

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 33 OF 2019

*(Originated from the Award of the Commission for Mediation and Arbitration for
Mbeya in Complaint No.CMA/MBY/CHY/127/2018)*

CHINA RAILWAY 15 BUREAU CORPORATIONAPPLICANT

VERSUS

JUMANNE ANTONY NTEMINYANDARESPONDENT

JUDGMENT

Date of Judgment: 13/10/2020

A.J. Mambi, J

This is an application for revision of the Commission for Mediation and Arbitration (CMA) at Mbeya Decision and award dated 07-11-2019 from the *Complaint No.CMA/MBY/CHY/127/2018*. The application was brought under Rule 24(1) & (2) (a), (b), (d) (e) (f) and 3 (a) (b), (d), 28(2) & (2) (a), (b), (d) (e) (f) and Rule 91(3) of the Labour Court Rules G.N.NO.106 of 2007. The application is supported by an affidavit sworn by one **ALEX DONATUS SANGA**

(the applicant's Human Resource Person). While in the affidavit, the applicant fault the CMA awards, in his chamber summons supported by an affidavit, the applicant presented the following prayers to this court:

- 1. That, the Honourable Arbitrator erred in law and Facts that the termination was fair*
- 2. That, the Honourable Arbitrator erred in law and Facts in reaching his decision without analysing evidence*
- 3. That, the Honourable Arbitrator erred in law and Facts for failure to consider some facts before reaching his decision*

During hearing, the applicant was represented by the learned Counsel Mr. Richard Baruti, while the Respondent was represented by the learned Counsel Ngwale. Earlier at the CMA, the respondent/employee successfully filed a labour dispute based on breach of contract against his employer (the applicant). The CMA made the decision in favour of the respondent. The records reveal that the CMA decided that the employer/applicant had breached an employment contract for a specific period of time without justification and ordered a relief of the sum of shillings 1,691,000/- to the respondent/employee.

Aggrieved, the applicant has now made an application for revision of the decision of the CMA award. Parties agreed to argue the matter by way of written submissions and this court ordered parties to do so. In his submission, the learned Counsel for the applicant Mr. Baruti faulted the Arbitrator's findings that the burden of proof on

breach of employment contract lies to the employer. He argued that in dispute for breach of employment contract, the burden of proof lies on the employee and not the employer. He contended that the respondent was not the employee of the applicant on a specific period of time for a contract of six month. He argued that the respondent testified failed to tender the contract before the CMA during trial. He averred that the CMA Arbitrator erred in law to shift the burden of proof to the applicant/employer. He was of the view that the Respondent did not proof the existing contract of employment between him and the Applicant.

He referred the decision of the court in **YAAQUBISMAIL ENZRON vs. MBARAKA BAWAZIRI FILLING STATION** Revision No.33 of 2018(unreported).

In response, the learned Counsel for the Respondent Mr. Ngwale submitted that during cross examination the respondent testified that he was employed by the applicant for a contract of six month in which the contract started from 12/05/2018. He argued that the applicant at the CMA admitted that the respondent was his employee who served for one month and there was a case before the District Court of Chunya and denied to have terminated his employment. He averred that the applicant is trying to escape from liability on basis of contradiction that arise from the testimonial evidence of DW1 one Donatus Sanga a Human Resource Officer before the CMA. He was of the view that the testimonial evidence of

the respondent has proved on balance of probability unlike in criminal case where it has to be proved beyond reasonable doubt.

The learned Counsel further submitted that the respondent was the employee of the applicant and he was a driver of the truck marked J.V 15 at the door. He argued that even the applicant's witness (DW1) admitted that there is a truck at the applicant office which marked as J.V 15 and the respondent had an employment contract for a specific period of 6 month. He contended that the applicant has no strong ground to challenge the CMA award apart from wasting time of this court.

I have keenly perused the documents and the whole file to satisfy myself on the issues raised by both parties. In my considered view, the applicant's claims may form one main issue that is whether the respondent had the contract with the applicant. The other issue to be determined by this court is whether there was a breach of employment contract and who did breach the contract.

My perusal from the records indicate that there was a contract between the applicant and respondent. This is evidenced by the evidence of both parties where there were some witnesses by the applicant who also in way or another admitted that there was a contract between the parties hence employee and employer relationship. It should also be noted that burden of proof in breach of employment contract cases, is governed by section 15 of the ELRA read together with Section 60 of the Labour Institutions Act, No. 7/2007. It is trite law that 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, so long as the factors enumerated under stated under Section 61 of the Labour Institutions Act, No. 7 of 2007 are complied with. In my considered view and basing on the evidence and facts of the case at hand the respondent proved at the CMA that he had been working as an employee for the applicant in a position of a truck driver. The respondent in his evidence mentioned the type of the truck and its number, the fact which was also admitted by the applicant witness who was at the management team. The burden to prove if the respondent was employed or not and his terms of his employment lies on the applicant as per section 15 (6) of the Employment and Labour Relations Act (ELRA) 2004. For easy reference, I wish to quote that provision which provides that:

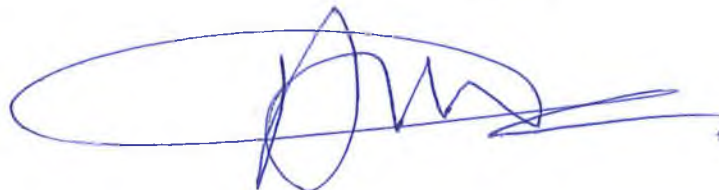
“15 (6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer”.

From what I have observed and basing on my above reasons, I am in agreement with the decision of findings of the Commission for Mediation and Arbitration (CMA) that there was a contract between the parties and it is the applicant who breached the contract. I have indeed gone through all issues and complaints raised by the applicant and found the CMA properly addressed itself to all issues and rightly made a decision in its award.

Basing on the above findings and reasons, I have no reason to fault with the decision of the Commission for Mediation and Arbitration (CMA) rather than upholding it.

In the circumstances, this appeal is dismissed and the applicant will only be entitled to the payment of total amount of **1,691,000**.

Given the circumstance of this case, each party shall bear its own costs.



A. J. MAMBI
JUDGE
13.10.2020

Ruling delivered in Chambers this 13th day of October 2020 in presence of both parties.



A. J. MAMBI
JUDGE
13.10.2020

Right of appeal fully explained.



A. J. MAMBI
JUDGE
13.10.2020