IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

REVISION APPLICATION NO. 35 OF 2019

(Originating from Labour Dispute No. CMA/ARS/ARB/145/2018)

ARUSHA CITY COUNCIL ..... APPLICANT

Versus

HEMED HAMIS ..... 1ST RESPONDENT

GEOFREY JAMES ..... 2ND RESPONDENT

JUDGMENT

3rd June & 15th July, 2021

MZUNA, J.:

Arusha City Council (the applicant herein) is challenging the findings of the Commission for Mediation and Arbitration for Arusha (the CMA) which adjudged that **Hemed Hamis and Geofrey James** (the respondents herein) were unfairly terminated. Subsequent to that findings, the CMA awarded compensation of 12 months' salaries being Tshs 4,200,000/= for Hemed as well as Tshs 3,600,000/= for Geofrey. Such payment, was to be effected within a period of 21 days from the date of the award. In addition, there was an order of issuing certificate of service.

The facts in brief show:- The respondents claimed that they were employed by the applicant as toll collectors whereby the first respondent was collecting tolls in the Ausha main bus stand while the second respondent was collecting at the mini bus stand. The first respondent was employed on

14/7/2013 while the second respondent was employed on 1/7/2013. Their salaries were Tshs 350,000/= and 300,000/= respectively. They claimed that they were given working tools by the applicant and they were even supervised by the applicant's employees. After collecting the stand fees, the respondents submitted them to the respondent's accountant, and they were paid wages by the respondent. The respondents stated that they were unfairly terminated from their employment by PW1 Shemakange, the applicant's employee on

on 31/8/2017, leading to this dispute.

On her part, the applicant denied to have employed the respondents, stating that she never had any employment relationship with them. That, the respondents were employed by SAGI Enterprises to which the applicant entered into a contract with, as an agent in 2013. The said Agent of the applicant collected tolls in both the main and the mini bus stands. The contract ended in 2016. After ending the contract with SAGI Enterprises, the applicant engaged another agent by the name of Tambaza Auction Mart. The applicant denied to have engaged private individuals in collecting bus stand fees.

The CMA in its findings found that the respondents were employed by the applicant because the applicant never tendered a contract between them and SAGI Enterprises, second that the respondents depended on the applicant economically; that they used the working tools of the applicants like uniforms

as evidenced by exhibit D1 which is the uniform with the applicant's logo; That even Exhibit D2 which was the attendance register supported such employment; Exhibit D3 are four typed messages, purported to be extracted from the respondents' mobile phone, that were tendered. That it was a proof that the respondents were communicating with the applicant's employee, one Caren. The rollers were also used as evidence against the applicant.

In the statement of legal issues, Mr. Mkama Musalama, learned State Attorney for the applicant raised two points 1. The Arbitrator did not consider the respondent's evidence. 2. That the award was improperly procured by over reliance on an inadmissible evidence of the respondents.

In this revision, the main issues are:- **Whether the respondents were employees of the applicant**, (if the first issue is answered in affirmative); Second, **Whether their employment was fairly terminated.**

Let me deal first with the complaint that the CMA did not consider the respondent's evidence in his decision.

Mr. Msalam insisted that the respondents were employed by SAGI Enterprise as the agent of the applicant in collecting the bus stand revenues, therefore they were responsible to the agent and not to the applicant. On her part, Ms Saad submitted that the applicant failed to bring any evidence to prove existence of any contract between the applicant, SAGI Enterprises and Tambaza Auction Mart. Therefore, in terms of section 110 of the Evidence Act, the

applicant failed to prove the allegation that the respondents were employees of SAGI Enterprise. Ms Saad further argued that while testifying, PW2 stated that at the time of emergency, the applicant employs any officer who is being paid from its own sources. Therefore, since the applicant had no contractual relationship with any agent for revenue collection it was the learned advocate's view that they employed the respondents for that purpose.

This court is of the view that merely because the CMA decided against the applicant, does not mean that the evidence was not considered. Reading from the CMA award it is clear that evidence both for the applicant as well as that of the respondent were considered. This complaint fails.

Another complaint is on procedural defects, that the CMA award was improperly and irregularly procured because exhibit D3 which was electronic evidence according to Mr. Musalama it was admitted in contravention of section 18(2) of the Electronic Transactions Act, No. 13 of 2015. Section 18(2) and (3) of the same Act requires a person who intends to tender such document to produce certificate of a senior officer of the system. He cited the case of **Serengeti Breweries Limited Vs. Break Point Outdoor Cateries Limited**, Commercial Case No. 132 of 2014 (unreported). He insisted that the tendering of exhibit D3 did not meet the above criteria, therefore it was wrongly admitted.

On her part regarding the admission of the exhibits, Ms Saad was confident that they were properly admitted. Exhibit D3 was admitted and the applicant's counsel did not bother to question on its functioning. Moreover, the respondents were the owners of the phone and the originator as well as the receivers of the text messages, therefore it was properly admitted under section 18(2)(d) of the Electronic Transactions Act. She stated that the cited case of **Serengeti Breweries Limited** (supra) is distinguishable since it has different facts compared to the case at hand, because in the case at hand certificate was of no importance since the device was produced in the CMA.

Ms Saad also faulted the applicant's counsel submission stating that the arbitrator did not solely rely on exhibit D3, he relied among others on section 61 of the Labour Institutions Act. Regarding the amount awarded to the respondents Ms Saad supported the CMA award stating that the respondents were terminated from employment verbally, therefore the award of 12 months salary was proper. In concluding, the learned advocate for the respondents implored the court to dismiss the application for being devoid of any merits.

I have to determine the admission of Exhibit D3 typed messages purported to be extracted from the respondents' mobile phone, that were tendered. The question is, were they properly admitted?

I have carefully examined the said four typed messages, as a proof that the respondents were communicating with the applicant's employee, one Caren.

First, the messages do not refer the applicant in any case. Second, the alleged messages, are not print out, rather they are typed ones. Further, there is no proof that the CMA Arbitrator or the applicant viewed the messages while in the mobile phone prior to their typing. That being the case, their authenticity is questionable. In any case, exhibit D3 did not meet the requirements stipulated under section 18 of the Electronic Transactions Act, on admissibility of electronic evidence. The case of **Serengeti Breweries Limited** (supra) applies because there is need for certificate certifying the manner in which the data message or computer stored information was generated, stored, and communicated and how the original was identified.

I have to say though in passing, there is also something strange on the procedure that was applied in admitting exhibitP1, P2 and P3. When the applicant's counsel objected its admission, a ruling was not delivered regarding that objection, instead, the said ruling was incorporated in the award. That is a serious error. The CMA arbitrator ought to have delivered the ruling in respect of the objections prior to composing the award. Further, the said exhibit D3 is not labelled as an exhibit, for easy identification. I therefore agree with Mr. Musalama that exhibit D3 was erroneously admitted, and in fact it has no connection with the applicant and respondents' employment relationship. The CMA Arbitrator should have not admitted it.

This takes me to the substantive part of the award, *the first question relevant for the first issue is whether the termination was substantively fair? In*

other words, are the respondents' employees of the applicant in view of the provisions of section 61 of the Labour Institutions Act?

According to Mr. Musalama, the CMA award was in error for relying on section 61 of the Labour Institutions Act stating that presumption of employment principle is inapplicable in the case at hand. He relied on the evidence adduced in the CMA. He fortified that the respondents were under control of the agent, and there is no proof of employment contract between them and the applicant. That exhibits D1, D2 and D3 never proved employment relationship despite the fact that they were improperly admitted after being objected by the counsel for the applicant in the CMA.

As far as exhibit D1 which is the uniform with the applicant's logo is concerned, Mr. Musalama fortified that presence of the logo itself does not justify that the applicant employed the respondents. He added that the logo and the uniform can be made by any person. Regarding the rollers, he submitted that they were empty rollers which cannot prove that they were of the applicant. In so far as the receipt is concerned, he said that, it has nothing to do with the applicant since the same ought to have been in the possession of the customer.

Regarding Exhibit D2 which was the attendance register, he submitted that it has no correlation with the applicant since it is only couple of papers with no front page indicating the applicant's name and logo. He reiterated that even the applicant's employee that is said to supervise and signing the attendance

register was not called to testify, therefore the respondents were under the supervision of SAGI Enterprise and not the applicant.

Further, that the respondents were economically dependent on the agent who was paying them remuneration. That there is no proof that the respondents were paid salary by the applicant, since the applicant pays her employees via bank accounts and not in cash as contended. To amplify the point that there was no employment relationship between the applicant and the respondent, Mr. Musalama cited the case of **George Kitinda Mwakasitu Vs. Temeke Municipal**, Labour Revision No. 948 of 2018, H.C DSM Labour Division, unreported. The learned State Attorney, implored the court to revise, quash and set aside the CMA award.

In response, Ms Saad the learned counsel, submitted the CMA award was correct in relying on section 61 of the Labour Institutions Act because the respondents were under direct control of the applicants. They were issued with machines, rollers and other equipment by the applicant. They were reporting to the applicant a fact which was not disputed by anyone in the testimonies.

In his rejoinder submission, Mr. Musalama reiterated what he stated in his submission in chief.

The nagging issue is on the definition of employee within the provisions of labour laws, in particular section 61 of the Labour Institutions Act. The term

employee under section 4 of the Employment and Labour Relations Act, Act No 6/2004 has been defined to mean an individual who-

(a) Has entered into a contract of employment; or

(b) Has entered into any other contract under which-

(i) The individual undertakes to work personally for the other party to the contract; and

(ii) The other party is not a client or customer of any profession, business, or undertaking carried on by the individual; or

(c) (N/A).

It is therefore a condition precedent that an employee must enter into a contract of employment alternatively there may be any other contract. However, under section 61 of the Labour Institutions Act, Act No. Act No. 7/2004, there are factors listed in (a) –(g) which must also exist. It is here where points like his/her work as well as hours of work are under control of another; must work for an average of 45 hours per month over the last three months; is economically dependent on the other person; is provided with tools of trade or work equipment by the other person (among others) comes into play. There is also issue of particulars of the contract to include what is listed in section 15 (1) (a) –(i) of the Employment and Labour Relations Act (No 6/2004). It includes hours of work and remuneration (among others), as stated in 15 (1) (g) and (h). In the case at hand, as a matter of law, if the respondents were employed by the applicant, the latter ought to have given them a written contract of employment. The respondents did not tender

"contract of employment" or proof of payment or any other evidence showing the mode of payment. They merely said that after collecting tolls, they submitted to the respondent's accountant (in our case the present applicant) and then pay them salaries when ready. Seemingly, there was no defined mode.

I happened to deal with similar issue in the case of **Jackline Mwingira Vs National Parking Solutions,** Revision No. 778 of 2018, Labour Division, at Dar es Salaam (unreported). Jackline Mwingira worked for National Parking Solutions (NPS), the respondent. She was paid on commission basis depending on their collections. In the beginning payments were made daily, weekly and then monthly. It ranged from Tshs 85,000/-, 95,000/- and sometimes 100,000/- depending on the collected amount. There were also deductions for NSSF.

The said NPS had a contract with the City Council of Dar es Salaam to collect parking levy as an agent. The NPS sub contracted to other sub agents including the applicant who were issued with receipts and uniforms as working tools. Her contract started in May, 2006 and came to an end on 4th November, 2017.

The applicant had her contract of employment terminated after the City Council found another Agent instead of the NPS and therefore asked to be paid terminal benefits. However, the CMA found that she had no such rights because she was not an employee within the law. The High court dismissed her revision for the simple reasons that she being a sub agent was not an employee within the law as her payment was based on commission basis and there being no any

defined prescribed method of payments of remuneration. The court awarded her contribution/deductions submitted at NSSF/PPF only.

I am convinced, the respondents had no employment contract with the applicant otherwise ought to have tendered copies. It seems, they were paid on bonuses.

In the case under consideration, the main complaint put forth by Mr. Musalama is on the admission of the exhibits D1, D2 and D3 by the CMA. He amplified that the 3 exhibits do not correlate the applicant and the respondents' employment relationship. As the record speaks, exhibit D1 was the respondent's uniforms and rollers which the respondents claimed that they were given to them by the applicant as working tools. However, Mr Musalama acknowledged it stating that presence of the logo itself does not prove employment relationship between the applicant and the respondents. I agree with him. The fact that the said uniform and rollers as well as receipts contained the applicant's name and logo, does not conclusively mean that the respondents were the applicant's employees. There must be some written form either as contract or otherwise as proof of the existence of that relationship. Therefore, exhibit D1 by itself, has no employment relationship between the parties herein.

Exhibit D2, which is purported to be attendance register, has nothing proving that it was maintained or supervised by the applicant. As rightly argued by Mr. Musalama, they are just pieces of papers with names, without any title

or anything to link the applicant. Further, the papers contain various names, other than the respondents. It was not substantiated whether those other names are the employees of the applicant as well. This goes to support the applicants proposition that there was room for the respondents to enter into contact with another agent, Tambaza which they never opted for. In other words, exhibit D2 has nothing to link the applicant and the respondents. The cover, applicant's logo and title of those who signed therein are missing. Therefore, relying on that exhibit will be jeopardizing the applicant.

It is therefore worth noting that all the three exhibits tendered could not form the basis of establishing employment relationship between the applicant and the respondents.

Another complaint is the application of section 61 of the Labour Institution Act, which is the presumption of employment principle. I hasten to agree with the learned counsel for the applicant that section 61 was improperly invoked since there was no material to justify the employment relationship between the applicant and the respondents. The mere fact that the applicant failed to tender the contract between her and SAGI Enterprise, cannot by itself form the basis of shouldering her that the respondents were her employees. There is nothing on record proving that the respondents depended economically or were paid monthly salary by the applicant. There is no evidence that the respondents were under direct control of the applicant, or its subordinates. I

find that all the factors listed under section 61 were not proved which makes that provision to be inapplicable.

The evidence of PW1 and PW2 was to the effect that they collected the revenues through its agents, namely SAGI Enterprises and then Tambaza Auction Mart. The tendered exhibits by the respondents ruled against their favour, for reasons above stated. They never depended on the applicant economically or that she supervised them. The first issue is therefore determined in favour of the applicant.

Having determined the first issue in the negative, there is no need to discuss the second issue which is essentially on the fairness of procedure. Of course, I took a considerable time to think, why is it that the applicant notified the respondent about the ending of the contract with the SAG Enterprise instead of the said SAG notifying the respondents. This defect however, just like the absence of a contract with SAG or even with Tambaza, is a mere procedural defect. The applicant having proved, there was no mode of payment of salaries to the respondent, leaves no doubt that there was no employment relationship. The respondents never adduced evidence showing whether they were paid salaries. The allegation that it was monthly salary was not substantiated. Similarly, no evidence suggesting that they were paid such salaries while on leave or when they were sick. This would have showed that indeed they were dependent on the applicant. There was no termination because there was no contractual relationship. The second issue is bound to fail.

For the above reasons, the application has merits, it is hereby allowed. The award by the CMA is hereby quashed and set aside. I make no order as to costs.

Order accordingly.

M. G. MZUNA
JUDGE.
15/7/2021.