IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 363 OF 2019

BETWEEN

RASHID MWEMA ..... APPLICANT

VERSUS

ELIAS NONNIOUS MAPOGA ..... RESPONDENT

JUDGMENT

Date of Last Order: 19/03/2020

Date of Judgment: 24/04/2020

S.A.N. Wambura, J.

Aggrieved by the Award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] delivered on 11th March 2019, the applicant **RASHID MWEMA** has filed this application under the provisions of Sections 91(1)(a), 91(2)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as ELRA] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007 praying for the following Orders:-

1. *That this Honourable court be pleased to call for records, examine and revise the proceedings, award and orders of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.366/18/277 by Hon. KIANGI, N. Arbitrator, dated 11th March, 2019.*
2. *Any other relief this Honourable Court deems fit and proper to grant.*

The application is supported by the sworn affidavit of the Applicant.

The respondent **ELIAS NONNIOUS MAPOGA** challenged the application through the counter affidavit of his Advocate Hamis Athuman Mbagwa who represented him. At the hearing of the matter the applicant was represented by Mr. Stephen Mboje Advocate.

Mr. Mboje prayed to adopt the applicant's affidavit to form part of his submissions. He consolidated his grounds for revision to form two grounds.

In the first ground he submitted that the Arbitrator erred in holding that the applicant was a casual labourer. He alleged that there is no dispute that the applicant rendered services to the respondent as stated in

Page 9 paragraph 2 of the award. The working hours were from 12:00 am to 8:00 pm daily.

Mr. Mboje referred to Sections 4 and 61(a)-(f) of ELRA which defines who is an employee. He submitted that the applicant was working at the respondents premises. That a Casual labourer is not defined in the ELRA. He further argued that the issue of a casual labourer was raised by the respondent who ought to prove the same by showing the working hours and payment modalities on the ground that the applicant was an employee of the respondent.

In the second ground he submitted that the Arbitrator did not evaluate the evidence properly by selecting and abandoning some crucial evidence. That the applicant was cleaning cars, feeding chicken and attended duty from 12:00 am to 8:00 pm as reflected at page 19 paragraph 3 of the award. Therefore the applicant was under the control of the respondent.

In reply, Mr. Mbangwa submitted that issues were framed, the main issue was whether there was an employer/employee relationships. That no witness managed to prove that the applicant was employed by the respondent, either orally or by written contract.

Mr. Mbangwa submitted that the Arbitrator properly conducted the hearing and there is no ground for faulting the award. The procedures were all adhered to as per Section 88(4) and (5) of ELRA and Rules 18 to 22 of the Labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2004. He further stated that since all the procedures were adhered to, the award was thus accordingly issued in favour of the respondent.

He thus prayed for the application to be dismissed and the applicants be ordered to pay damages at the tune of Tshs. 15,000,000/= for mental torture and physiological effects caused by the applicant to the respondent as well as costs of this case.

In rejoinder Mr. Mboje argued that they do not dispute that the issues were framed. They are challenging CMA's award for considering the applicant as a Casual labourer while he was not as he was employed under an oral contract as well as the number of hours which the applicant spent working for the respondent.

He further stated that the respondent does not dispute the services were rendered by the applicant, and that is what is stated under Section 61 of ELRA. He thus prayed for the decision of CMA to be quashed.

I believe the issues to be considered by this Court are:-

(i). Whether or not there was an employer/employee relationship, if yes

(ii). Whether the applicant was employed by the respondent, if yes

(iii). Whether the respondent had a valid reason for terminating the applicant.

(iv). Whether the respondent adhered to the procedures of terminating the applicant.

(v). The reliefs which the parties are entitled to.

1. Was there an employer/employee relationship?

To respond to this question I wish to refer to the case of **Mwita Wambura Vs Zuri Haji,** Revision Application No. 42/2012 at Mwanza reported in LCCD 2014 Part II at page 182 which stated that:-

"...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. 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.

.... the Court or CMA can legitimately seek help in interpreting law, by looking at relevant ILO Convention and Recommendation, opinion of the ILO Committee of Experts on the issue and judicial practice of court in comparable jurisdiction."

In our laws employment relationship has been defined under Section 4 of the Employment and Labour Relations Act No. 6 of 2004. It defines who is the employer and who is the employee. This section has to be read together with Section 61 of the Labour Institution Act No. 7 of 2004 which provides for factors to be considered when presuming the existence of an employment relation which I herein quote:-

> *"Section 61 For the purpose of 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 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 tools of trade or works equipment by** the other person.*

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

[Emphasis is mine].

CMA found that the employment contract if any was one of casual employment which the applicants have challenged.

Having gone through CMA's record I have noted that the applicant was not paid monthly which bears a factor of economic dependence of the applicant to the respondent. There was also no direct supervision of work by the respondent. It is on record that even the work equipments were not

supplied by the respondent. The hours of work were also not subject to the control and direction of the respondent.

Now since there is no proof that the applicant was working under the control and direction of the respondent from 2003 up to 2017 when he was allegedly terminated, which in my view is a fundamental aspects for establishing employment relation, it is obvious that there was an employer/employee relationship between the applicant and respondent but which according to Section 35 of ELRA does not apply and cannot be entertained by the law.

The applicant has even failed to issue a break down as to how he came about the claim of Tshs. 44,000,000/=.

One cannot be paid his salary for years and remain quiet without complaining to anyone for over ten (10) years. The allegations of PW1, PW2 and PW3 that he was performing specific tasks from one employer to another does in the circumstances hold water.

According to the evidence of DW1, DW2, DW3, PW1, PW2 and PW3, I believe the applicant was employed to perform certain tasks only such as

car washing, gardening etc and was paid on daily basis as provided for under Section 14(1)(c) of ELRA.

Since there was no proof of contract of employment nor proof of termination the matter was even not supposed to have been filed at CMA as per Section 35 of ELRA which provides as herein quoted:-

*"Section 35 The **provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer**, whether under one or more contracts."*

[Emphasis is mine].

In the case of **Charles Filipo Machengejo V. District Executive Director, Mwisungwi District Council**, Lab. Div., MZA, Rev. No. 52 of 2014 the application was dismissed on the ground that CMA's and Court's powers are ousted by Section 35 of the ELRA.

In the circumstances, I find no reason to fault CMA's award that there was no employment relationship between the parties.

Due to these findings I also find the 2nd, 3rd and 4th issues to be answered in the negative and will not deal with them here for there was no

employment relationship thus the issue of substantive and procedural fairness in termination cannot arise.

2. What are the reliefs entitled to each parties?

This application lacks merit and I dismiss it accordingly. The respondent has prayed for damages and costs. However these cannot be granted for apart from want of jurisdiction they have not even been justified. The issue of costs is rarely granted in this Court and nothing has been stated to prove that the proceedings are frivolous and vexatious as provided for under Rule 51 of the Labour Court Rules, 2007.

S.A.N. Wambura
JUDGE
24/04/2020