

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

REVISION NO. 281 OF 2016

BETWEEN

PAULO JOSEPH MNYAVANO APPLICANT

VERSUS

ANDREW MƘANGAA RESPONDENT

JUDGMENT

Date of Last Order 09/07/2018

Date of Judgment 17/08/2018

NYERERE, J.

In this application applicant/ **PAULO JOSEPH MNYAVANO** filed the present application seeking revision of the Commission for Mediation and Arbitration (CMA) decision and award issued by Arbitrator Masaua,A. in respect of the employment dispute No. CMA/DSM/ILA/R.226/15/617.

The applicant is alleging termination under Section 38 of the ELRA Act, No. 6/2004, that he was unfairly terminated sometime in April, between 2008 to 2015. Aggrieved by the said termination, on 15/04/2015

the applicant referred the matter to the CMA opposing the decision of the employer. The CMA entertained the matter and found that there was no employment relationship between the complainant and the respondent in that the matter was dismissed for lacking merit.

The aggrieved applicant lodged revision application whereby he is challenging the CMA decision on one ground that;

- (i) **That the honourable arbitrator erred in law and fact by relying only on one factor in establishing employment relationship between the applicant and respondent without considering other grounds on delivering the award**

In this revision the applicant had the representation of Mr. Gilbert Mushi Advocate, while respondent was represented by Mr. Abdallah Shaibu, Advocate.

Arguing the application Counsel for Applicant submitted that, Arbitrator failed to consider Section 61 of Labour Institutions Act, and the International Labour Organization (ILO) on Employment Relationship Recommendation of 2006 at page 198 in paragraphs 9 and 13, while determining whether a person is an employee or not, thus cited the case of Labour Revision No. 51/2013 between THE HEAD TEACHER OF IGANZO VS

FURAHA MONGO MWANZOMBA; Labour Revision No. 417/2013 between KINONDONI MUNICIPAL COUNCIL VS RUPIA SAID & 107 OTHERS where the court elaborated in detail the applicability of Section 61 of LIA.

Counsel for Applicant proceeded to argue that, at the CMA the applicant proved, that he worked more than 45 hours per month, he was under respondent's control, also respondent provided tools for work. Therefore Counsel for Applicant prays the CMA award be quashed and set aside.

In rebuttal Mr. Abdallah Shaibu Counsel for Respondent argued that, the arbitrator in deciding the matter had to consider economic dependence of applicant to respondent, that applicant was being paid salary at the rate of one hundred and eighty thousand Shs. (180,000/=) per month. Also, arbitrator did consider applicant other activities which he performed at the neighboring houses in return for payment; for instance farming.

In observing this factor, arbitrator made finding that applicant was not under the control or directives of the respondent and applicant's hours of work were not subject to respondent's control.

Counsel for Applicant went on to argue that there is no single evidence showing that the applicant was being provided with tools and

materials for work therefore Counsel for Applicant prays the application be dismissed.

In rejoinder Mr. Gilbert Mushi Counsel for Applicant reiterated his submission in chief, and further insisting the court is to determine factors provided for under Section 61 of The Labour Institution Act No. 7/2004 and that if the factors are independent or dependent to one another.

After carefully considered parties submission and examined CMA records, Affidavit and Counter affidavit filed in this court, labour laws and practice of this court my decision on the ground for revision is as hereunder.

The key question is whether there existed employment relationship between applicant and respondent.

It is in court records at page 4 of the CMA award, that the respondent on cross examination stated, applicant was doing ground cleaning jobs and other personal activities, and that respondent was not paying him rather assisting him with little money.

However applicant disputes this contention at page 5 of the CMA award, stating that he worked for respondent since 1999-2002 when he got sick and decided to leave to Iringa. He came back to Dar es Salaam in

2003. In 2008 respondent asked him to work in his site at Mbweni, as Security Guard for salary of 180,000/=. On 7/4/2015 respondent terminated the applicant because he, went out at night and reported back late. And that there was no employment contract.

As correctly argued by both parties, Section 61 of the Labour Institutions Act make analysis of the presumption of who is an "employee", therefore in determining whether the applicant in this case is an employee, I will utilise the "criteria" for determining who is an employee as per Section 61 of LIA, No. 7 of 2004 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 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".

I further wish to refer to the International Labour Organization (ILO) on Employment Relationship Recommendation of 2006 at page 198 in paragraphs 9 and 13 which provides;

"(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 agree between the parties.

(13).,..... the specific indicators of the existence of an employment relationship include,...

(a) the facts that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work...

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the workers sole or principle source of income; provision of payment in kind, such as food, lodging or transport; recognition or entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker".

In order to determine whether the applicant in this case is an employee, I am to evaluate four "primary criteria "for determining whether a person is an employee. These are:

- (i) the employer's supervision and control;**
- (ii) whether the employee forms an integral part of the organization with the employer;**
- (iii) the extent to which the employee is economically dependent upon the employer.**
- (iv) Person only works for or renders services to one person**

In determining so, the court is to give due weight to the contract concluded by the parties, to consider the relationship between the parties. Unfortunately in the present case there is no employment contract between the parties, as subscribed under Section 15 of the Employment and Labour Relations Act, No. 6 of 2004, in which the law require the employer to keep and provide written particulars of the contract.

That being the case, I am left to scrutinise circumstances existing in the case, whereas , in the present case there is no record to support applicant's claims; for instance, salary payment or written contract or whether the applicant was provided with tools, materials and machinery by the respondent in order to do his work. Again what was paid to applicant by respondent was little money and such remuneration cannot constitute the applicant to be sole or principle source of income because it is evidenced in record that applicant was also working in the neighbors

houses and engaged himself in farming Water Melons and Vegetables. Thus earning extra money for his upkeep. All these facts are not disputed by either party. So we cannot say that applicant solely depend on the respondent for his economy. We are left with allegation that respondent was assisting the applicant with little job and other personal activities.

On the other hand, facts suggest that the applicant/employee obeyed orders or instructions of the respondent/employer who prescribed him work to do.

I must confess, it's difficult to determine if respondent/employer had total control to the employee or there was independent service agreement between them, as it was observed herein that applicant did not solely depend on the respondent for his economy. As he was performing other independent service like, farming work to the neighbors houses. Thus against the criteria that person only works for or renders services to one person Section 61(g) of Labour Institutions Act. No. 7/2004.

However, I am convinced, the present case involves opportunism, and parties deliberately attempt to cover up the true nature of their relationship so as to avert any applicable legal implications. That being said, I am of the considered view applicant failed to prove that he was an employee. In that, I agree with the learned arbitrator reasoning that there

was no employment relationship between the applicant and the respondent, thus dismissing the application for lacking merit, in that the CMA award is hereby confirmed.



A.C. Nyerere

JUDGE

17/08/2018

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Date: 17/08/2018

Coram: Hon. S. Simfukwe, DR.

Applicant: }
For Applicant: } Absent

Respondents: }
For Respondents: } Absent

C.C. J. Kalolo

Court: Judgement delivered in chamber, this 17th day of August, 2018
in the absence of both parties who were duly informed.


S. Simfukwe
DEPUTY REGISTRAR
17/08/2018