IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO 417 OF 2013

KINONDONI MUNICIPAL COUNCIL..... APPLICANT

VERSUS

RUPIA SAID & 107 OTHERS.....RESPONDENT

(ORIGINAL/ CMA/ DSM/ILA/ 03/2009)

JUDGEMENT

19/6/2014 & 10/9/2014

R.M.RWEYEMAMU, J:-

In this matter, the respondents Rupia Said and 107 others were employees of the Kinondoni Municipal Council (Applicant). They were employed way back 2002 as Village Executive Officer and were worked on different stations/office within Kinondoni Municipality. It is interesting to note that since the respondents were employed to date, none of them were paid his/her agreed basic wage. After a long demand however, the applicant paid Tsh 660,000/= to each, terming it 'golden hand shake hand' in labour parlance, 'mkono wa heri'. The respondents pocketed the said amount; after that they referred an employment dispute to the Commission for Mediation and Arbitration (CMA) claiming among others, unpaid salaries, accrued and unpaid leave, notice, overtime, severance and NSSF Contribution.

Issues framed at the CMA were that:- **1**; Iwapo walalamikaji waliajiriwa na mlalamikiwa au hapana **2.** Iwapo wanastahili kulipwa madai yao: mishahara wanayodai katika kipindi chote toka kuachishwa kazi hadi sasa, overtime kwa kipindi walichokuwa kazini, likizo ambayo hawakupewa kipindi chote walichokuwa kazini, NSSF, fidia kwa kuachishwa kazi visivyo halali.**3.** Nafuu ya kila upande.

Loosely translated:- **1** Whether or not there was an employment relationship between the parties.**2** whether or not the respondents were entitled to benefits claimed **3.** Reliefs' parties are entitled to.

The arbitrator's reasoning and decision was that:- **(1)** In accordance with the definition under section 4 of the *Employment and Labour Relation Act*, No. 6 of 2004, the respondents were employees of the applicant. **(2)** The employee's termination was procedurally unfair **(3)** The respondents were entitled to; unpaid salaries, accrued leave, notice, severance pay and 5 months salaries' as remedy for unfair termination. The applicant now seeks revision of that decision reasons articulated on paragraph 6 of the supporting affidavit. These are;-

a) That in his decision the Arbitrator did not properly consider the contents of the agreement between the Ward Development Committee and the respondents. The agreement which specifically stipulated the entitlements of the respondents.

b) That the Arbitrator misdirected himself in ordering the applicant to pay salaries as alleged to be arrears without taking regard that the respondents, for the whole period of their service were fully paid through the mode expressed in the agreement.

c) That it was irrational illogical, wrong and improper for the Arbitrator to have reached a conclusion that the agreement for Mkono wa Kwaheri entered between the applicant and the respondents was not binding.

d) That the Arbitrator failed miserably to grasp the fact that the respondents were removed at the instance of the Circular from the President's Office Reginal Administration and Local

Government which required their posts to be filled in by people whose levels of education are form six or Diploma, the respondents did not meet the requirements.

e) That it was illogical, irrational, wrong and improper for the Arbitrator to admit exhibit P1 on his own motion without even affording an opportunity to the applicant to scrutinize it.

f) That arbitrator improperly recorded the evidence of DW2 and came up with words which were not uttered by the said witness.

In this court parties were represented as follows; , Mr. Mahenga, Advocate assisted by Ms. Flora Advocate for the applicant, and Mr. Christopher mumanyi, a personal representative for the respondents. The application was heard by way of written submission.

Faulting the Arbitrator's decision, Counsel for the applicant submitted that the decision to pay uniform rate to all respondents ignored clear terms of the agreements between the respondents and ward development committees on one hand, and between the respondent and applicants on the other. Those terms were, and I quote for easy of reference:-

- Kulipwa mshahara wa kima cha chini cha mshahara wa serikali iwapo nitatimiza lengo la makusanyo.
- Kulipwa mshahara ambao ni chini ya kima cha chini cha mshahara iwapo nitashindwa kutimiza lengo.
- Kulipwa mshahara ambao unalingana na asilimia ya mapato niliyokusanya ikilinganishwa na lengo la mwezi husika niliopewa na halmashauri ya manispaa ya Kinondoni.
- Kulipwa na halimashauri ya manispaa ya Kinondoni asilimia kumi ya mapato zaidi ya lengo niliyopewa na halmashauri katika mwezi husika.

From the above, the respondents' payment was to be based on an individual performance hence their entitlement cannot be uniform as per Arbitrator's finding. He further submitted that after the respondents signed a "Mkono wa heri," the terms were clearly that they don't have any claim against the applicant. May be more important, Counsel submitted that the respondents were not employed by the applicant but by the Ward Development Committee which operated under Chief executive officer and councilor **s.**

In opposition, Mr. Mumanyi submitted that; the respondent's employment by the applicant was confirmed by the letter dated 20/07/2002; and that by the letter dated 10/10/2002, the Kinondoni Municipal Director directed all ward executive officers to allocate the respondents their respective places of work. Basically the representative was stressing that;

- the respondents were working under the applicants' instruction
- that they were paid by the applicants; and hence were employees of the applicant as decided by the CMA Arbitrator.

After evaluating the parties' arguments, the evidence on record including the reasons for decision articulated in the award, in light of the relevant law, I am of the view that the decisive issue is:-

1) Whether the Arbitrator's finding that there was an employment relationship between the parties was illegal.

I wish to commence by repeating a general observation I made in a case where an issue of determination of employment relationship arose. In that case of, **Mwita Wambura v. Zuri Haji, Reviosion No. 45/2012 LC (Mwanza Sub Registry)** I stated that:

> "The issue of determination of existence of employment relationships is a complex one, particularly now, given an increase in flexible work arrangements which invariably, also increases incidents of disguised employment relationships. For that reason, the issue was given special focus by the ILO, in the 95th Session of the International Labour Conference- (2006 Report V(1).
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> The report gives a comparative analysis of legislation on definition of employment relationships and principles governing determination of existence of employment relationship developed by case law, from different ILO member states which fundamentally apply similar ILO standards. Clearly demonstrated in the Report is that, different counties have different definitions and there are no hard and fast rules regarding how to determine existence of employment relationship but, there are a number of common factors running through which can aid a decision maker in determining existence of an employment relationship.
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> These principles are, among others, **a)** defining employment relationship by looking at parties roles, considering matters among others; *dependency, subordination, direction, supervision and control of services rendered;* (page 19 to 23 of the report) **b)** principle of primacy of facts- looking at what was actually agreed and performed by each of the parties' **c)** use of burden of proof, (From page 24 and 28 of the Report respectively). I will indicate below how the principles above are applicable in this case. The purpose of the discussion above is show that in determining the issue, the Court or CMA can legitimately seek help in interpreting national law, by looking at relevant ILO Convention and Recommendation, opinion of the ILO Committee of experts on the issue, and judicial practice of Courts in comparable jurisdictions.

In Tanzania, ...an employment relationship in terms of the national law? An employment relationship is defined in terms of who is **an employer,** and who is **an employee** under Section 4 of the *Employment and Labour Relation Act,* No. 6 of 2004 (ELRA). That section has to be read together with Section 61 of the *Labour Institution Act*, No.7 of 2004, which provide factors to be considered in presuming existence of employment relationship. The Section provides, and I quote:-

"For the purpose of labour law, a person who works for, or renders service 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 factor is present;

(a) **The manner in which the person works** is subject to the control or direction of another person;

(b) The persons hour of work are subject to the **control or direction** of another person;

(c) In the case of person's work for an organization, the person is 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 who that person works or render service;

(f) The person is provided with tools of trade or works equipment by the other person; or

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

The above factors are tailored along principles contained in the ILO Employment Relationship Recommendation 198 of 2006, which provide in paragraphs 9 and 13 that;

"9.....protection for workers in an employment relationship, **the determination** of the existence of such a relationship **should be guided primarily by the facts relating to the performance of work and remuneration of the worker**, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may be agreed between the parties.