

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 32 OF 2023**

*(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 23<sup>rd</sup> day of December 2022 in Labour Dispute No. CMA/DSM/ILA/173/2022/145/2022 by (Mbeni: Arbitrator)*

**MOHAMEDI SIMBA..... APPLICANT**

**VERSUS**

**MOHAMED ENTERPRISES (T) LTD.....RESPONDENT**

**JUDGEMENT**

**K. T. R. MTEULE, J.**

**08<sup>th</sup> May 2023 & 16<sup>th</sup> May 2023**

This Revision application originates from the award of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala

(CMA) in Labour **Dispute No.**

**CMA/DSM/ILA/173/2022/145/2022.** The prayers contained in the Chamber summons are: -

1. That, this Honorable Court be pleased to call for the records of the proceedings of the Commission for Mediation and Arbitration at Dar es Salaam, in Labour Dispute No. CMA/DSM/ILA/173/2022/145/2022, revise the proceedings and award made by Hon. Mbeni, M.S, dated 23<sup>rd</sup> December 2022.

2. Any other orders as this Court may deem fit and just to grant.

The background facts of the dispute leading to this application is grasped from CMA record, affidavit and counter affidavit filed by the parties as stated hereunder.

In the above-named Labour Dispute, the applicant claimed to have been employed by the respondent as a Sales Officer for an unspecified period. He alleged that on **16<sup>th</sup> March 2022** he was terminated unfairly. Aggrieved by the termination, he filed a labour dispute in the CMA against the employer claiming for payment of compensation for the alleged unfair termination. The CMA decided the matter not in his favour having found that there was no employer-employee relationship between the applicant and respondent. Being resentful with the award, the Applicant preferred this application for revision.

The application is supported by the applicant's affidavit where he deposed that there was no valid and fair reason for termination and procedures implemented in ending employment relations was not in accordance with law.

In his affidavit, the Application has two legal issues of revision which are: -

- i. Whether it was proper and legal for the arbitrator to reject the applicant's claim.
- ii. Whether the burden of proof is on employee regarding Labour law practices.

Opposing the application, the respondent filed a counter affidavit sworn by Hassan Dewji, the respondent's Principal Officer disputing the application and denying to have ever been a termination at all, as the respondent had never employed the applicant.

At the hearing the applicant was represented by Mr. Stepheno Haonga, Personal Representative, while Advocate Adam Mwambene was for the respondent. The matter was disposed of by oral submissions.

Starting with the first issue as to whether it was proper for the arbitrator to reject the Applicant's claims, Mr. Haonga challenged the holding of the arbitrator that there was no employment relationship. He submitted that the applicant produced exhibits which were admitted in the CMA, which reflect communications between the applicant and his supervisor which showed the money he was collecting from customers and deposits in respondent's accounts.

While reminding about the duty of the employer to prove fairness of termination of an employment in Labour disputes, Mr. Haonga stated that the applicant's exhibits mentioned the name of his supervisor Cazim Walj who used to pay him TZS 2,000,000/= per month.

According to Mr. Haonga the exhibits were never questioned by the Respondent and secondly, they didn't question the involvement of the Respondent employee Cazim Walj in those exhibits. He added that since the respondent did not deny the evidence neither did, they call the said Cazim Walj to state the nature of relationship he had with the Applicant then, the applicant managed to establish employment relationship between him and the Respondent.

The Applicant further submitted that the respondent owes a duty to prove otherwise, either by bringing a pay roll, and having Cazim Wahj came to CMA to tell the truth. In absence of that proof, according to Mr. Haonga, the arbitrator was therefore wrong in his findings that there was no employment relationship. They thus prayed for the decision to be set aside, and for an order for payment of what the applicant was claiming or the matter to be returned to the CMA to be heard afresh before another arbitrator.

In resisting the application Mr. Mwambene submitted that the application is brought with no reasonable cause, and it is frivolous application premised on gambling.

On first issue as to whether there was employment relationship, Mr. Mwambene denied the fact that the Respondent employed the applicant. In his view, on such denial, the burden of proof shifted to the applicant because **section 60 (2) of the Labour Institutions Act No. 7 of 2004** requires a person who alleges a breach of employment law to prove such allegation, in line with **Section 110 & 112 of Tanzania Evidence Act Cap 6 of 2001, R.E.** According to Advocate Mwambene, this section requires he who alleges to prove.

He referred to the case of **Global Agency Limited vs. Tarbin Tarim Tekstill Gida San Vetic Limited, Commercial Application No. 79 of 2021c**, High Court of Tanzania, Commercial Division, at Dar es salaam, (unreported) and the case of **Barelia Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017, Court of Appeal of Tanzania, at Mwanza, (unreported) where the same position was confirmed that he who alleges must prove.

Mr. Mwambene submitted that, the applicant said that he was receiving a salary from Cazim Walj but not from Mohamed

Enterprises, and no explanation as to what was the relationship between Cazim Wahj and the Respondent.

He challenged the Applicant's claim to have been employed on 13<sup>th</sup> November 2020 without any written contract. According to him Mohamed Enterprises is a big Company with more than 12 sister Companies and therefore it was not possible to employ a person without a contract. He questioned the Applicant's failure to claim the copy of contract and even to be able to mention the names of his General Manager, neither that of Human Resource Manager and any employee in the Company other than Cazim Wahj. According to Advocate Mwambene, the marketing Department is not a small thing, it is big, and no way could a person from that department work with a single person Cazm Wahj. Advocate Mwambene contended that the Applicant had never signed any attendance register. He challenged the applicant's claim that he was leaving home directly to market centers without while claiming to have been receiving **TZS 2,000,000** as a salary without showing where he was signing without any other knowledge to him such as the deductions for pension, tax etc. and without any ID. According to Advocate Mwambene, in absence of those mentioned factors, then the claims



before this Court are baseless that is why the CMA dismissed the dispute.

In rejoinder the applicant reiterated his submission in chiefs but emphasized that **Section 60 of the LIA**, does not direct employee to keep record and to prove, because an employee just gets paid with salary. He added that keeping documents and prove of the allegation is primarily a duty of Employer and therefore Cazim should have been brought to explain the type of relationship they had with the applicant.

From the submissions made by both parties, the applicant's affidavit, the Respondent counter affidavit, and the CMA record, I draw up two issues for determination which are **whether the applicant have provided sufficient ground for this Court to revise and vary the CMA award** and second **to what reliefs parties are entitled?**

In addressing the above issue, the grounds identified in the affidavit will be considered. In the CMA, the arbitrator found that there was no employment relationship between the Applicant and the Respondent. As to **whether there was an employer employee relationship between applicant and respondent**, the applicant contended that the applicant produced exhibits to the CMA, which

reflect communications between the applicant and his supervisor which were the money he was collecting from customers and deposits in respondent's accounts and in his view, it was upon the Respondent to counter the allegations since there is an issue of unfair termination.

On other hand the respondent maintained that she had no employment relationship with the Applicant and suggested that, since the applicant alleged to be employed by the respondent, he owes a legal duty to prove the existence of employment relation.

To properly approach the issue as to whether there was an employment relationship amongst the parties, I find worth to give the meaning of who is an employee. The meaning of an employee is well captured under **Section 4 of the Cap 366 of 2019 R.E** which describes an employee as an individual who has entered into a contract of employment or any other contract under which such individual undertakes to work personally for the other party to the contract who is not a client or customer of any profession, business, or undertaking carried on by that individual.

Further explanation concerning what constitutes employment relationship is provided for under the provision of **section 61 of the Labour Institutions Act**, which provides; -



*"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, one or more of the following factors is present:-*

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

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

*c) **In the case of person who works for the organization, the persons form 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 tools of trade or works equipment by the other person.***

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

Basing on the above cited provisions, it is a principle of law that, for an employer-employee relationship to be established, one or more of the above-mentioned factors should be met. In this application I have gone through **Exhibit P1** (message conversation), **Exhibit P-2** (WhatsApp conversation) and **Exhibit P-3** (bank slip for payment). The messages seem to have been flowing between the Applicant and Cazm Walj who is not disputed to be the Respondent's employee. The flow of the said messages has been in a constant trend for more

than 3 months and it followed with deposits of cash into the Respondent's Bank count. This is an obvious indication of the Applicant rendering service to the Respondent.

The question which needs to be answered is under which kind of relationship all these were done. According to the Applicant, it was employment relationships while the respondent denies. The respondent has not given any details of which kind of relationship was there, where the Applicant after communicating with Cazm Walj who is the Respondent's employee deposited the cash into the Respondent's account. In my view, since the Applicant made his statement on oath and that he was employed by the Respondent and he was being paid a monthly salary and having been able to tender the conversation which demonstrated an existence of a relationship between the Applicant and the Respondent, Section 61 of Cap 300 comes in to assume the claimed employment relationship. In my view, the Applicant proved the employment relationship on a balance of probabilities. He discharged his duty to prove. Then, it was upon the Respondent to counter the evidence by explaining which kind of relationship she had with the Applicant. This prove is not vivid in the CMA.

Since the Applicant stated on oath that he was receiving salary from the Respondent's employee Casm Walj, it was upon the Respondent to call the said Casm Walj to counter the evidence of the Applicant because it has never been in dispute that Casm Walj is the employee of the Respondent.

In line with **Section 61 of the Cap 300**, I am satisfied that the applicant's statement that he was being paid salaries by the Respondent indicates that the Applicant's livelihood is dependent on the Respondent's paid salaries.

Advocate Mwambene challenged the Applicant's assertion that he was being paid salaries by Casm Walj without explanation of who was Casm Walji in the Respondent. In the CMA, it was not disputed that Casm Walji was an employee of the Respondent. Furthermore, cash deposits were being made in the Respondent's bank account after the Applicant having communicated with Mr. Casm Walj. I insist that since Casm Walj was an employee of the Respondent, then the Respondent had a duty to call him as a witness to testify against the evidence of the Applicant.

The fact that the Applicant failed to mention the name of the Human Resource Officer and the Managing Director does not make him not an employee of the Respondent. He said he was working outdoor,

mainly communicating with his supervisor Cazm Walj over phone. In my opinion, this explanation provides the reason as to why the Applicant did not know the names of other personnel in the Respondent's office.

Possession of Identity card has never been a mandatory criteria to prove employment relationship. It is not all employments operates with identity cards. If someone does not have it, he cannot be denied in employment. The bottom line in this matter is that the Applicant used to render service to the Respondent which the applicant considers to be an employment. The Respondent has not explained sufficiently which kind of a relationship was in the services the applicant rendered to the Respondent. I therefore differ with the arbitrator's demand of ID as applicant's exhibit to prove employment relationship.

From the foregoing, it is my finding that the Applicant has managed to prove employment relationship with the Respondent. Now what follows is the reliefs. Since, the Respondent has been in denial of such a relationship, there could be no fair termination in terms of procedure and reasons. According to the Applicant, Cazm Walji called him on phone and informed him to stop going to search markets something which followed by a call to the police where he found

Cazm Walji accusing him of crime. It remains that the Applicant was terminated without fair procedures and reasons.

Now follows the reliefs. In the CMA, the Applicant is claiming TZS 140,000,000 with the following breakdown:

1. Unpaid salaries for 2 months, - TZS 4,000,000/-
2. One month salary in lieu of notice – TZS 2,000,000
3. Leave allowance – TZS 2,000,000
4. Compensation for unfair termination for 36 months TZS 72,000,000
5. General Damages – TZS 60,000,000

Since this is an assumed employment relationship, the Applicant needed to specifically prove how the leave comes in and how the unpaid salaries came into existence. Equally the claims for general damages must be proved by showing how the Applicant suffered damages. These claims cannot be allowed.

As well, the compensation of 36 months for unfair termination in my view is excessive. Compensation will only exceed the minimum amount provided under **Section 40 of CAP 366** when there are circumstances which may differentiate the extent of the redress needed. In this matter, it was a simple termination and no prove of



any hardship the applicant could have gone through to attract more than 12 months compensation. As such, I will reduce the amount of compensation to 12 months which will make a total of TZS 26,000,000.00 inclusive of one month salary in lieu of notice.

From the foregoing, the answer to the first issue as to whether there is sufficient ground to revise and vary the CMA award is answered affirmatively.

As to relief, since the applicant has managed to establish that there was an employment relationship which was not fairly terminated, the relief available is to allow the applicant to the extent discussed.

Consequently, I hereby revise and set aside the CMA award. I grant the Applicant an award of **TZS 26,000,000** being compensation for unfair termination of contract and one month salary in lieu of notice. The Application is allowed to that extent. Each party to take care of its own cost. It is so ordered.

Dated at Dar es salaam this 16<sup>th</sup> Day of May 2023



**KATARINA REVOCATI MTEULE**  
**JUDGE**  
**16/05/2023**