IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

LABOUR REVISION NO. 10 OF 2020

(Arising from the award of the Commission for Mediation and Arbitration for Musoma (Hon. Mnembuka -Arbitrator) dated 30th March, 2020 in Labour Dispute CMA/MUS/127/2019)

KASERKANDIS CONSTRUCTION &

TRANSPORT CO. LIMITED ..... APPLICANT

VERSUS

SABASTIAN MATHIAS SABAI ..... RESPONDENT

JUDGMENT

Date of Last Order: 5th October, 2020
Date of Judgment: 26th January, 2021

KISANYA, J.:

The applicant, Kaserkandis Construction & Transport Co Limited (also referred to as KASCCO) has lodged an application for revision of the proceedings and decision of the Commission for Mediation and Arbitration (CMA) at Musoma in Labour Dispute No. CMA/MUS/127/2019 and prayed for the following orders:

1. *That this honorable Court be pleased to call for and examine the records of the Musoma Commission for Mediation at Musoma in Labour Dispute No. CMA/MUS/127/2019, the award therein dated 30th March, 2020 and the proceedings, for the purposes of satisfying itself on the correctness, legality or*

propriety of the said proceedings and award for was improperly procured, hence revise the same.

2. *That this honorable Court be pleased to quash and set aside the proceedings and award of the Commission for Mediation at Musoma dated 30th March, 2020 for the errors disclosed in the supporting affidavit and order hearing of the application denovo before another arbitrator,*

In terms of CMA Form No. 1, the crux of the matter was unfair termination from employment of Sabastian Mathias Sabai (the respondent). The said Sebastian Mathias Sabai also prayed for salary arrears, other statutory rights, NSSF payment and compensation of six months' salary. Four issues were raised by the CMA in the course of hearing the Labour complaint before it. These were;

1. Whether the respondent was terminated without valid reasons;
2. Whether the procedure for terminating the employee were complied with;
3. Whether the parties had an employment contract and if the same was lawful terminated; and
4. Reliefs to which the parties were entitled to.

After hearing the complaint, the CMA was of the view that, the respondent was employed by the applicant in the position of training officer and that, the termination was unfair, both procedurally and substantively. Thus, the first, second and third issues were answered in affirmative. As regards the fourth issue, the applicant was ordered to pay Tshs. 26,000,000 out of which: Tshs. 5,000,000 was for five months' salary arrears; Tshs. 3,000,000 was for notice pay; and Tshs. 18,000,000 was for compensation of six months' salary.

That decision aggrieved the applicant who filed the present application through the legal services of Advocate Wilbard R. Kilenzi of KZR Law Chambers. The reasons for revision are reflected in paragraphs 3 to 9 of the affidavit in support of the application as follows:

3. *The arbitrator failed to consider that the respondent evidence used to work as training consultant of the applicant since when he was working with ACCACIA Mara and that he continued doing the same upon his retirement. He concocted his own facts to support his findings.*
4. *That the arbitrator was totally biased only relying on the story narrated by the Respondent and totally excluded the water tight evidence by the Applicant.*
5. *The Arbitrator wrongly relied on the Respondent's false testimony in respect of the order to the Applicant to him to surrender the gate pass and work identity cards, for all gates passes and identity cards are sole properties of the Mine owner, one ACCACIA, such the Applicant had no such order.*
6. *That given the nature of contract for service by the Respondent by any estimation was not an employee capable of being terminated.*
7. *That owing to the length of service the respondent, had he been an employee in the eyes of the law couldn't have been qualified for such huge granted terminal dues.*
8. *The Arbitrator awarded the unproved claims under payment of salaries which were time barred in absence of an order condoning that excessive delay without good cause.*

9. *That it is a settled principle of law that courts to test the evidential value/weight of the parties' evidence they should be subjected to evaluation and assessment, which duty the arbitrator totally failed to discharge.*

On the date when this application came up for hearing, the applicant was represented by Mr. Stephen Kaswahili, learned advocate while the respondent appeared in person.

In support of the application, Mr. Kaswahili faulted the CMA in holding that the respondent was an employee capable of being terminated. He argued that the respondent was an independent consultant and not employee of the applicant. He argued further that the arbitrator erred in considering the payment made to the respondent as salary and that, salary is not one of the factors for presumption of employment contract.

Mr. Kaswahili went on to submit that the Hon. Arbitrator's findings that the respondent was employed by the applicant was based on the fact that, the respondent was using the applicant's working tools and that, he worked under supervision of the Site Manager. It was Mr. Kaswahili's contention that, such evidence was not adduced before the CMA and that, the Hon. Arbitrator invented facts which were not adduced in evidence. Citing this Court's decision in **Abel Maligisi vs Paul Fungameza**, PC Civil Appeal No. 10 of 2018, HCT at Shinyanga (unreported), the learned counsel argued that, the Court cannot import new facts.

Mr. Kaswahili submitted further that it was not proved that the applicant worked for average of 65 hours per week as required by the law. He also faulted the Hon. Arbitrator in holding that, the applicant was by virtue of section 15(2) of the Employment and Labour Relations Act [Cap. 366, R.E.

2019] (the ELRA) required to prove that, there was no employment relationship. The learned counsel argued that section 15(2) of the ELRA was misapplied on the reason that, it applies when there is a dispute on the terms of employment.

Making reference to section 60(2)(a) of the Labour Institutions Act [Cap. 300, R.E.2002] (the LIA), Mr. Kaswahili argued that the duty to prove facts as to breach of right of Labour law protection lies on the person who alleges that fact. He contended that, the respondent failed to discharge the said duty by producing the contract of employment.

Thereafter, Mr. Kaswahili challenged the reliefs granted by CMA in favor of the respondent. He argued the reliefs were not justified and proved in the eyes of law.

Starting with the claim for salary arrears, the learned advocate submitted that, the said claim was filed out of 60 days specified by rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. As for the compensation of 6 months' salary, Mr. Kaswahili argued that there was no employment contract between the applicant and the respondent. In relation to payment of one month's salary in lieu of notice, the learned advocate argued that the same was not prayed for in CMA F.1.

In view thereof, Mr. Kaswahili prayed for the Court to quash and set aside the award issued by the CMA.

The respondent on his part contended to have been employed by the applicant. He submitted that evidence to such effect was the applicant's letter to the CMA which introduced him (the respondent) as her (the applicant) employee and the bank statements. The respondent submitted further that the applicant gave him working tools namely, identity card,

permit to possess mobile and permit to drive vehicle. He contended that, although all tools were issued by Accacia, they bear the name KASCCO (the applicant) as his employer.

Responding to the reliefs granted by the CMA, the respondent stated that some of the claim for salary arrears was not filed within 60 days because the applicant undertook to pay him. He went on to submit that the Labour dispute was filed 12 days from the date of termination and after asking for the salary arrears. In relation to compensation for unfair termination, the respondent asked the Court to decide the matter in accordance with the law. He concluded by urging the Court to uphold the CMA's award and dismissing the appellant's application.

When Mr. Kaswahili rose to rejoin, he reiterated his submission that; the respondent was not employed by the applicant due to lack of evidence; the claim for salary arrears was time barred; and the consultancy agreement between the applicant and the respondent was oral.

I have impassively considered the rival arguments of both parties together with the affidavit in support of the application and the respondent's counter affidavit. In my view, the issues for consideration are:

1. Whether the respondent was employed by the applicant;
2. If the answer to the first issue is in affirmative,
   (a) whether the respondent was terminated from employment;
   (b) Whether the termination of the respondent's employment was unfair substantively and procedurally;
3. The reliefs to which parties are entitled to.

Starting with the first issue, parties do not dispute that the respondent worked for the applicant from 1/11/2018 to 8/05/2019. It is also not

disputed that the respondent was paid monthly for the service provided to the applicant. Three million shillings were paid in November and December, 2018 while two million shillings was from January to May, 2019. What is in dispute is whether the respondent was engaged by the applicant as her employee. The applicant argues that the respondent was engaged as independent consultant and paid basing on the number of staff trained. On the other side, the respondent contends that he was employed as training officer and paid take home salary of three million shillings.

However, neither the applicant nor the respondent tendered the written consultancy contract or employment contract respectively. It follows that their contract, whether for consultancy or employment was oral. Pursuant to section 61(1) of the LIA, unless it is proved to the contrary, a person working for or providing service to another person is presumed to be employee if any of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organization, the person is a part of that organization;

(d) the person has worked for that other person for an average of at least forty five hours per month over the last three months;

(e) the person is economically dependent on the other person for whom that person works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g)the person only works for or renders services to one person.

In this case, the CMA's decision that the respondent was employed by the applicant is based on the ground that the applicant admitted to have been paying him (respondent) monthly salary. The Hon. Arbitrator held that:

> *"...kitendo cha kulipwa mshahara kinaonesha alikuwa mwajiriwa."*

With respect to the Hon. Arbitrator, payment of salary is not one of the factors taken into account in considering whether a person was employee. Further, in his evidence in chief, the applicant's sole witness one, Emanuel Majura (DW1) did not depose that the respondent was paid salary. He stated that the applicant was paid every month basing on the number of staff trained. For that reason, I agree with the learned counsel for the applicant that the CMA erred in considering this factor.

Furthermore, the CMA was satisfied that the respondent was using the applicant's working tools and reporting to the site manager. In other words, the CMA was of the view that, the factors stated in section 61(1)(a) and (f) of the LIA were proved.

Starting with the issue of using the applicant's working equipment, I find no mention of the working equipment supplied to the respondent in the evidence adduced by either party. The respondent submitted before this Court that, he was using the applicant's identity card, permit to possess mobile phone and permit to drive vehicle/ machine. However, such evidence was not deposed before the CMA. It cannot be considered at this stage.

Also, neither the applicant nor the respondent adduced that the respondent was reporting to the Site Manager, in the course of executing his duties. The

site manager was not mentioned at all by Emanuel Majura who gave evidence for the applicant. The said Emanuel Majura deposed that, the respondent was working when needed to train the staff and not every day. On the other hand, the Site Manager was only mentioned in the respondent's evidence on matters related to written contract of employment and salary arrears. His evidence went as follows:

> *"...nilitoa copy akasema original inaenda kusainiwa na Site Manager. Nilienda kufuatilia huku ninaendelea na kazi. Mwezi November na December nililipwa mshahara milioni 3, kuanzia Januari ukawa pungufu akaniambia nionane na Site Manager akasema watanipa mwezi ujao..."*

It is my considered view that, the above evidence did not prove that the respondent was reporting to the site manager in the course of executing his duties as a training officer. In the circumstances, the provision of section 61(1)(f) of the LIA could not apply.

Therefore, the CMA's decision that the respondent was employee of the applicant was based on evidence which was not adduced before it.

However, I have earlier on stated that, the applicant do not dispute that, the respondent worked for or provided service to her by teaching the machine operators. For ease of understating, evidence in chief of Emanuel Majura (DW1) is reproduced hereunder:

> *"S. Sabai unamfahamu.*
>
> *J. Ndio, alikuwa trainer wa kuendesha mashine kubwa.*
>
> *S. Alifanya kazi kwa muda gani?*
>
> *J. Nov-2018 – Mei, 2019 (mwanzoni)"*

S. Nini yalikuwa makubaliano.

J. Ni makubaliano ya mdomo kuwafundisha maoperator ambao walikuwa na shida tofauti katika matumizi ya mashine ...

S. Alikuwa anawafundishia wapi.

J. Gokoma

Since it is in evidence that, the respondent worked for or rendered service to the applicant from November, 2018 to May, 2019, he is presumed to be employee under section 61(1) (g) of the LIA. Thus, the respondent discharged his duty under section 60(2)(a) of the LIA.

The applicant was therefore duty to prove to the contrary. Did she discharge her duty? Mr. Kaswahili asked this Court to consider that, the respondent was engaged as an independent consultant. I have gone through evidence adduced by the applicant. Her sole witness did not state so in his evidence in chief. He testified that the applicant was engaged as a trainer. Even if it considered that evidence to such effect was given during cross examination, it was not proved that, the respondent was engaged and executed his duties as consultant. For instance, evidence as to machine operators trained by him in each month and days of training is wanting. It was not sufficient for the applicant to state that the respondent was not working every day without proving that fact. Likewise, the documents as to payment made to the applicant could have enlighten us on whether it was for consultancy services. Also, records as to the number of staff trained by the respondent every month was required to justify the reason for decrease of payment made by the applicant from January to May, 2019. In the absence of evidence to prove how the respondent was engaged as consultant, this Court finds he was employed. Consequently, the applicant was duty bound

to provide particulars as to the respondent's employment as provided for under section 15(1) and 19(1) of the ELRA.

Having disposed the first issue in affirmative, I move on to consider the first limb of the second issue. Was the respondent terminated from employment? The answer to this issue is not hard to find. The respondent testified that, he was terminated from employment on 8/5/2019 when he requested for salary arrears and written employment contract. The applicant's witness (DW1) testified that, the applicant's service ended in May, 2019 on the reason that, there were no staff required to be trained. He stated as follows:

> *"S. Kwa nini hakuendelea kutrain.*
>
> *J. Huduma ilifika mwisho hakukua tena na watu wa kufundisha. Alilipwa hela yake ya mwisho."*

As stated herein, the applicant did not give evidence on the terms of contract between her and the respondent. In such a case, the contract duration and terms as to how the contract could be terminated were not stated. Therefore, it cannot be stated that the contract reached its end. For that reason, I find that the respondent was terminated from employment.

The next issue is whether the termination was unfair substantively and procedurally. This issue is premised on the provisions of section 37 (1) and (2) of the ELRA which bars the employer to terminate the employment of an employee unfairly. The law provides further that, termination is unfair if the reasons thereto are not valid and or fair; and/or where the procedure for termination have not been complied with. According to the provision of section 39 of the ELRA, the employer is duty bound to prove that the termination is fair.

It was deposed by the applicant that; the contract was ended due to decrease or lack of staff who needed the training. Such evidence suggests that, the termination was due to operation requirement of the applicant. This is a fair reason under section 37(2) (b) (ii) of the ELRA.

However, evidence to prove the reason for termination was not tendered. This is because records and other relevant information related to the contract of employment and the number of trainees or staff was not given. Even it is considered the respondent was terminated due to operation requirement, the applicant was required to comply with the provisions of section 38(1) of the ELRA. This include, giving notice of intention, disclosing relevant information on the intended retrenchment and the reasons thereto. No evidence was deposed by the applicant to prove compliance with section 38 (1) of the ELRA. Therefore, the respondent's termination was unfair substantively and procedurally.

The last issue is reliefs to which the parties are entitled to. As stated herein, CMA Form No. 1 is unambiguous. The respondent claimed to have been terminated unfairly. He also prayed for salary arrears from January to May, 2019, compensation of six months' salary and other statutory entitlement.

Remedies available to an employee whose termination is unfair are provided for under section 40(1) of the ELRA. These are re-engagement, reinstatement, compensation. However, compensation is paid in addition to other entitlement. The said section reads as follows:

40.-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months remuneration.

(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.

(3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

The CMA awarded salary arrears of five months from January to May 2019, (Tshs. 5,000,000); payment of one-month salary in lieu of notices (Tshs. 3,000,000); and compensation of six months' salary (Tshs. 18,000,000). Was the respondent entitled to the above reliefs?

Mr. Kaswahili was of the view that the claim for salary arrears was time barred. I agree with him that, according to rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 200, such claim is required to be filed within 60 days. Since the Labour complaint was filed

before the CMA on 20.5.2019, it implies that the claim for salary arrears for January and February was time barred. But, it is deduced from the respondent's evidence that, the applicant continued to breach the employment contract by paying him less salary every month. In such a case, the time began to run against the respondent at every time during which the breach continued. This is provided for under section 7 of the Law of Limitation Act [Cap. 89, R.E. 2019] that:

> "*Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues.*"

In the light of evidence available, the time began to run against the respondent when the applicant paid him less salary for the last time and terminated from employment on 8/05/2020. Having considered that, the Labour dispute which gave rise to this matter was filed on 20th May, 2019, I am of the view that, the claim for salary arrears was not timed barred.

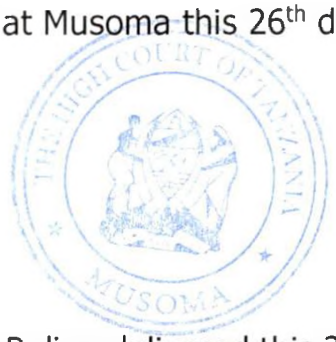
Another relief granted by the Hon. Arbitrator is compensation of 6 months' salary. The law requires the CMA or Labour Court to grant compensation of not less than 12 months' salary. However, the CMA awarded compensation of six months' salary as prayed for in CMA Form No. 1. In his oral testimony, the respondent prayed for compensation of 12 months' salary. It is settled law that, parties are bound by their pleadings. Therefore, the Hon. Arbitrator was right in granting the amount prayed in CMA Form No. 1.

Mr. Kaswahili challenged the relief of notice pay on the reason that it was not claimed in the CMA Form No. 1. The applicant stated in CMA Form No. 1 that he prayed for other statutory rights. Notice pay is one of the statutory

provided for under section 44(1) (d) of the ELRA. Therefore, the argument by the counsel for the applicant is unfounded. That said, I am of the considered opinion that, the respondent was entitled to the reliefs granted by the CMA.

For the reasons which I have endeavored to discuss, I find no merit in this application and dismiss it. A party dissatisfied with this decision is entitled to appeal to the Court of Appeal in accordance with the law.

Dated at Musoma this 26th day of January, 2021.



E. S. Kisanya
JUDGE

Court: Ruling delivered this 26th day of January, 2021 in the presence of Ms. Tupege Mwambosya, learned advocate for the applicant and the respondent in person. B/C. Mariam Present.

E. S. Kisanya
JUDGE
26/01/2021