IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 495 OF 2020

EMMANUEL SHIO ..... 1ST APPELLANT
NURDIN RAMADHAN JUMA ..... 2ND APPELLANT
MACHUNGU MSAMA ..... 3RD APPELLANT
NILUFAR MANALLA ..... 4TH APPEELANT
JOSEPHINE JOACKIM TESHA ..... 5TH APPELLANT
FARAJA JOHN LUTEGO ..... 6TH APPELLANT
FIONA ALEX ..... 7TH APPELLANT
CECILIA MWANGA ..... 8TH APPELLANT
LUCY TESHA..... 9TH APPELLANT

VERSUS

RESOLUTION INSURANCE LIMITED ..... RESPONDENT

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

(Aboud, J.)

Dated the 29th day of May, 2020

in

Labour Revision No. 642 of 2019

JUDGMENT OF THE COURT

13th & 29th February, 2024

MDEMU, J.A.:

Resolution Insurance Limited, the respondent herein, was incorporated in 2008 under the Companies Act, Cap. 212 dealing with insurance business. It thus recruited the appellants and others on

different dates and under different capacities to run insurance business operations. It appears the business did shake and the company was making loss. It thus contemplated, issued retrenchment notice on 2nd July, 2018 and ultimately retrenched the appellants the following day on 3rd July, 2018. Following that retrenchment, each of the appellants was paid accrued salary up to 10th July, 2018, outstanding annual leave, severance pay, medical insurance up to 31st December, 2018, certificate of service and other outstanding dues.

The appellants were not happy with the retrenchment, thus rushed to the Commission for Mediation and Arbitration (the CMA) challenging the respondent's decision for want of valid reasons and without following proper retrenchment procedures. The CMA thus arbitrated the dispute and, in the end, found retrenchment grounded on fair reasons but without abiding to proper procedure, particularly on the retrenchment notice which was issued on 2nd July, 2018 and the following day on 3rd July, 2018, the appellants were retrenched. The CMA, on that account, awarded each, twelve months salary compensation which in total, the award was TZS. 241, 500,000.00. This was in terms of section 40 (1) (c) of the Employment and Labour Relations Act, Cap.366 (the ELRA).

The CMA decision aggrieved the respondent herein who then moved to the High Court on revision complaining that the retrenchment exercise was substantively and procedurally fair. The High Court heard them and finally made a finding to the effect that the respondent had valid ground to retrench the appellants both substantively and in terms of procedure. Believing that the CMA was right in the circumstances, the appellants appealed to this Court on one ground that:

> *"The honorable High Court Judge erred in law and in fact by holding that the respondent herein (applicant by then) complied with all the mandatory procedure for retrenchment as provided by the Labour Laws of this country.* "

Arguing the above ground of appeal before us on 13th February, 2024, all the appellants were represented by Mr. John Lingopola, learned advocate. The respondent company did not appear either through its principal officer or by an advocate despite being served through Mr. Shurkran Eliot Mzikila, advocate of C & F Law Advocates on 24th January, 2024. On that account, Mr. Lingopola prayed the hearing of the appeal to proceed in terms of rule 112 (4) of the Tanzania Court of Appeal Rules, 2009, the prayer which we accepted because the respondent had filed written submissions.

Having settled that, Mr. Lingopola prayed his written submissions filed in that behalf and authorities in support thereof be adopted and thus urged us to allow the appeal. In deciding this appeal, we will not reproduce the said written submissions of the parties but rather use them in the course of resolving the raised ground of complaint. Essentially, the appellants are contented with substantive retrenchment. Intervention sought to this Court on appeal is in respect of noncompliance with retrenchment procedures.

Before we resort to the contentious issue as to whether retrenchment procedures to retrench the appellants were adhered to, we have first to look at the law regulating retrenchment procedures in our legal system. It is section 38 (1) (2) of the ELRA which we reproduce as follows:

> *"38 (1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall:*
>
> *a) Give notice of any intention to retrench as soon as it is contemplated;*
> *b) Disclose all relevant information on the intended retrenchment for the purpose of proper consultation;*

c) Consult prior to retrenchment or redundancy on-

(i) The reasons for the intended retrenchment;

(ii) Any measures to avoid or minimize the intended retrenchment;

(iii) The method of selection of the employees to be retrenched;

(iv) he timing of retrenchment and

(v) Severance pay in respect of the retrenchment.

d) Give the notice, make the disclosure and consult, in terms of this subsection, with

(i) Any trade union recognized in terms of section 67;

(ii) Any registered trade union which members in the workplace not represented by a recognized trade union;

(iii) Any employees not represented by a recognized or registered trade union.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to the mediator under Part VIII of this Act."

Given the above provisions of the law and having gone through the ground of complaint and the entire record of appeal, we find it settled to

all parties that on 2nd July, 2018, general notice to all employees on the upcoming of retrenchment (exhibit D1) was issued by the respondent. It was a thirty (30) days' notice having effect from that date. The following day, that is on 3rd July, 2018, retrenchment staff meeting was convened attended by 66 staff members, the appellants inclusive. It is in that meeting according to the retrenchment staff meeting minutes (exhibit D5), the appellants were informed of the decision to retrench them and in effect, they were retrenched that day.

It is on this state of affairs which, in our view, the appellants base their grievances regarding unreasonableness of the notice. This essentially is the basis of the appellants' complaint in the ground of their appeal. It follows that, there is one issue for determination, that is, whether the notice of retrenchment issued on 2nd July, 2018 followed by retrenchment of the appellants on 3rd July, 2018 was reasonable in the circumstances. In addressing the question of reasonableness of the notice, the learned Judge ruled out that it was reasonable. From page 386 through 397 of the record of appeal, the learned judge's findings appear to have a basis on: **One**, the appellants accepted and signed the retrenchment package. **Two**, they did not refer the matter to the CMA for mediation before retrenchment exercise was concluded. **Three**, the

nature of business and circumstances leading to retrenchment made the retrenchment exercise an urgent one. **Four**, the appellants had an opportunity to air their views regarding retrenchment, notwithstanding that such views were not recorded. **Five**, the appellants, after accepting the retrenchment package, pledged to have no further claims against the respondent and **six**, no specific duration through which the retrenchment notice was to be issued to the retrenched.

In the adopted written submissions of the appellants, Mr. Lingopola argued that, since the purpose of the notice is to facilitate pre-retrenchment consultations, then one day interval between the issuance of notice to the actual retrenchment cannot reasonably and practically serve that purpose. The learned counsel cited the High Court case of **Samora Boniphace & Two Others v. Omega Fish Limited**, Revision No. 56 of 2012 (unreported) on the purpose of the notice. He thus submitted that, the appellants were not consulted because the consultation meeting was convened seven hours prior to retrenchment and there was no discussion save for notifying the respondent's decision to retrench the appellants. He cited the case of **Arusha Meru Secondary School v. Francis Laizer & Charles William**, Revision No. 33 of 2018

(High Court) (unreported) insisting on proper consultation in retrenchment processes.

The respondent's written submissions in resisting the appeal is to the effect that, as there is no specific period on issuance of the notice of retrenchment, then the notice issued was reasonable. In the circumstances, he commented, there was consultation that is why the appellants accepted the retrenchment package. It is through such consultation, according to the respondent, that the appellants understood the purpose of the retrenchment, the reason why they did not refer the matter to CMA before the retrenchment was concluded.

Having considered the written submissions of the parties, we should state from the outset that, in the circumstance of this appeal, we think the issue of procedure regarding notice of retrenchment alone will suffice to resolve what is envisaged under section 38 of the ELRA. We have arrived at that understanding because, it is through the retrenchment notice where the employer and the employee to be retrenched meet and initiate consultation processes. All other procedure regarding retrenchment, in our view, follow thereafter.

As it is, there is no particular duration prescribed in section 38 (1) (a) of the ELRA on issuance of notice of intention to retrench. Both the

CMA and the High Court are in agreement on this. We also have the same understanding, so do the parties herein. It is to say, was the notice of retrenchment issued few hours to retrenchment reasonable in the circumstances to meet consultative purpose of the notice? As we said above, parties parted ways.

In essence, all the appellants were present in the second meeting which in the end communicated their retrenchment. It is not therefore correct as submitted by the appellants in their written submissions that some of them were absent. Annexed to exhibit D5, that is the 2nd retrenchment staff meeting minutes, is a list of names of attended staff, the names of the appellants inclusive. However, their mere presence in the meeting without being actively engaged through reasonable notice, serves no useful purpose. We have gone through the notice which features at page 156 of the record of appeal and found that, it appears the respondent intended that notice to last for 30 days, but unfortunately, it lasted for only few hours before retrenchment. For ease of reference, part of the said notice reads as hereunder:

> *".... With implementation of these changes, some position/roles within the organization will unfortunately become redundant. The management*

has therefore decided to commence a retrenchment exercise by ***issuing this generai notice which shali be construed as the statutory 30 days with effect from today.***

[Emphasis ours]

Reading the extract of the notice above, in our respective view, and as we said, it was a thirty days' notice intending to inform the appellants and other employees the respondent's intent to commence retrenchment exercise. This being the only message available in the notice, what transpired few hours from issuance of the notice, that is, retrenching the appellants, may not be construed in any other language other than this, that, there was no reasonable notice of retrenchment served to the appellants. We therefore agree with the appellants' counsel that, the said notice did not intend to inform the appellants of the intent and commencement of retrenchment exercise intimated, but rather to communicate the respondent's decision reached in the management meeting held on 2nd July, 2018 on retrenching the appellants.

In its face value therefore, a few hours' notice of retrenchment may not be considered reasonable in the circumstances. We thus hold, as the notice was not reasonable, the appellants were not informed of retrenchment and in effect, consultation processes were stalled thereof.

In that regard, we cannot hold, as the learned Judge did, that processes regarding disclosure of relevant information, selection criteria, referring the matter to the CMA for mediation before finalizing retrenchment processes and even the urgency of retrenchment resulting into issuance of such hours' notice, were made known and closely followed by the respondent.

We do not also find it prudent that the retrenchment was contemplated shortly to the issuance of an hours' retrenchment notice. According to the Resolution Insurance Limited Reports and Financial Statements, 31 December, 2017 (exhibit D 7), the respondent became aware that the company was making loss. Since the conceded fair grounds of retrenchment is associated with loss ensued by the company, we take the view that, the respondent contemplated retrenchment has its genesis here. Therefore, had the respondent left the notice to last for 30 days as intimated in the notice itself, then allegations of the appellants on unreasonableness of the notice would be an afterthought. As it is, the notice issued was not commensurate with contemplation of the retrenchment. It was too short as observed by the CMA at page 286 of the record of appeal. The notice of intention to retrench was unreasonable

and we so hold, because it was not given as soon as the retrenchment was contemplated.

As to reliefs, section 40 (1) (c) of the ELRA is clear on this. It requires a compensation of not less than 12 months remunerations on unfair termination. The appellants claim at the CMA, among others were a compensation of 36 months remunerations. The CMA at page 286 of the record of appeal after making reference to section 40 (1) (c) of the ELRA made the following observation:

> *"I have also taken into account that the respondent is going through rough times and therefore the commission see that the award of 36 months as compensation as prayed by the complainants will be too harsh punishment for the employer who is already having economic difficulties."*

We make a finding, as the CMA did, that a compensation of 12 months remuneration is reasonable in the circumstances. As we recently observed in **Tanzania Cigarette Company Limited v. Lucy Mandara**, Civil Appeal No.187 of 2021 (unreported), this is the minimum compensation awardable in the event of unfair termination under section 40 (1) (c) of the ELRA, in this case, non-observance of retrenchment

procedures. In the end, we find merit in this appeal and allow it. This being a labour matter, we do not make any order as to costs.

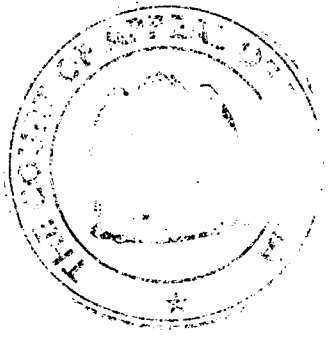
DATED at **DAR-ES-SALAAM** this 27th day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 29th day of February, 2024 in the presence of Mr. John Lingopola, learned counsel for the Appellant who also took brief for Mr. Shukrani Eliot Mzakila, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL