THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 17 OF 2019

(Originating from the Complaint Ref. CMA/MBY/79/2018 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)

INNOCENT KIBADU AND 17 OTHERS.....APPLICANTS

VERSUS

TUMAINI UNIVERSITY MAKUMIRA.....1ST RESPONDENT
THE REGISGTERED BOARD OF TRUSTEES OF
THE EVANGELICAL LUTHERAN CHURCH OF TANZANIA.....2ND RESPONDENT

JUDGEMENT

Date of Last Order: 16/04/2020
Date of Judgment: 27/05/2020

MONGELLA, J.

The applicants filed a chamber application calling for this Court to call for the original records of the Commission for Mediation and Arbitration (CMA) award dated 20th March 2019 and a corrected ruling dated 27th May 2019 accompanied with an award erroneously dated 20th March 2019 and revise the same on the ground that the award is illogical and or irrational causing injustice to the applicants. The applicants engaged Mr. Innocent Kibadu as their personal representative, while the respondents

enjoyed the legal services of Dr. Daniel Pallangyo, learned advocate. The application was argued by written submissions.

Mr. Kibadu started by adopting the affidavit filed in support of the application. Under paragraph 14 of the affidavit the applicants raised three issues for determination as follows:

1. *That the arbitrator misdirected himself in law and facts in holding that the termination was procedurally fair and proper.*

2. *That the arbitrator failed to analyse the reliefs claimed by the applicants in application forms (CMF No. 1) and to evaluate the evidence adduced by both the applicants and respondents.*

3. *That the arbitrator erred in law and fact in holding that only the twelve applicants are entitled to repatriation to places of their recruitment, and to be paid subsistence allowance from the date of termination to date of award, while omitting the other lawful terminal benefits as claimed and admitted by the second respondent.*

Arguing on the first issue, Mr. Kibadu submitted that the termination was unfair and improper in the eyes of the law therefore the arbitrator erred in holding that it was fair and proper. He argued that it is on record that the former Tumaini Makumira University-Mbeya Campus (TUMA-Mbeya Centre) which belonged to the 1st respondent underwent organizational closure following directions from the Tanzania Commission for Universities

(TCU). He said that the respondents claimed that the TCU notice was too short, but the record indicates that TCU issued one month notice on 04/04/2018 and the 1st respondent received it on 12/04/2018. He claimed that the 1st respondent had information and contemplated closure of business as from 12/04/2018 until 17/05/2018 (making 38 days) when he traveled from Arusha to Mbeya to close operations of the Centre by repatriating students to the main campus in Arusha. He contended that the same was done without informing the Management of the Centre and its staff regarding the closure of business of the Centre.

He referred to section 38 of the Employment and Labour Relations Act of 2004 and Regulation 23 (4) to (7) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 which provides for procedure on retrenchment on operational basis. He submitted that Regulation 23 (7) specifically provides:

> *"The more the urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process may be. Urgency may not, however, be induced by the failure to commence the process as soon as a reduction of workforce was likely. On the other hand, the parties who are required to reach agreement shall meet, as soon as and as frequently, as may be practicable during the process."*

He argued further that the termination was unfair as consultation was not done. He referred to the case of ***Security Group (T) Ltd. v. Samson Yakobo & 10 Others***, Civil Appeal No. 76 of 2016 in which the employer held a meeting to determine the amount of severance allowance after a

retrenchment was done. Under the circumstances, the Court of Appeal (CAT) held that the consultation as envisaged under section 38 (1) (d) (iii) of the ELRA was not done. Basing on this case, Mr. Kibadu faulted the Hon. Arbitrator's holding to the effect that before the closure of business and termination of the applicants, the consultation process was properly followed as required under the law. He argued that as per exhibit D7, the termination occurred on 17th May 2018 while discussion meetings were held on 18th May 2018 and 2nd June 2018 to discuss the applicant's rights after termination. He added that the said meeting was not conducted voluntarily by the respondent as he had to be compelled by the Mbeya District Security Council following complaints by the applicants. He challenged the Hon. Arbitrator's reasoning that the Centre closed under emergency circumstances and that consultation process was done in emergency state. He argued that it is on record that the 1st respondent repatriated students on 17th May 2018 and the 2nd respondent barred the applicants from entering the office on the same date by changing the door locks.

He contended that under the circumstances, the applicants were constructively terminated without notice contrary to section 38 of the ELRA and Rules 23 to 24 of GN No. 42 of 2007. He added that there is no evidence on record showing that the respondents complied with the mandatory procedures under the law or payment of terminal benefits to the applicants. He referred to exhibit D12 and argued that the same indicates that the Centre was officially revoked on 13th July 2018. Therefore his stance was that the 1st respondent closed the Centre even

before being revoked by TCU and hence the reason of emergency cannot stand.

Responding to this first issue, Dr. Pallangyo submitted that the termination was on operational ground following the TCU's closure of TUMA-Mbeya Centre for failure to comply with TCU academic quality assurance standards. He argued that the provision of the law as provided under section 38 of the ELRA and Rule 24 (4) to (7) of GN No. 42 of 2007 requires consultation prior to termination. He argued that it is on record that the 2nd respondent conducted consultative meetings with the applicants prior to termination. He contended that the 1st respondent received a notice letter from TCU on 12th April 2018 and immediately communicated with TUMA-Mbeya Centre administration in trying to show cause as to why certain quality assurance issues had not been rectified. He said that TUMA-Mbeya Centre administration attended meetings that sat to address the notice letter, that is, exhibit D11. Referring to exhibit D7, he submitted that on 19th May 2018 the 2nd respondent held a consultative meeting with the respondents whereby they were given details of the situation and agreed to finalize the matter on 2nd June 2018. He argued that the Hon. Arbitrator was right in finding that the termination was fair because the 2nd respondent conducted two consultative meetings whereby both parties agreed on the way forward and the applicants signed the minutes. He distinguished the case of ***Security Group (T) Ltd*** (supra) arguing that in this case, the employer did not conduct any consultative meeting.

Dr. Pallanyo challenged the applicants' claim that the 1st respondent failed to issue notice prior to the consultative meetings. He argued that the Hon. Arbitrator concluded that the 1st respondent was not the employer and the applicants have not moved this Court to determine on this issue something which connotes that they were satisfied with the findings of the Hon. Arbitrator on the issue. Referring again to exhibit D7, he argued that the applicants reached an agreement with the 2nd respondent whereby they agreed to be paid one month salary in lieu of notice. Referring to the case of ***Oil Gas & Marine (T) Ltd*** (supra) and that of ***Rwekiza and 11 Others v. BS Stanley Mining Services***, Revision No. 23 of 2012, cited by the applicants, he argued that an interpretation of section 38 of the ELRA was provided to the effect that the provision is not meant to be applied in a checklist fashion, but rather to provide guidelines to ensure that consultation is fair and adequate.

Dr. Pallangyo also challenged the claim by the applicant that the termination occurred on 17th May 2018 while consultative meetings were held on 18th May 2018 and 2nd June 2018. He argued that termination took place as per the agreement reached on 2nd June 2018. He referred to Rule 23 (4) of GN No. 42 of 2007 which provides that "*obligations placed on an employer are both procedural and substantive. The purpose of the consultation required by section 38 of the Act is to permit the parties in the form of a joint problem-solving exercise, to reach an agreement...*" Dr. Pallangyo argued that since the 2nd respondent and the applicants did meet and reach an agreement as evidenced by exhibit D7 the law was complied with. He cited the case of ***African Martin Shijale v. Ukwamo Industries (T) Ltd.***, Revision No. 12 of 2008 in which the Labour Court

emphasized on the importance of workers' involvement in the retrenchment exercise by ruling that where the workers are adequately involved in the exercise, the redundancy exercise is deemed to have followed the law.

Mr. Kibadu argued collectively on the 2nd and 3rd issues. He submitted that the Hon. Arbitrator failed to analyse the evidence adduced by both the applicants and the respondents thus reached at an erroneous award. He contended that the Hon. Arbitrator failed to first ascertain when exactly the applicant's employments were terminated given the circumstances of the case. He said that the students who were the subject matter of the applicants' employment were ordered by the 1st respondent to move to Arusha in three days on 17th May 2018 and that he convened the meeting with the students without involving the Management and the applicants as the staff. He contended that if the Hon. Arbitrator considered the said evidence, he would have arrived at a fair decision by ordering twelve months salaries as compensation, notice pay, leave pay and severance pay in addition to the orders he pronounced in his award, whereby he had ordered payments as per section 41 to 44 of the ELRA. He argued further that the Hon. Arbitrator also failed to order payment of salary arrears as unpaid remuneration for the work done before termination despite the fact that the respondents, as per exhibit D8 admitted to be indebted.

He further contended that through exhibit D7, the respondents admitted on the agreed term that the applicants' claims including salary arrears were to be verified by the respondents and a proper schedule of

payment be arranged. Citing the case of ***Oil Gas & Marine (T) Ltd v. Jovent Mushwaimi & 19 Others***, Revision No. 293 of 2016 he argued that the applicants' claims were to be verified before closure of business, but to the contrary they were verified after closure of the business. He concluded that since the termination was procedurally unfair, the applicants were entitled to be paid all their terminal dues including twelve months compensation for unfair termination.

In response, Dr. Pallangyo submitted on these two issues collectively as well. He argued that the Hon. Arbitrator properly analysed the evidence adduce before him and reached a proper award. He argued that from exhibit D7 it is clear that the applicants were terminated on 2nd June 2018. He contended that the 1st respondent was ordered to transfer the students of Mbeya Centre to Arusha, but the said transfer of students did not mean termination of the applicant's employment. That, while the students were being transferred, the 2nd respondent started consultations with the applicants. He contended that an amicable settlement between the applicants and the 2nd respondent was reached and the applicants went to the 2nd respondent to verify their due whereby each of them signed a paper indicating his/her agreement to the dues as evidenced in exhibit D8 and D9. He submitted that the 2nd respondent is ready to pay the applicants their dues as exhibited in exhibit D8 and D9 respectively, but it is not right for the applicants to raise the timing of verification of their dues as a ground for unfair procedure. He concluded that the termination was procedurally fair thus the applicants are not entitled to twelve months salary compensation as they claim.

I have considered the rival arguments from both parties and read carefully the CMA record. It is clear that the reason for termination was operational requirement occasioned by the closure of the 2nd respondent's business by the TCU which is a regulatory authority for higher learning education in the country. The issue for determination therefore is whether the procedure for termination on operational requirement was followed and whether the applicants are entitled to twelve months salary as compensation for unfair termination. The procedure for operational requirement/retrenchment is governed under section 38 of the ELRA and Rule 23 of GN No. 42 of 2007. Section 38 (1) requires the employer to first issue notice of any intention to retrench as soon as it is contemplated; second, to disclose all relevant information on the intended retrenchment for the purpose of proper consultation; and third, to consult prior to retrenchment. On consultation, section 38 is to be read together with Rule 23 (4) of GN No. 42 of 2007 whereby it provides that the consultation process is to permit the parties, in the form of a joint problem solving exercise, to reach an agreement on, among other things, the retrenchment benefits of the employees including severance pay.

The applicants claim that they were unfairly terminated because the consultation took place after they were terminated contrary to the procedural rules. The records however, especially exhibit D7, shows that the termination occurred on 2nd June 2018. In his submission Mr. Kibadu first claimed that the termination occurred on 17th May 2018 when the students who are the subject matter of their employment were transferred to Arusha. In my opinion however, the claim of unfair termination of the applicants' employment cannot be attributed to the transfer of the

students to Arusha. As much as I agree that the students were the subject matter of the applicant's employment, the circumstances pertaining to their transfer have to be reasonably considered. It is undisputed that the Centre's business was to be closed by the government. Therefore in my view, the students had to be rescued first and immediately before solving employment issues with the workers.

Mr. Kibadu as well claimed that the respondent constructively terminated the applicants by changing the office door locks thereby hindering their entrance into the office premises. I have gone through the records, particularly the witnesses' testimony from both sides and found no witness who testified to this effect. This issue therefore appears to have cropped up at this revisional stage. Since the same is a matter of fact/evidence and not law, it cannot be entertained at this stage of revision. The position of the law is settled to the effect that issues of fact not raised and discussed or determined at the court of first instance cannot be brought up and entertained at the appellate or revisional stage. The Court of Appeal (CAT) in ***Farida and Another v. Domina Kagaruki***, Civil Appeal No. 136 of 2006 held that:

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and or raised at the lower court."*

Considering the above decision, it is my finding that the applicants never pleaded constructive termination at the CMA nor proved the said allegations and therefore the same cannot be entertained at this revisional stage. See also: ***Yazidi Rajabu Aka Byamungu & 2 Others v.***

Nakuroi Investment Co. Ltd., Land Appeal No. 118 of 2016 (HC at DSM, Kente, J. unreported).

Mr. Kibadu also claimed that the respondents never wanted to carry out the consultations until when the applicants complained to the Mbeya District Security Council which compelled them to hold the meetings. I have gone through the proceedings of the CMA and found nothing to that effect being testified by any of the witnesses. It was only complainant witness no. 5 who spoke something similar to what Mr. Kibadu submitted. This witness testified that on 18th May 2018 a meeting was held with the Regional Security Committee to discuss the security issues at the premises of the Centre following the transfer of the students, and then the Chairman of the Committee directed that the 1st respondent holds a meeting with the employees to reach an agreement on their benefits. She testified that meetings were then held and an agreement reached. In addition, what I find relevant in the circumstances is that consultative meetings were held and an agreement was reached as per exhibit D& and the testimony of complainant's witness no. 5. Like I said earlier, the provisions of section 38 of the ELRA are to be read together with Rule 23 (4) of GN No. 42 of 2007 whereby the consultation process is to permit the parties, in the form of a joint problem solving exercise, to reach an agreement. They are not to be followed in a checklist fashion. See: ***Rwekiza and 11 Others v. BS Stanley Mining Services*** (supra).

To this point, it is my finding that the procedure for operational requirement was followed as consultative meetings were held and an agreement reached. The law under section 38 (2) of the ELRA directs that

if an agreement is not reached the matter should be referred to the CMA for mediation. However, in the case at hand, as per the testimony of the witnesses, an agreement was reached. The applicants however, proceeded to the CMA claiming for unfair termination. In my considered opinion there was no unfair termination both substantively and procedurally and therefore, the applicants cannot be entitled to twelve months compensation for unfair termination. However, they are entitled to other statutory benefits payable to them regardless of whether the termination was fair or not which I find they have not been included in the CMA Award. These include payment in lieu of notice as per section 41 (5) and 44 (1) (d) of the ELRA; Salary for work done as per section 44 (1) of the ELRA; Annual leave not taken as per section 31 (4) (a) and 44(1) (b) of the ELRA; and severance pay as per section 38 (1) (v) and 42 of the ELRA.

The CMA ruled that the 1st respondent is not the employer of the applicants and that the 2nd respondent is the one responsible for paying the applicants' terminal benefits. Since this finding was never challenged in this revision, I see no reasons to interfere with it. The 2nd respondent thus remains responsible for paying the terminal benefits to the applicants as I have ruled above. As nothing was presented by the parties to assist me in knowing the exact amounts to be awarded to each of the applicants, I order the 2nd respondent and the applicants to work on the figures to be paid depending on the applicants' last remuneration. The whole process should be completed within three months from the date of this judgment.

Among the issues presented was on repatriation package for some of the applicants whom the CMA ruled that they were not entitled. However, I

am not in a position to deliberate on this because Mr. Kibadu kind of abandoned the claim in his submission. He did not submit on this claim to assist me to know the basis under which I can consider the claim and decide on whether to award the same or not. Under the circumstances, the decision of the CMA shall prevail. In the upshot I uphold the award of the CMA, save for the added reliefs to the applicants as stated herein above.

Dated at Mbeya on this 27th day of May 2020.

L. M. MONGELLA

JUDGE

Court: Judgment delivered through video conference on this 27th day of May 2020 in the presence of Ms. Lillian Gama, learned advocate, on behalf of Mr. Innocent Kibadu, the applicants' personal representative and Dr. Daniel Pallangyo, learned Advocate representing the respondents.

L. M. MONGELLA

JUDGE