IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 76 OF 2016

SECURITY GROUP (T) LTD ..... APPELLANT

VERSUS

SAMSON YAKOBO AND 10 OTHERS ..... RESPONDENTS

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

(Rweyemamu, J.)

Dated the 1st day of February, 2013
in
Revision No. 171 of 2011
.....

JUDGMENT OF THE COURT

13th August, 2019 & 16th January, 2020.

MWARIJA, J.A:

The respondents, Samson Yakobo and 10 others were the employees of the appellant, Security Group (T) Ltd as Fire Fighters. On 22/12/2010, they were terminated from employment on retrenchment basis following what was described by the appellant as its inability to meet the company's operational costs.

The respondents were aggrieved by the appellant's act of terminating them and therefore complained before the Commission for

Mediation and Arbitration (the CMA), Dar es Salaam Zone contending that they were unfairly terminated. It was their complaint that, since they were not members of the trade union at their place of work, their termination was not fairly done because no consultative meeting was held between them and their employer, the appellant. They contended that they were given the notice of termination before being made aware of the impending retrenchment exercise. They thus claimed for reinstatement or payment of 20 months' salaries each as compensation for having been unfairly terminated. They also claimed for payment of their monthly salaries for the whole period between the date of their termination and the date of reinstatement or payment of the claimed compensation.

On its part, the appellant disputed the respondent's claims contending that they were fairly terminated and that they were duly paid their terminal benefits. According to the Conservation, Hotels, Domestic and Allied Workers' Union (CHODAWU) field branch leader at the respondents' place of work, Michael Mhagama who testified before the CMA as DW1, the respondents were given one months' notice of termination and upon expiry of that notice, they were paid their terminal benefits. He averred that the cause of the respondents' termination was

the appellant's inability to meet the operational costs due to dwindling state of income from its business. It was his evidence further that the appellant consulted CHODAWU before it proceeded to terminate the respondents.

Having heard the dispute, the CMA found that the termination of the respondents breached the provisions of s. 38(i)(d)(iii) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 64 of 2007 (GN No. 64 of 2007) which require that, before terminating its employees, the employer should consult with the employees or the employees' field branch leaders where there is one at the employees' place of work. The CMA found that the employees were not members of CHODAWU and that such trade union could not represent them at a consultative meeting between the respondents and the appellant. On the basis of those findings, the CMA awarded each of the respondents the amount equal to 12 months' salaries as compensation for having been unfairly terminated.

The appellant was dissatisfied with the award and therefore applied for revision before the High Court of Tanzania, Labour Division (the Labour Court). The application was unsuccessful. The same was dismissed hence this appeal.

In its memorandum of appeal, the appellant raised the following six grounds of appeal:-

"1. *That, the High Court Judge grossly erred in law and fact by finding and holding that at the CMA, the dispute was a representative suit while there was no evidence of compliance with the procedure of institution of a representative suit by the Respondents.*

2. *That, the High Court Judge grossly erred in law and fact by finding and holding that where there are a number of employees with same interest in the matter, any one of them may appear in a representative capacity if he is mandated in writing by others while there was no provision of the law providing to that effect.*

3. *that, the High Court Judge grossly erred in law and fact by finding and holding that rule 5(2) and (3) of the labour institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 mandates one employee to appear on behalf of others while the said rule permits many employees to authorize any one of them to sign documents on their behalf.*

4. *That, the High Court Judge grossly erred in law and fact by finding and holding that two witnesses namely Pius Wilfred Boikombe and Stephen Jacob, properly testified for all the Respondents while there was no any evidence that the said Pius Wilfred Boikombe and Stephen Jacob were*

authorized/mandated by other Respondents to testify on their behalf.

5. *That, the High Court Judge grossly erred in law and fact by proceeding with the hearing of the revision application without first disposing of the preliminary objection raised by the Appellant.*

6. *That, the High Court Judge grossly erred in law and fact by finding and holding that the Honourable Arbitrator properly analyzed the evidence."*

At the hearing of the appeal, the appellant was represented by Mr. Emmanuel Safari who was being assisted by Mr. Othman Omary Othman, learned advocates while on their part, the respondents entered appearance through the 1st respondent, Samson Yakobo. They did not have the services of a counsel.

The learned counsel for the appellant had earlier on 1/8/2016 filed written submission in support of the appeal in compliance with Rule 106(1) of the Tanzania Court of Appeal Rules, 2009, (the Rules). Similarly, in compliance with Rule 106(8) of the Rules, on 8/9/2016 the respondents filed their written submission in reply to the appellant's submission.

In his written submission, Mr. Safari dropped the 5th ground and proceeded to submit on the rest of the grounds of appeal. With regard to the 1st ground, the learned counsel argued that the learned High Court Judge erred in holding that the 1st respondent rightly appeared in the CMA as the representative of the other ten employees who were terminated by the appellant. According to the learned counsel, the other ten employees were not parties to the dispute filed in the CMA because the 1st respondent did not seek and obtain leave to file the dispute by way of a representative suit. He went on to argue that, the 1st respondent should have moved the CMA under rule 29(1) (c) and (2) of GN No. 64 of 2007 to seek leave to file the complaint in a representative capacity.

Relying also on the provisions of s. 86 (1) of the Employment and Labour Relations Act, No. 6 of 2004 (the ELRA) and also rule 12(1) of GN No. 64 of 2007 which prescribes the manner in which a labour dispute should be instituted in the CMA; that is, by filling in a prescribed form (CMA F1), and present it to the CMA, Mr. Safari argued that, since the form which was signed by the 1st respondent does not contain the names of the other ten employees, the High Court erred in holding that the 1st respondent appeared in the CMA in a representative capacity.

The learned counsel added that the filed form does not also contain the particulars of the other ten employees thus signifying that the labour dispute was not instituted by the 1st respondent in a representative capacity. In support of his argument, Mr. Safari cited the decision of the High Court (Land Division) in the case of **Swift Motors Ltd v. Pascal Exavery and Others**, Revision No. 157 of 2018 (unreported).

On the 2nd and 3rd grounds, the appellant's counsel argued that the learned High Court Judge erred in relying on rule 5(2) and (3) of GN No. 64 of 2007 to hold that any employee may appear in a representative capacity provided that he is mandated to do so in writing by the other employees. He argued that the provisions relied upon by the Labour Court provides for the right to sign documents on behalf of others, not the right to appear on behalf of other employees.

As for the 4th ground of appeal, it was the argument by the appellant's counsel that the evidence of two witnesses did not prove the claim for all the ten employees because, whereas the 1st respondent Samson Jacob, did not testify, the two witnesses, Pius Wilfred Boikombe and Stephen Jacob were not authorized by the other employees to testify on their behalf. The learned counsel stressed that, since the 1st

respondent, the person who instituted the complaint, did not testify, it was wrong to hold that the complaint before the CMA was proved.

With regard to ground six of the appeal, the learned counsel faults the learned High Court Judge for having failed to analyse the evidence thus straying into an error by finding that there was no trade union at the respondents' place of work while according to the evidence on record, there was CHODAWU which was the exclusive bargaining agent in respect of the respondents. He contended that the said trade union was properly consulted during the retrenchment exercise. For that reason, the learned counsel argued, the Labour Court erred in holding that there was no basis for faulting the finding of the Arbitrator.

Responding to the arguments made in support of the 1st ground of appeal, the 1st respondent argued in his written submission that, the complaint was properly filed by way of a representative suit as found by the Labour Court. He stressed that the same was instituted vide CMA F1 which was signed by him as the representative who was duly appointed by the other ten employees. According to his submission, in filing the complaint, he complied with the provisions of rule 5(1) (2) and (3) of GN No. 64 of 2007. He argued further that, the requirement of applying for leave to file a representative suit did not apply in this matter because

filing a joint complaint in a labour dispute is governed by the above stated provisions of GN. No 64 of 2007. By way of elaboration, he submitted that the procedure is to attach to the CMA F1, a document containing the names and signatures of the other employees who have appointed one of them to act on their behalf in their joint complaint.

On the case of **Swift Motors** (supra) cited by the appellant's counsel, the 1st respondent argued that the same is distinguishable in that, in the present case, CMA F1 was signed by the respondents while in the cited case, the form was not dully signed.

As for the 2nd and 3rd grounds of appeal, the 1st respondent contends in his written submission, and correctly so in our view, that it encompassed the other grounds of appeal; grounds four and six. His response was that the said grounds are devoid of merit. He argued that the learned High Court Judge correctly found that the evidence of the two witnesses; Pius Wilfred Boikamba (PW1) and Steven Jacob (PW2), sufficiently proved the respondents' complaint against the appellant. He stressed that, the fact that the 1st respondent did not testify did not in any way prejudice the appellant. On those arguments, he implored the Court to dismiss the appeal.

From the submission made by the learned counsel for the appellant and the reply by the 1st respondent, the immediate issue for our determination, which arises from the 1st ground of appeal, is whether or not the complaint filed in the CMA was bad for want of leave to the 1st respondent to institute it on behalf of the other ten employees. In his submission, the appellant's counsel was firm that, like in the case of a representative suit, the 1st respondent should have sought and obtained leave to file the complaint on behalf of the other ten employees. According to the learned counsel, that application should have been brought under rule 29(1) (c) and (2) of GN No. 64 of 2007 which provides as follows:-

> *"29-(1) Subject to Rule 10, this Rule shall apply, to any of the foilowing-*
>
> *(a) Condonation, joinder, substitution, variation or setting aside an award;*
>
> *(b) Jurisdictional dispute;*
>
> *(c) Other applications in terms of these Rules.*
>
> *(2) An application shall be brought by notice to all persons who have an interest in the application."*

It is not disputed that the governing provision as regards institution of a labour dispute in the CMA is rule 12 of GN No. 64 of 2007 which states as foilows:-

> *"12(1) A party shall refer a dispute to the Commission for Mediation by completing and delivering the prescribed form ("the referral document").*
>
> *(2) The referring party shall-*
>
> *(a) sign the referral document in accordance with rule 5.*
>
> *(b) attach to the referral document a written proof, in accordance with rule 6, that the referral document was duly served on the other parties to the dispute.*
>
> *(c) if the referral document is filed out of time, attach an application for condonation in accordance with rule 10.*
>
> *(3) The Commission shall refuse to accept a referral document until the requirements of sub-rule (2) has been complied with*

Rule 5 of GN No. 64 of 2007 allows one of the complainants to sign a document on behalf of others who are jointly involved in a complaint. That provision states as hereunder:-

"5 (1) A document shall be signed by the party or any other person entitled under the Act or these rules to represent that party in the proceedings.

(2) Where proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to do so.

(3) Subject to sub rule (2) a list in writing, of the employees who have mandated a particular employee to sign on their behalf, must be attached to the document. The list must be signed by the employees whose names appear on it."

The argument by Mr. Safari was that the provisions of rule 5 of GN. No. 64 of 2007 reproduced above, are restricted to signing of documents involved in a dispute before the CMA not the right of appearance by one of the employees on behalf of others in a labour dispute. In his written submission , the learned counsel stated as follows:

> *"Our contention is based on ground that the Judge wrongly interpreted the law. The Judge was supposed to give plain meaning to the words of the applicable law but to the contrary she did not on ground that the said rule 5(2) and*

(3) of the labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 which the Judge relied with ***does not provide for the right to appear*** *but for right to sign documents on behalf of others."*

The Court had the occasion of considering the issue arising from interpretation of rule 5 of GN. No. 64 of 2007 in the case of **Elia Kasalile & 20 Others v. The Institute of Social Work,** Civil Appeal No. 145 of 2016 (unreported). In that case, the appellants had similarly filed a complaint against the respondent in the CMA challenging their termination on the ground that it was unfairly made. They filed the complaint through CMA F1 signed by the 1st appellant, Elia Kasalile. The list of names of the other employees with their signatures appended thereto was attached to the CMA F1. By way of a counterclaim, Mr. Safari, learned counsel who appeared for the respondent in that case, challenged the competence of the complaint contending *inter alia*; one, that dispute was not referred by all the appellants but only the first appellant and two, that the first appellant was not mandated by the other 20 employees to file the complaint on their behalf because leave to appear in a representative capacity was not sought and obtained.

Having considered the provisions of s.86(1) of the ELRA read together with rules 12(1) and 5(2) and (3) of GN. No. 64 of 2007, the Court held as follows:

> *"...since the dispute at the CMA was filed by the appellants in accordance with section 86 (1) of the ELR Act, Rule 12(1) read with Rule 5(2) and (3) of the Mediation Rules, then it involved all the 21 appellants. As such, we do not think that the contention by Mr. Safari that the appellants ought to have filed an application for a representative suit under Order VIII rule 7 of the Civil Produce Code, Cap. 33 R.E. 2002 can stand. The reason is clear that, there are specific provisions under the labour laws which provided for the mode of filing of labour disputes involving more than one employee."*

In his submission before us, the appellant's counsel insisted that rule 5 of GN. No. 64 of 2007 allows only the signing of documents but does not vest an employee with the right to appear on behalf of others. With respect, we do not agree with the learned counsel's interpretation. In our considered view, the documents referred to under sub- rule (2) of rule 5 included the document which institutes a labour dispute; a pleading synonymous to a plaint which by definition is also a document.

In the book, **Civil Procedure**, 6th Ed., Eastern Book Company by Justice C.K Takwani, a plaint is defined as:

> *"... a statement of claim, **a document**, or a memorial by the presentation of which a suit is instituted..."*
>
> [Emphasis added]

For the reason state above, we do not find merit in the first ground of appeal.

The other grounds of appeal need not detain us much. The finding on the 1st ground above answers also the 2nd and 3rd grounds of appeal. The learned High Court Judge did not misinterpret the provisions of rule 5(2) and (3) of GN. No. 64 of 2007. As held in the case of **Elia Kasalile and 20 Others** (supra) when read together with s. 86(1) of the ELRA and rule 12 of GN No. 64 of 2007, that rule provides for the procedure of filing a labour dispute in a representative capacity.

With regard to the 4th ground of the appeal, we do not, with respect, agree with the appellant's counsel that the learned High Court Judge erred in failing to find that the evidence tendered in the CMA by the two witnesses (PW1 and PW2) was insufficient to prove the claims for all the respondents. We agree with the learned Judge that since the

evidence was from the witnesses who were parties to the complaint (the complainants), the same was sufficient to prove the claim even though their representative, Samson Jacob did not testify.

The crux of the contention by the appellant's counsel was the propriety or otherwise of the state of the complaint; whether or not it was brought as a representative suit. After that issue had been answered in the affirmative, there is no gainsaying that the evidence may be given by some of the complainants, not necessarily all of them. We are aware of the case of **National Agricultural Food Corporation (NAFCO) v. Mulbadaw Village Council & Others** [1985] TLR 88. In that case which was filed in the form of a representative suit, only five plaintiffs, who were authorized by the other 61 plaintiffs to represent them, gave evidence. The Court observed that in order to prove their claims, each of the 66 plaintiffs ought to have testified. The particular facts of that case are however, different from the facts of the present case. In the said case, each of the plaintiffs claimed ownership of separate farms within the disputed land in which they complained that NAFCO had trespassed.

In this case however, unlike in a situation where each person has an individual claim to prove, the respondents had a common claim and

in such a situation, evidence need not be adduced by all of them. Their complaint was against the appellant's breach of the law in terminating them. It will be sufficient if the complained of breach is proved by the evidence of some of them. For these reasons, we do not find merit in the 4th ground of appeal.

On the 6th ground, the finding of the Labour Court which is being challenged by the appellant appears in the impugned decision at page 115 of the record of appeal as follows:-

> *"The relevant law, that is section 38(1) (d) (iii) of the ELRA requires that the employer must consult the employees where such employees are not members of a union, and there is no union which is a bargaining agent of employees in the given work premises. Both the above facts were not disproved by the applicant in this case. As there was no other evidence of consultation adduced by the applicant, I find no basis of faulting the arbitrator's conclusion on the issue."*

The argument by Mr. Safari was that there existed a trade union at the respondents' place of work, that is; CHODAWU. In their evidence however, PW1 and PW2 stated that they were not aware of existence of that trade union. Furthermore, in his evidence, (DW1) who described

himself as the leader of CHODAWU, did not state anywhere in his evidence that the employees were involved at any stage of the retrenchment exercise. The substantial part of his evidence at page 25 of the record of appeal is as follows:-

> *"On 19th November, 2011 the meeting was done on the amount of severance package for the* ***retrenched employees****. The respondent said that the cause of termination is loss of the contracts from the customers. Therefore the respondent company failed to accommodate the employees."*
> [Emphasis added]

So, even if there would have been evidence that the respondents were members of CHODAWU, from the evidence of DW1, the consultation envisaged under s. 38(1) (d) (iii) of the ELRA was obviously not done. What can be gathered from the evidence of DW1 is that he held a meeting with the appellant to determine the amount of severance allowance after the respondents had been retrenched. In the circumstances therefore, we do not find any sufficient reason to fault the finding of the learned High Court Judge. This ground is also devoid of merit.

On the basis of the forgoing reasons, this appeal must fail. The same is hereby accordingly dismissed in its entirety. Since the appeal arose from a labour dispute, we make no order as to costs.

DATED at **DAR ES SALAAM** this 7th day of January, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R.J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 16th day of January, 2020 in the absence of the Appellant, dully served and in the presence of 1st Respondent, Samson Yakobo is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL