IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 380 OF 2019

HAMIDU ABDALLAH MBEKAE ..... 1ST APPELLANT

VITUS OSMUND MKINGA ..... 2ND APPELLANT

DANIEL MNDOLWA ..... 3RD APPELLANT

HAJI ALLY BAKARI ..... 4TH APPELLANT

RAPHAEL JEUL MAKINGO ..... 5TH APPELLANT

SHIJA NICO SHIJA ..... 6TH APPELLANT

MUGISHA KAIJAGE FRANCIS ..... 7TH APPELLANT

SAAD ZUBERI MADAWILI ..... 8TH APPELLANT

HASSAN SUDI MNYAMANI ..... 9TH APPELLANT

PASCAL ANOLD ..... 10TH APPELLANT

WILLUM SIMON MLANGI ..... 11TH APPELLANT

JUMA YUSUF ..... 12TH APPELLANT

VERSUS

BE FORWARD TANZANIA CO. LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Arufani, J.)

dated the 20th day of September, 2019

in

Revision Application No. 425 of 2017.

JUDGMENT OF THE COURT

13th & 24th February, 2023

MWAMPASHI, J.A.:

This is an appeal by the appellants against the judgment of the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) dated 20.09.2019 in Revision Application No.425 of 2017 where the dismissal of the appellants' claims

against the respondent by the Commission for Mediation and Arbitration at Dar es Salaam (the CMA) in Labour Dispute No. CMA/DSM/ILA/R.350/16/424 was confirmed.

The facts relevant to the matter at hand *albeit* in brief are as follows: The appellants were among 34 drivers who filed the dispute before the CMA complaining and claiming that their employment with the respondent as drivers had been unfairly terminated. According to Form No. 1 filed by the appellants before the CMA, the appellants were employed in 2012 and were verbally terminated on 04.04.2016, the reason for the termination being operational requirements (retrenchment).

On the other hand, the respondent, the company dealing in car importation business, denied to have employed the appellants but that the appellants were just freelancer drivers who used to be engaged to transport cars imported by the company to different destinations within and outside the country. The respondent explained that after cars imported by them had been cleared from the port by their agent, the appellants used to be engaged by the agent and car owners to transport them from the port to different destinations according to the agent and car owners' directions. It was also the respondent's contention that its relationship with the appellants was only in some few aspects where for the purpose of enabling the appellants to better perform their responsibilities and duties towards car owners who were their customers, it rendered its assistance to the appellants, for instance in formalization of their association and opening its bank account.

In consideration of the fact that the appellants' claims were based on unfair termination and having in mind that the rights and remedies for unfair termination only apply to employees under contracts of service, the central issue before the CMA became on whether or not there existed an employment relationship between the

parties. The hearing and decision of the CMA therefore hinged on the above question as to whether the appellants were employees of the respondent or not.

After a full hearing, the CMA found that there was no sufficient evidence to establish that there existed employment relationship between the parties. It was found that the nature of relationship the appellants had with the respondents was of a contract for service and not a contract of service. The appellants' claim was thus dismissed. Aggrieved, the appellants referred their grievances to the High Court. Unfortunately for the appellants, the High Court confirmed the CMA decision adding that though the CMA reached at its decision basing on the finding that the engagement between the parties amounted to a contract for service, in fact the engagement amounted to a contact for a specific task as provided by section 14 (1) (c) of the Employment and Labour Relations Act No. 6 of 2004 (the ELRA) which does not entitle them to any terminal benefit. Still aggrieved, the appellants have preferred the instant appeal upon the following three grounds:

1. *That the Hon. Judge erred in law in holding that the appellants had no employment relationship with the respondent.*
2. *That the Hon. Judge erred in law by relying on contradictory evidence and or testimony of the respondent hence reaching at an erroneous decision.*
3. *That the Hon. Judge erred in law in failing to analyse all exhibits tendered by the appellants.*

When the appeal came before us for hearing, Mr. Daniel Erasmi Shao, learned advocate, appeared for the appellants whereas the appellant had the services of Messrs. Japhet Mmuru and Wilson Mafue, both learned advocates.

In his submissions in support of the appeal, Mr. Shao began by first adopting written submissions he had earlier filed on 14.02.2020. He then combined and conjointly argued grounds 1 and 3 of appeal contending that it was an error on part of the High Court to hold that the appellants had no employment relationship with the respondent and that the appellants had a contract for service while the appellants had sufficiently established the presence of a number of factors as provided for under section 61 of the Labour Institutions Act, No. 7 of 2004 (the LIA), to prove that they were employees of the respondent. Mr. shao contended that the respondent had control of the appellants who were not working for any other person and also that tools of work such as vehicles were being provided by the respondent. He further argued that there was evidence that the appellants used to report at the respondent's yard at 08.00 am and were being paid salaries. Mr. Shao went on submitting that the appellants had identity cards (Exhibit D1) issued to them by the respondent and further that the bank statements clearly showed that the appellants were being paid salaries by the respondent. He also referred the Court to Exhibits D3 comprising two letters, the first one written by the respondent introducing PW1 to Kinondoni District Court as the respondent's employee and the second being a recommendation letter written by the respondent's Human Resource Officer issued to the 5th appellant.

In regard to the 2nd ground of appeal on the complaint that the respondent's evidence was contradictory, Mr. Shao relied on the decision of the Court in **Shukuru Tununu v. Republic,** Criminal Appeal No. 243 of 2015 (unreported) arguing that it is trite law that existence of contradictions and inconsistencies in evidence is a basis for finding lack of credibility of witnesses. He pointed out that DW1 and DW2 gave contradictory evidence on the name of the drivers' association. While DW1 said the

name was Umoja wa Madereva wa Be Forward, DW2 claimed it was Umoja wa Madereva Dar es Salaam and according to the constitution of the drivers' association (Exhibit BF1), the name is Be Forward Drivers Association Tanzania. Another piece of evidence Mr. Shao found to be contradictory was on the question as to whom were the appellants as drivers dealing. It was argued that while DW3 said the appellants were dealing with JAMAB Clearing and Forwarding Company, according to DW1 and DW2, the appellants were dealing with the respondent.

Mr. Shao concluded his submission by insisting that the appellants were employees of the respondent and further that the High Court relied on the respondent's contradictory evidence hence reaching at an erroneous decision to the detriment of the appellants. He thus prayed for the appeal to be allowed by up-setting the decision by the High Court which confirmed the decision of the CMA and allowing the appellants' claims as presented in the CMA.

Mr. Mmuru who took the floor to argue against the appeal, made it clear, at the outset, that the appeal is baseless and that it should be dismissed. He also pointed out that he would respond to the three grounds of complain as raised by the appellants, conjointly focusing on whether there existed employer- employee relationship between the parties. He then referred us to page 107 of the record of appeal where there is Form No. 1 in which it is indicated that the appellants' claim was for unfair termination on account of operational requirement. It was further contended by him that there was evidence in abundance showing that the appellants' engagement with the respondent was dependent on the availability of imported cars that needed to be transported to different destinations. On this, we were referred to the evidence given by DW1, DW2 and DW3.

Mr. Mmuru further submitted that in the appellants' engagement to transport the cars, the respondent had no control over the appellants. He insisted that since the evidence show that after the appellants had delivered the cars to owners they returned to Dar es Salaam and stayed home waiting the availability of other cars, their contract with the respondent, if there was any, was for a specific task as provided under section 14 (1) (c) of the ELRA which is not covered by Sub Part E of ELRA. Mr. Shao further contended that since contracts for specific tasks are not covered by Sub Part E of ELRA which caters for unfair termination of employment, the appellants could not have, at first place, claimed before the CMA for unfair termination. To cement this argument, Mr. Mmuru put reliance on the decision of the Court in **Asanterabi Mkonyi v. TANESCO**, Civil Appeal No. 53 of 2019 (unreported).

Mr. Mmuru also submitted that what used to be paid to the appellants was not salary but allowances basing on the type and engine capacity of the cars involved. This is why the amount paid, according to bank statements tendered in evidence, for every appellant, differed between one month and another, he argued. He also contended that the reason the respondent permitted the appellants to open their bank account in its name was well explained by DW2. As regards the identity cards and the recommendation letter, it was argued by Mr. Mmuru that that was not evidence to prove the existence of employment but it was done for assisting the appellants to better perform their duties for instance when the appellants had to enter the port premises.

For the above reasons and arguments, Mr. Mmuru concluded that the High Court did not err in confirming the decision by the CMA dismissing the appellants' claims. He

prayed for the dismissal of the appeal because the appellants had no right to sue for unfair termination and their contracts with the respondent were for specific tasks.

In his brief rejoinder, Mr. Shao insisted that the appellants were employees of the respondent because they were being paid salaries and had identity cards issued by the respondent.

We have closely examined the record of appeal and the submissions made by the learned counsel for the parties. We are of the considered view that the main decisive issue for our determination as it was before the CMA and the High Court, is on the kind or type of contractual relationship that was created from the parties' engagement.

Mindful of the fact that questions of burden and standard of proof in civil proceedings are of paramount importance in the determination of such cases, we find it proper to begin our deliberations with firstly addressing the question of who, between the parties, had the burden to prove the issue in dispute before the CMA and thereafter we will see whether the issue in dispute was proven to the required standard or not.

It is undisputable that according to CMA F1 as presented by the appellants before the CMA, the appellants' claim against the respondent was for unfair termination. The complaint before the CMA as referred to by the appellants was that the respondent had unfairly terminated them from employment. Ordinarily, according to section 39 of the ELRA, the burden was upon the respondent to prove that the termination was fair. It is provided under section 39 of the ELRA that:

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair".*

It is clear from the above, that, the applicability of section 39 of ELRA presupposes the existence of employment relationship between the parties, that is, employer-employee relationship. So, it is only where such relationship between the parties exists and where a dispute arises concerning termination of employment, when the burden of proof is placed upon the employer to prove that the termination was fair.

In the case at hand, the respondent's resistance against the claims by the appellants was, from the very beginning of the proceedings before the CMA, that there was no employment relationship between the parties. It was strongly denied by the respondent that the appellants were its employees. In effect, the respondent's defence turned the issue in dispute from whether or not the termination was unfair to the issue whether the parties had employment relationship or not. This did also turn the place on whom the burden of proof was. Since the main issue, as also rightly stated by the CMA, became whether the parties had employment relationship or not, then the burden of proof was upon the appellants to prove the existence of such relationship, that is, whether they were employees of the respondent.

Having placed the burden of proof of the above stated main issue on the appellants, we now turn to another crucial issue relevant to this appeal on whether, on balance of probabilities and on the evidence on record, the appellants managed to prove that there existed between them and the respondent, employment relationship, that is, whether they were employees of the respondent.

Without beating around the bush, we are of the settled view that, as it was found by the CMA and confirmed by the High Court, the evidence on record do not show that there existed any employment relationship between the parties. We agree with Mr.

Mmuru and the High Court that there is no sufficient evidence on record proving that the appellants were employed by the respondent on permanent terms. There is evidence in abundance showing that the appellants' engagement or relationship with the respondent was based on contracts for specific tasks. The appellants used to be hired to transport cars imported by the respondent from the port of Dar es Salaam to different destinations within and outside the country and their contracts terminated upon the cars being safely delivered to car owners. The evidence to that effect did not only come from the respondent's witnesses but also from the appellants' side. At page 224 of the record of appeal there is evidence from one Shija Nico Shija (PW2) which goes as follows:

> *"Utaratibu wa kazi tunasikiliza kama gari zimetoka tunapigiwa simu tunaenda kuchukua gari na hela then tunasafirisha. Awali tulikua tunakusanyika yard tunasaini asubuhi then tunasubili maelekezo. Ilikuwa kama kuna gari wanapangiwa madereva kulingana na kiwango na magari".*

As testified by PW2, the appellants' engagement or contract with the respondent was on specific task. The engagements depended on the availability of cars to be transported and the appellants were being paid per trip and at the time of engagement. Further, what was being paid to the appellants was allowance and not salary. It was for that reason the amount paid to each of the appellants through their respective bank accounts was not consistent as it differed from one month to another and in some months it was not paid at all. We also find from the evidence that the respondent had no full control of the appellants who were free to work for any other person when there were no cars to be transported. We therefore do not agree with Mr. Shao that any of the tests listed under section 61 of the LIA were met by the appellants. It is also our observation that section 61 provides for presumption of

employment based on the factors listed thereunder and the presumption was successfully rebutted by the respondent. As alluded to above and as found by the High Court, no factor among the listed factors under section 61, was established by the appellants.

We have also noted that in their endeavour to prove that they were employees of the respondent, the appellants relied on identity cards (Exhibit D1), a recommendation letter for one of the appellants and a letter introducing PW3 to the District Court at Kinondoni, all of which were purportedly issued by the respondent. Another piece of documentary evidence on which the appellants heavily relied comprised of a number of bank statements (Exhibit D2) in which it is indicated that the amounts deposited in each of the appellants' bank account was so deposited as salaries and that they came from the respondent's bank account. We do not find that, under the circumstances of this matter, the said documents were conclusive evidence to prove the existence of employer-employee relationship between the parties. We find that the purposes and circumstances under which these documents were issued were well explained by the respondent's witnesses. For instance, DW1 and DW2 who were among the leaders of the appellants' drivers association testified that the identity cards were prepared and issued by the association and not by the respondent. Regarding the bank statements, it was testified that the account belonged to the association and it was the association that asked to be permitted by the respondent for the account to be opened in the respondent's name. Exhibits BF4 and BF6 were tendered in evidence to prove that the permission for the account to be opened in the respondent's name was asked by the appellants and given by the respondent. There was also evidence to the effect that the moneys to that bank account was being deposited by the association from part of the

drivers' allowances that was retained and kept as security for safe delivery of cars to the respective owners and destinations. The amount used to be kept in that account before it was later, at the end of the month, paid to the drivers through their respective bank accounts. Explanations for the two letters was also sufficiently given. The fact that the above stated documents, though had the respondent's name on them were not evidence to prove that there exited employer-employee relationship between the parties, was also proved by the letter dated 19.11.2013 (Exhibit BF1) written by the appellants through their association to the respondent asking for the assistance of the respondent in connecting them to potential car owners who were looking for drivers on hire.

Since the appellants were not employees of the respondent and as their engagement with the respondent was on contracts for specific tasks as provided under section 14 (1) (c) of the ELRA, then the appellants' claims for unfair termination before the CMA were rightly dismissed. The appellants had no right to claim for unfair termination. It is a trite law that rights and remedies provided for under unfair termination of employment do not apply in contracts for specific tasks. In its decision in the case of **Mtambua Shamte and 64 Others v. Care Sanitation and Supplies,** Revision No.154 of 2010 (unreported) which was cited with approval by this Court in **Asanterabi Mkonyi** (supra), the High Court rightly stated that:

> *"Principles of unfair termination under the Act do not apply to specific tasks or fixed term contracts which come to an end on the specified time or completion of a specific task".*

In approving the above decision by the High Court, the Court in **Asanterabi Mkonyi** (supra), observed that:

> *"In view of the foregoing, it our view that the High Court was correct in its holding in this matter, premised on its earlier decision in* ***Mtambua Shamte*** *(supra), that the principles of unfair termination do not apply to a fixed-term contract (or even a specific task contract) unless it is established that the employee reasonably expected a renewal of the contract. It is instructive to note that in terms of rule 3 (4) (a) and (b) of the Code, a fixed-term contract exists where the agreement to work is for a fixed time or upon completion of a predetermined task".*

For the above observations and the position of the law, we find the 1st and 3rd grounds of appeal of no merits.

The 2nd ground of appeal need not detain us at all. As correctly observed by the High Court, the fact that in their respective testimonies DW1 and DW2 did not give a correct name of the drivers' association is not a contradiction as such. The statements in question as given by DW1 and DW2 are not opposite to one another. Even if we take it as a contradiction, the same did not go to the root of the matter. The main issue, as we have repeatedly stated above, was whether the appellants were employed by the respondent, it was not about the correct name of the drivers' association. The same applies to the evidence given by DW3 on which it is complained by the appellants that her evidence that the appellants were engaged by JAMAB contradicted DW1 and DW2 evidence which was to the effect that the appellants used to work for the respondent. We think that the contradiction complained of was just consequential because the evidence clearly show that JAMAB which was a company dealing in forwarding and clearing business, was an agent of the respondent and it is JAMAB which used to clear from the port the cars imported by the respondent. The 2nd ground of appeal therefore fails too.

In fine, we find no merit in the appeal and dismiss it accordingly. This being an appeal on a labour dispute, we make no order as to costs.

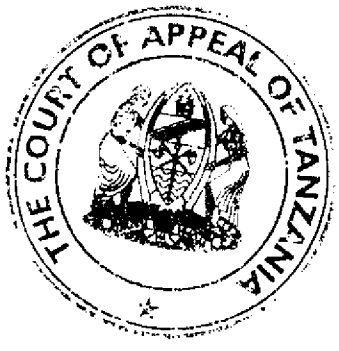
DATED at **DAR ES SALAAM** this 23rd day of February, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in absence of the Appellant and in the presence of Wilson Mafia, learned advocate for the respondent is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL