliged to withhold income tax from any wages paid to the employee.

Mr. Elipidius argued that the issue of withholding taxes from the amount paid for work done does not involve independent contractors and that is why the applicant paid the respondent the exactly amount agreed without any tax deductions.

The counsel for the applicant stated further that, the arbitrator erred in law and fact when he was evaluating the evidence on whether the respondent was an independent contractor or not by stating that since the respondent was subjected to supervisor, then he was not independent hence he was the applicant's employee. The counsel contradicted this

evidence analysis by pointing that the control by supervision was aimed at the result of the work and not on what could be done and how it could be done.

The counsel also argued on the point that the contract of employment did not reveal the expiry of contract. He said that, this does not justify the respondent as an employee, because this was per the parties' agreement, so they would decide to end their contract as they wish.

On the second issue, Mr. Elipidius argued that the arbitrator was not justified legally to hold that the respondent was terminated from employment by the applicant. He submitted that, respondent stopped working on 14th April 2018 and there is no evidence to show that he was indeed terminated, only that the respondent stated that he was terminated orally. He avers that the respondent stopped working at the applicant's hospital by himself because he got an employment at Ocean Road Cancer Institute (ORCI). The counsel for applicant prayed for this Court to revise and set aside the award of CMA.

Responding to the counsel for applicant's submissions, Ms. Lizzy Minja also prayed to adopt the respondent's counter affidavit to form part

of his submissions. On the first issue, she guided the Court to the definition of who is an employee in Section 4 of the Employment and Labour Relations Act, Cap 366 R.E 2019.

Also, she invited the Court to read Section 61 of the Labour Institutions Act, Cap. 300 R.E 2019 on presumption of who is an employee. She maintained that, the respondent had a contract with applicant which did not state the specified period of time.

Ms. Lizzy submitted further that, Section 14 of Cap. 366 (supra), specified on how the contracts of an employee should be. So, the fact that the respondent contract did not specify the period of time, it justify that the respondent's contract to be the contract of an employee.

On working hours, the contract specified that the respondent is required to work for 40 hours a week which shows the existence of control on respondent by the applicant. Furthermore, the warning letter as exhibit D2 from the applicant to the respondent also shows that it was in nature of the applicant to control how and when the respondent should perform his duties.

The respondent's counsel refer this Court on the cases of **Rashid Mwema vs. Elias Nonnious Makoga** Revision No. 363 of 2019 which

also quoted a case of **Mwita Wambura vs. Zuri Haji**, Revision Application No. 42 of 2012 at Mwanza (Reported in LCCD, 2014, PART 2 AT PAGE 182), and referred a case of **John Ngwengwe vs. Super Spring T (Ltd),** Revision No. 306 of 2014 (High Court Labour Division). The cases were on determination on whether there was an employer/employee relationship.

Ms. Lizzy argued that the cited case of **DPP vs. Eliatosha Mrema** (supra) was distinguishable from the present matter because, the referred case stated that the nature of the disputed contract on that case was of payment of commission, while in the present matter, there was no place to the contract agreed orally or written to the fact that the respondent's contract was that of payment of commission.

On the point of respondent's salary not being taxable by the employer by withholding his income, Ms. Lizzy stated that it was the duty of the employer to make statutory deductions from the employee's salary and remit the same to the authorities. She maintained that it is clear that the nature of the contract and the performance of the said contract, created the relationship of an employer/employee. Therefore the respondent was an employee of the applicant.

Replying on the second issue raised by the applicant, Ms. Lizzy submitted that, it was provided in the respondent testimony before CMA that he was orally terminated by the owner of the hospital after he had gone to inquire on the status of his employment, having received a message (mobile sms) from his supervisor that he should not report to work from the day of the receipt of the message. That, the said message was admitted together with other exhibits on respondent's side.

She avers that, in the light of the circumstances of matter at hand, the law requires the employer to terminate employment contract only if there is valid reason and by following proper procedures of termination. In the light of her submissions, she prayed for this Court to uphold the decision of the CMA as the trial arbitrator had justifiable reasons to rule that the respondent was an employee and that he was unfairly terminated.

In rejoinder, Mr. Elipidius reiterated his submissions in chief and added that, section 61 of Cap. 300 on presumption of who is an employee, does not set out that one factor is enough to justify that a person is an employee, rather all other elements have to be proved to justify the same.

Regarding the principle in the case of **DPP vs. Eliatosha Mrema** (supra), the counsel maintained his argument that the act of presenting an

invoice for payment was similar to the payment of the commission. And in the referred case it was stated that once a person is paid commission, they does not fall in the category of an employee.

He concluded by submitting that the CMA award was unjustifiable since the respondent was an independent contractor to the applicant, and it was he, the applicant who decided to end the service he was rendering to the applicant.

Having heard and considered the submissions of both parties and carefully considered the evidence on record, I believe the issues to be considered by this Court are;

i) Was the respondent an employee or an independent contractor?

ii) Whether there was an employer/employee relationship, if yes;

iii) Whether the applicant terminated the respondent, and if they had a valid reason for such termination;

iv) Whether the applicant adhered to the procedures of terminating the respondents,

v) The relief which the parties are entitled to.

On the first issue on whether the respondent was an employee or the contractor, the Court basing on submissions on both parties and the Court

records which includes the proceedings at the CMA, was certain that the respondent did have an agreement to work for the applicant. As per the submissions of the counsel for the applicant, the parties that is applicant and respondent chose to enter into a contract where the respondent would be a contractor to the applicant.

The letter of appointment by the applicant to the respondent which was exhibit D1 during the CMA proceedings, states that:

'Following our discussions, I am pleased to appoint you as our Radiographer/Sonographer on the following;

1. *You will be contractor to SANITAS HOSPITAL*
2. .....
3. .....
4. *You may start work from the first January 2017.'*

Therefore, the parties in the matter at hand, had a contractual relationship albeit unspecific one since the same did not reveal the end of that relationship. Did that relationship amounted to a contract of service with an employer? This is answered in affirmative because there was an agreement between the applicant and respondent, for the respondent to tender service on one part and the applicant to pay specific amount on the other part.

At this juncture, I would like to point that I agree with the counsel for the respondent that the circumstances in the case of **DPP vs. Eliatosha Moshi & Another,** (supra) which was cited by the applicants counsel is distinguishable in the present matter.

On the evidence at hand the counsel for the applicant submitted that, as per exhibit D1, the terms were clear that the respondent would be a contractor to the applicant, and that the respondent will invoice the applicant for payment of work done which shows that the respondent was a contractor and not an employee of the applicant. The counsel also pointed out that the applicant did not withhold income tax and Social Security Fund from the salary paid to the respondent, so, the respondent was not an employee.

To determine if a person is an employee, one has to consider factors stated under section 61 of the Labour Institutions Act, Cap. 300. It states;

'61: *For the purpose of labour law, a person who works for or renders a service to other person, is presumed until the contrary is proved to be an employee regardless of the form of contract; if any or more of the following factors is present;*

a) The manner in which a person works subject to the control or directions of another person.

b) The person hours of work are subject to the control or directions of another person.

c) In the case of person who works for the organization, the person forms part of the organization.

d) The person has worked for that 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 which that person renders service.

f) The person is provided with tool of trade or works equipment by the other person.

g) The person only works or renders service to one person.'

This principle of law has been enumerated in various cases, among them being the case of **TIFPA vs. Aloyce Byaro**, Revision Application No. 2 of 2019 High Court Musoma Registry. In the referred case, the issue was whether the respondent was an employee or an independent contractor. The Hon. Judge also made reference to the case of **Amos Henry & 25 others vs. Tanzania Telecommunication (TCCL),** where by the Court

took position that to establish that a worker is an employee it must be proved that the employer controls what should be done and how.

It was held that;

> *'Key factors to be taken into account in determining existence of an employment relationship are provided for under section 61 of labour institutions Act, Cap.300. Generally, a worker is an employee when he performs service for the employer in return for pay for the work done, such employee is controlled by such employer with respect to what should be done, when it should be done and how, including what tools to use.'*

The same principle was also elaborated in the case **of Mwita Wambura vs. Zuri Haji**, Revision application No. 42/2012 at Mwanza, reported in LCCD 2014 part II at page 182. The same was also set in the case of **Summit Lodge Limited vs. Daniel Jeremiah Mngale**, labour Revision No. 130 of 2018 High Court Arusha (unreported) which held;

> *'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'.*

In the matter at hand, the record shows that the respondent was engaged by the applicant, was needed to work 40 hours a week and was working under a supervisor. I am inclined to agree with counsel for the respondent that, the testimony provided at the CMA by the applicant's witnesses and respondent himself indicated that the respondent was not free but was under supervision and control of the applicant; First, in the exhibit D1, the respondent was required to work for 40 hours a week, second, the respondent was working under a supervisor. This is proved at page 11 of the CMA proceedings where DW1, A Human Resource Manager from the applicant stated that the respondent was under a supervisor one Boniface. Third, there was the warning letter, exhibit D2 which was given to the respondent, warning him for his lateness and abscondment from work.

The above indicators, indicates that, the relationship of the applicant and respondent might have been one of an independent contractor however, the circumstances changed it into an employer/employee relationship whereby the respondent was under the control of the applicant and was not free as an independent contractor. In this juncture, I also agree with the findings of the Arbitrator at page 7 of the award that, where he explained that;

'.....pamoja na wadaawa hawa kuwa na Mkataba wa kumwajiri mlalamikaji kama "contractor", lakini hawakuuishi mkataba kimatendo kwani pamoja na kuwa walikubaliana kuwa mlalamikaji atafanya kazi kwa masaa 40 tu kwa wiki na kwamba muda wa kazi ni "flexible". Lakini bado walimuwekea msimamizi ambae alikuwa akimsimamia utendaji wake wa kazi.....'

'Pia pamoja na kukubaliana "flexibility" katika masaa ya kazi, lakini mlalamikaji huyu alipewa onyo juu ya uchelewaji na kutoonekana kazini'.

By this analysis basing on the evidence on record, the terms of the contract between the parties in dispute, changed to one of employer/employee relationship.

Therefore, this answer in affirmative the issue that the respondent was an employee of the applicant and hence they had an employer/employee relationship.

The third and important issue is whether the applicant terminated the respondent, and there was valid reason for such termination. Section 41(3) of the Employment and Labour Relations Act, Cap. 366, R.E 2019, provides that;

43(3) *Notice of termination shall be in writing, stating;*

i. The reasons for termination

ii. The date on which the notice is given.

In the present matter, on paragraph 3 of the applicant's affidavit by Amiri Ally Ameir, it is stated that, the respondent worked until 14th April 2018 when he disappeared without any prior information. That, the respondent later filed a labour dispute at the CMA alleging to have been unfairly terminated. In his counter affidavit, and as later submitted by his advocate, the respondent avered that he was an employee of Sanitas Hospital Limited until the date he was orally terminated and chased out of the office by his supervisor and Hospital Manager (owner).

During the proceedings at the CMA, the testimony by DW1, the Human Resource Manager was that the respondent was served with a warning letter, then after two months of being served, he disappeared. And that the respondent was never terminated.

The respondent stated that, he received a threat messages from his supervisor saying that he will be terminated from work. Later, he received a message from supervisor that he (respondent) is not supposed to come to work. But he nevertheless went personally, that was when the Hospital Manager chased him. At page 20 of the CMA proceedings it is provided;

> *'nilitumiwa message za vitisho kutoka kwa incharge wangu Boniface Kagina akisema* ***watanifukuza kazi****.....'*

(emphasis mine).

> *'.....nilienda mwenyewe hospital kuonana na Hospital* ***Manager alinifukuza****, nikaenda kwa Mkurugenzi akasema* ***nitakufukuza kazi sasa hivi.*** *Akaandika cheque ya mwezi mmoja na nusu, niliona sijatendewa haki nikaleta malalamiko Tume.....'*
> *(emphasis mine)*

The respondent stated at page 20 of CMA proceedings that 14th April 2018 was his last day of working for the applicant. Does the respondent's statement amounts to being terminated by the applicant? In the circumstance like the present matter where the employee alleges to be orally terminated, and the employer denies to have terminated the employee, who is to prove that facts?

In the case of **Said Selemani and 13 Others vs. A-One Product and Buttlers Ltd,** Revision No. 890 of 2018 (High Court Labour Division at Dar es Salaam), Muruke, J, among other issues in determining whether the respondent did terminate the complaint's contract as alleged, she restated the provisions of section 60 (2) (a) of the Labour Institutions Act, No. 7 of 2004, which provides as follows;

a) The person who alleges that a right or protection conferred by any labour law, has been contravened shall prove the facts of the conduct

to constitute the contravention unless the provisions of subsection (1)(b) apply.

Muruke, J, then proceeded to find that;

> *'It is the complainants who have alleged for unfair termination before CMA, and in terms of section 60(2)(a), it is the complainants who have the burden of proof of their allegations.....'*

Furthermore in the case of **Exim Bank (T) Ltd vs. Jacquiline A. Kweka,** Revision Application No. 429 of 2019, at page 9, Muruke, J, referred the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois and Joseph Sita Joseph** (2006) TLR 419, where it was held that;

> *'It is an elementary principle that he who alleges is the one responsible to prove his allegations.'*

In the present matter before me, I find that, the respondent failed to prove that he was terminated by the applicant. I am inclined to believe so by the evidence of the proceedings at the CMA which I had already produced herein above. The respondent's words that; 'nilitumiwa *message za vitisho kutoka kwa incharge wangu..... akisema atanifukuza kazi,'* does not amount to oral termination. Beside, this was his incharge not an employer.'

Furthermore, words that '*nilienda mwenyewe kuonana na Hospital Manager alinifukuza, nikaenda kwa Mkurugenzi* akasema *nitakufukuza kazi sasa hivi,'* Shows the contradictions in the respondent's testimony, and does not prove that, he was really terminated as alleged.

Furthermore, in the proceedings, there is no evidence which shows on which date the respondent was terminated instead, at page 20 of the CMA proceedings, the respondent state that 14th April 2018 was the last date he worked for the applicant.

Therefore, I find that the Arbitrator erred in law and fact when he made a finding that the respondent was terminated. The respondent did not establish his allegations for being terminated. With this findings, my third issue is also answered in affirmative that there was no termination, fair or unfair and thus, there is no need to ponder on the other issue on whether the procedure for termination were followed.

Regarding the issue on the relief of the parties, since the termination of the respondent was not established, I find that the award adduced by the CMA for the respondent was not proper in the circumstance and I hereby set it aside. However, since the respondent was employee of the applicant, I find that he filed the matter prematurely before the CMA.

I therefore, quash and set aside the arbitrator's findings that the respondent Goodlucky Nyakaselula was terminated and therefore entitled to terminal benefit. I proceed to set aside the CMA award. Application for revision is allowed to such extent. Right of appeal explained.

It is so ordered.

A. Msafiri
JUDGE
29/06/2021