IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 56 OF 2019

SHARAF SHIPPING AGENCY (T) LTD .... APPELLANT

VERSUS

BACILIA CONSTANTINE ....1ST RESPONDENT
PILLY ABBASS MKUFUNZI ....2ND RESPONDENT
FRANCIS GILBERT MWAKASEKELE ....3RD RESPONDENT
MARIETHA KIBWENGO ....4TH RESPONDENT
NAKIA MTENGA ....5TH RESPONDENT
TAFAWA NURU SWAI ....6TH RESPONDENT

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

(Wambura, J.)

dated 20th day of December, 2018
in
Revision Application No. 579 of 2017

JUDGMENT OF THE COURT

5th & 17th May, 2022

KITUSI, J.A.:

The respondents were all employees of the appellant, a shipping agency company registered in Tanzania. On 31st October, 2016 the appellant issued a notice of intention to retrench employees, citing financial constraints. On 17th November, 2016 the appellant served some employees, the respondents included, with letters of retrenchment. However, while some employees accepted the offered payments and

closed the chapter with the appellant, the respondents were critical of the retrenchment.

Therefore, the respondents lodged complaints with the Commission for Mediation and Arbitration (CMA), challenging the retrenchment in both substance and procedure. In terms of substance, the respondents alleged that the reasons for retrenching them were not good enough. Procedurally, they attacked the retrenchment on two grounds namely that; consultation was not properly done and that the selection of employees who were to be retrenched was highly discriminatory.

The appellant led evidence of Pankaj Singh (DW1) and Captain Shashi Bhusan Kumar (DW2) to disprove the allegations and to prove that the termination was substantively and procedurally fair. They stated that the appellant is carrying on business of their principal Hanjin Shipping Line, a company which is not within Tanzania, and that the said principal went bankrupt, resulting in loss of business. The other reason was losses that were being incurred by the appellant as a result of negligence of employees. They cited an instance when the second respondent sent six containers to a wrong customer necessitating the appellant to compensate the owner.

The witnesses alluded to consultation meetings held between the appellant and the employees and wondered why the respondents, who did not make a counter offer during those meetings, decided to institute the complaints at the CMA.

The respondents made a rebuttal through two witnesses whose testimonies had common threads. They disputed the allegation of loss of profits because no financial statements were exhibited by the appellant, and that in July 2016 salaries were increased, suggesting that there was increase in profits. On losses caused by employees' negligence, the respondents testified that the appellant could take disciplinary measures against the employees involved, instead of retrenching 12 employees to cure a loss of USD 10,000. In any event, they stated, the profit of USD 100,000 outweighs the loss of USD 10,000. They admitted to have attended the consultation meetings but disputed to have reached an agreement.

On the evidence before it, the CMA concluded that the termination of the respondents' employment by the appellant was substantively and procedurally unfair. It proceeded to award each of them 12 months remuneration as compensation. That award was upheld by the High Court, Labour Division (Wambura, J.), sitting on revision.

Still aggrieved, the appellant has preferred this appeal raising four grounds.

We had the benefit of both oral and written submissions from the parties. First, they addressed us on the first ground of appeal which faults the learned judge "*for determining that the arbitrator's failure to show he was responding to issues framed was not fatal to the merit of the case.*"

It is to be noted that before the High Court, the appellant had sought to challenge the award that had been made by the arbitrator on the ground that it did not answer the issue "*whether the termination was procedurally fair.*" So, the first ground of appeal referred to above faults the learned judge's determination of that complaint.

Mr. George Shayo, learned advocate who argued the appeal submitted that the learned judge failed to appreciate that during the hearing at the CMA, the evidence adduced by parties was addressing the issues, therefore the arbitrator's omission to determine them should not have been taken lightly by the learned judge. The learned counsel referred to the steps the appellant followed towards conducting the retrenchment in line with section 38 (1) (a) (b) (c) (i) (ii) (iii), (iv) and

(v), (d) (i) (ii) and (iii), 38 (2) of the Employment and Labour Relations Act No. 6 of 2004, [Cap 366 R.E 2019] (ELRA).

One, it published a notice of the intended retrenchment, containing all vital information including the reasons of the contemplated retrenchment. Two, it convened three meetings during which the reasons for the retrenchment, measures to minimize the retrenchment, selection criteria and the agreement on the retrenchment package were discussed. Three, letters of retrenchment with breakdown of the final dues and certificates of service, were served on those selected.

The learned counsel wondered why, having made a finding that the appellant observed the procedure in retrenching the respondents, the learned judge ended up concluding that the retrenchment was unfair both in substance and procedure. On the alleged discrimination, the learned counsel submitted that the learned judge erred in concluding that the allegation went unchallenged. The learned counsel referred to documents in the record showing that employees of Asiatic origin were affected by the retrenchment.

On the other hand, Mr. Rahim Mbwambo, learned advocate who, like Mr. Shayo, had acted for the respondents at the High Court, continued to represent them before us. He submitted that section 38 (2) of the ELRA does not have a distinction between substantive and procedural fairness in retrenchment so the arbitrator should not be criticized for generally deliberating on them. He referred to the judge's conclusion that *"there is also a background information, summary of the evidence adduced and findings on the issues,"* as indicating that in her finding she concluded that issues were determined.

We have considered counsel's submissions on this point and closely examined the arbitrator's discussion, a very informed discussion, we must say. With respect however, nowhere does the learned arbitrator conclude on the fairness of the procedure. We are not wholly comfortable with Mr. Mbwambo's suggestion that the way the issue was framed, and the way section 38 (2) of the ELRA is couched are the reasons for the arbitrator's lack of specificity in his findings.

We shall demonstrate our discomfort by reproducing a portion of the learned arbitrator's discussion: -

> *"Implicit in section 38(1) (i) of the Act is the requirement that the employer and the*

employees or their representatives must attempt to reach a consensus on appropriate measures to avoid the contemplated dismissal. Section 38(3) (b) requires the employer to disclose to the other consulting party the reasons for the proposed dismissal, any measures to avoid or minimize the intended retrenchment the method of selection of the employees to be retrenched the timing of the retrenchments and severance (package) in respect of the retrenchments."

The learned arbitrator then attempts to test those factors with the case before him, and here is where we see the track fading: -

> "*The respondent in this matter decided to carry out retrenchment due to financial situation facing the company and reduction of volume of work. However, no evidence was adduced before the commission and during consulting meetings on comparative analysis of the situation as compared to previous years to justify retrenchment."*

With respect, while the discussion was on the procedure, in terms of section 38 (1) and (3) of the ELRA, the conclusion is on the validity of the reasons for retrenchment. What is missing is a finding like the one the learned judge made towards the end of her ruling that: -

"It is on record that the parties herein held consultative meetings and reached an agreement thus signed an exit package. To that extent I cannot fault the procedures taken by the applicant."

We think we have sufficiently demonstrated that the learned arbitrator did not specifically make a finding on the procedure and that, in our view, was an error because it is not always that when termination is substantively unfair it must also be procedurally unfair, or the opposite. But having concluded that she was not going to fault the arbitrator on the procedure the learned judge made a turn around and held: -

"However, there are claims on racial discrimination which have not been challenged. This erodes the whole procedure."

The above conclusion is a subject of ground three of appeal which reads: -

"3. The Honourable Revisional Court Judge erred in both fact and law by holding that there was an issue of racial discrimination which was never challenged by the appellant hence she nullified all the procedures of the

retrenchment already adhered to by the appellant."

As alluded to earlier, Mr. Shayo has submitted that the appellant adduced evidence showing that the retrenchment affected those of Asiatic descent too. Mr. Mbwambo responded by submitting that the retrenchment letters that were written to the employees of Asiatic descent should be expunged from the record because they were not formerly tendered as exhibit.

Here is another issue then, whether the letters of retrenchment written to employees of Asiatic origin are part of the evidence so as support the appellant that there was no racial discrimination or, they are not part of the evidence with the result that the allegation was unchallenged as held by the learned judge.

Without much ado, it is clear to us that the retrenchment letters, including those issued to employees of Asiatic origin were tendered before the CMA, because if they were not, even the basis for asserting that the respondents were retrenched, would not be there. This is because, nowhere do the proceedings show that the respondents were served with letters of retrenchment and the same were formerly tendered as exhibits. Besides, the proceedings of the CMA show that

when DW1 was testifying, he tendered several documents as exhibit D1, D2 and D3 as follows: -

> *"I pray to tender the documents relating to consultation. The complainant: 'no objection': the commission: 'the document is admitted as exhibit D1'. That exit package was discussed but some of the employees did not sign the agreement for exit package which includes one-month salary as notice pay, severance pay, leave balance, salary for service rendered and one-month salary as golden handshake. The agreed exit package was released to everybody. Thereafter we issued certificate of service and retrenchment letters. 'I pray to tender relevant documents': the complainants: 'no objection'. the commission: 'the document is admitted as exhibit D2 collectively'. Those who didn't sign the retrenchment letters went to CMA and the company was served with the notice. 'I pray to tender the relevant documents'. the complainants: 'no objection'. the commission: the document is admitted as exhibit D3."*

From the above excerpt it occurs to us that the letters of retrenchment were part of exhibit D2. We endorse as correct what Rweyemamu, J. (as she then was) stated in **Secretary General ELCT**

– **North Western Diocese v. Edward Magurubi,** Revision No. 5 of 2012: -

> *"First, with all due respect to counsel for Mr. Magurubi, I do not agree with his interpretation of the relevant law. That law, Rule 24 (6) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN 67/2007 allows parties to produce evidence at the opening stage. I should point out that the process of receipt of documentary evidence is different from the procedure used in ordinary civil cases. I thus agree with counsel for the ELCT that relevant evidence was produced".*

And so is the case here, and it is our finding that the letters of retrenchment were admitted as exhibit D2. Counsel for the appellant referred to letters of retrenchments appearing at pages 139-145 of the record of appeal as proving that employees of Asiatic origin were also retrenched. Counsel for the respondents' only argument was that these letters were not part of the evidence, but on the basis of the foregoing discussion we find no merit in that argument. The learned counsel for the respondents did not dispute the suggestion that those employees

were of Asiatic origin. As there were four employees of Asiatic descent who were retrenched, the allegation of discrimination was unfounded.

Consequently, we conclude that grounds one and three of the appeal have merits. It is our finding that the retrenchment of the respondents was procedurally fair as it substantially followed the steps we stated in **Haider Mwinyimvua & Others v. Deposit Insurance Board & Another**, [2022 TZCA 97 (7Th March, 2022)] that: -

> *" In our view it is clear that subsection (1) (a), (b) and (c) above creates three preconditions for retrenchment, one, that it imposes on the employer the onus to give notice of any intention to retrench as soon as it is contemplated. Secondly, it requires the employer to disclose all relevant information on the intended retrenchment for the purpose of proper consultation. Thirdly, it enjoins the employer to consult prior to retrenchment or redundancy on the matter..."*

Turning to the second ground of appeal which faults the learned judge for upholding the arbitrator's decision that there were no reasons for retrenching the respondents, it has been submitted that it is not true that the appellant the employer was operating at a loss and business

volume was on the fall. The respondents counsel has maintained that the profits were higher than the alleged loss and, in any event, the appellant increased employees' salaries within the same period which was not consistent with the claims that it was operating at a loss.

With respect we accept the argument by the counsel for the respondents. We note that on 3rd November, 2016 during one of the consultation meetings the employer was asked a question.

> *"Why don't you reduce salary and transport cost?"*

The answer to which was: -

> *"The company has taken tough decisions based on analytical process. Restructuring would affect twelve employees as a means of ensuring the company survives."*

We are increasingly of the view that the appellant did not consider alternative means of mitigating the loss of business because even when reduction of salaries was suggested, it refused to take it. As correctly held by the learned arbitrator, retrenchment should be taken as a means of last resort. We adopt the statement quoted by the arbitrator from **General Food Industries Ltd v. FAWU** (200407 BLLR 667 (LAC): -

"The loss of jobs through retrenchment has such a deleterious impact on the lives of workers and their family that it is imperative for that – ***even though reasons to retrench employees may exist – they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchment or to limit it to the minimum."*** *(emphasis ours)*

It is clear from the evidence in this case that the appellant was not very keen in considering alternative steps to minimize or avoid the retrenchment. On that basis it is our considered conclusion that the appellant did not prove reasons for carrying out the retrenchment. Thus, the second ground of appeal has no merit, we dismiss it. This conclusion deals with the fourth ground of appeal as well which sought to fault the learned judge for not taking into account that there was an agreement between the appellant and the respondents. We say there could not be an agreement where the reasons for retrenchment had not been proved.

Therefore, despite our finding that the appellant complied with the procedure of retrenchment, the same was unfair for want of proof of reasons. As the award of 12 months' salary as compensation is the minimum under section 40 of the ELRA, we cannot disturb it. The end

result is that this appeal is, save for the first ground of appeal on the procedure, devoid of merits. It is dismissed, with no order as to costs, this being an employment dispute.

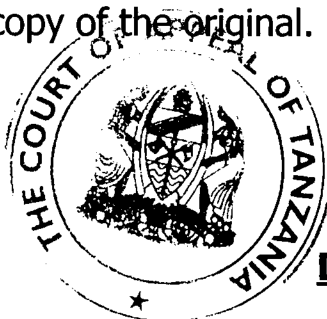
DATED at **DAR ES SALAAM** this 12th day of May, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of May, 2022 in the presence of Mr. George Shayo, learned counsel for the Appellant and Mr. Rahim Mbwambo, learned counsel for the respondents, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL