THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA
LABOUR REVISON NO. 46 OF 2017
(Arising from the award of the Commission for Mediation and Arbitration at Mbeya in Labour Dispute No. CMA/MBY/38/2017)

MIHAN GAS COMPANY LTD.....APPLICANT
VERSUS
AIKO ROBERT.....RESPONDENT

JUDGMENT

Date of last order: *06/07/2020*
Date of Judgment: *30/09/2020*

NDUNGURU, J.

This judgment is in respect of the application for revision filed by the applicant, one Mihan Gas Company Ltd. against the decision and award issued by the Commission for Mediation and Arbitration for Mbeya (herein referred to as CMA) in Labour Dispute No. CMA/MBY/38/2017 which was delivered on 28th day of July 2017 in favour of the respondent herein above.

The application is by way of Notice of application and Chamber summons which is predicated on Section 91 (1) (a) and 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relation Act, No. 6 of 2004 and Rule 28 (1) (c) (d) (e) and Rule 24 (1) and 24 (2) (a) (b) (c) (d) (e) (f)

and Rule 24 (3) (a) (b) (c) (d) of the Labour Court Rules, G.N. No. 106 of 2007.

Also, the application is supported by the affidavit which duly deposed by the one David Ndossi, the applicant's counsel. The respondent challenged the applicant's application through the counter affidavit which sworn by the one Irene Mwakyusa, the respondent's counsel.

In order to appreciate the sequence of events, I think, it is instructive to set out briefly the background giving rise to the present application. The complainant, the respondent herein, employed by the applicant as sale representative on 01st day of February, 2015 at Dar es Salaam station. Thereafter, he was transferred at Mbeya station. Also, the record revealed that, the respondent was employed under fixed term contract and the respondent's contract expired in January, 2017.

Again, it is apparent that, the respondent was an employee of the applicant until 28th day of January, 2016 when his employment was terminated on alleged reason that, the company undergo high operational costs. Being aggrieved by the termination, the respondent referred the matter to the CMA and prayed for compensation of 24 months salaries, subsistence allowance, damages and repatriation costs.

In a reasoned award, the arbitrator decided that, the respondent's termination was procedurally unfair and ordered the applicant (employer)

to pay the respondent compensation in the form of thirteen months salaries of Tshs. 10,400,000/=, bus fare Mbeya-Dar es Salaam of Tshs. 90,000/= and repatriation costs of Tshs. 3, 550,000/=.

Being dissatisfied with the award given by the CMA, the applicant lodged the present application for the Court to revise and set aside the award of the CMA on the following grounds:-

1. That, the Honourable arbitrator erred in law and fact by disregarding the terms and conditions of the contract which binds the parties item number 1 and 6 (6.7) of the contract of the employment.
2. That, the Honourable arbitrator has erred in law and fact for failure to draw and determine issue as required by the law.
3. That, the Honourable erred in law and fact for failure to record the proceedings and evidence tendered before the CMA.
4. That, the Honurable arbitrator erred in law and fact for awarding repatriation costs without basis and or calculation.

On the date of hearing of the application, Mr. Felix Kapinga, learned advocate appeared for the applicant whereas Ms. Irene Mwakyusa, learned advocate appeared for the respondent. Upon the request of the parties, this Court allowed the parties to argue the application by way of the written submissions.

The learned counsel for the applicant abide by the schedule fixed by the Court save for the learned counsel for the respondent who she opted not to file the reply to the written submission filed by the learned counsel for the applicant. Therefore, I highly appreciate the timely filing of submission by the learned counsel for the applicant.

In supporting of the application, the first and fourth grounds submitted jointly by the learned counsel for the applicant that, the arbitrator awarded Tshs. 13,840,000/= without taking into consideration the requirement of the law and the circumstances of the case. He added that, the repatriation costs awarded without justification as the same was ready received by the respondent.

In relation to the second and third grounds, Mr. Kapinga argued that, the arbitrator failed to analysis the evidence as there was fair termination. He added that, the respondent was given notice of intention for retrenchment by the applicant and disclose all relevant information on the intended retrenchment to the respondent.

Also, he stated that, the applicant did not dispute the retrenchment package proposed to the respondent but the same was not recorded by the arbitrator which amount denial of right to be heard. He went on to submit that, the applicant proved that had fair reasons for termination of the respondent's employment.

Further, the learned counsel for the applicant cited Section 38 and 39 of the Employment and Labour Relation Act, No. 6 of 2004 and Rule 23- 25 of the Employment and Labour Relation (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007 to cement his submission. In conclusion, he prayed for the Court to revise and set aside the whole award due to the fact that the applicant' s evidence was not recorded and the Court order retrial by another arbitrator.

Having carefully considered the record of CMA, the submission filed by the counsel for the applicant and the pleadings filed in this Court, the issues calling for determination of this application are following:

(a) Whether the respondent termination was procedurally unfair or not.

(b) Whether the arbitrator was fail to record properly the evidence adduced by the applicant or not.

(c) The reliefs entitled to each party.

Starting with the first issue, the issue here is whether fair prescribed procedure was followed. It is well established that, once the employer give notice to the employee, the duty moves to the employee to respondent. If the time of notice is too short, the response could merely state so, and seek more.

As regards consultation, the law puts the duty to engage in a consultation in good faith, is put on both employer and employee. Again

the consultation process shall commence as soon as the employer contemplates a reduction of the workforce through retrenchment so that possible alternatives can be explore. Also, the purpose of consultation is to permit the parties, in the form of a joint problem solving exercise, to reach agreement.

Retrenchment properly so called can only be adjudged unfair if the employer fails to prove that procedural requirements provided under Section 38 of the Employment and Labour Relations Act, No. 6 of 2004 read together with Rule 23-26 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007.

For easy reference I see it is very important to reproduce Section 38 (1) and (2) of the Employment and Labour Relations Act, No. 6 of 2004 which provides that:

> *"(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be shall-*
>
> *(a) Give notice of any intention to retrench as soon as 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 pf the employee to be retrenched*

(iv)the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments,

(d) shall give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognized in term of section 67

(ii) any registered trade union with members in the workplace not represented by a recognized trade union,

(iii) any employees not represented or registered trade union.

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

Turning to the facts of the present application, it is clear that, the respondent was given the notice of intention of the retrenchment by the applicant through the e-mail. And even the respondent did not dispute these facts.

Further the record revealed that, the respondent in this application made response to the employer who replied that the decision of termination was already reached against the respondent, this fact revealed at page10 of the typed proceedings of the CMA. In other words there was no proper consultation between the respondent and applicant as provided by the law.

From the discussion above, it is clear that, the applicant did not comply with the mandatory procedure required by the law. Therefore, the

arbitrator was right to hold that the respondent termination was procedurally unfair.

Coming to the second issue, my determination is that, on the stage of appeal or revision this Court deals with the evidence available on the Court record and not otherwise. On that regard the assertion that the arbitrator failed to record properly the evidence adduced by the applicant is afterthought and it is not tenable in law. Therefore, this issue answered in negative.

In relation to the issue reliefs, the labour law does not provide a formula on how to calculate the repatriation costs for the employee who employed under the private sectors unlike for the employee who employed under government sector. Again the employment contract of the respondent (employee) does not provide a formula on how the repatriation costs will be paid to the respondent once his employment will be terminated.

On that regard, this Court cannot apply the formula which applied for the public servant to calculate the repatriation costs for the employee who employed under private sector. Therefore, this Court found that, the arbitrator was right to award the sum of Tshs. 3,640,000/= as the repatriation costs.

Also, I feel profoundly to put clear that, the issue of re-allocation allowance is the matter of contract which operate during the existence of the contract whereas the repatriation costs is the matter of law which operate when the employee is terminated from his/her employment. Therefore, the repatriation costs and re-allocation allowance are two different thing.

Further, the applicant in addition should pay subsistence allowance to the respondent as from the date of termination to the date of payment of repatriation costs to the respondent back to his place of recruitment which is Dar es Salaam. The respondent's salary was Tshs. 178,150/= per week which is about Tshs. 712,600/= per month, if you divided by 30 days of the month daily subsistence allowance it will come at the nearest 2,375 Tshs per day which the respondent has to be paid as subsistence allowance costs from the date of termination the date of payment of transportation costs from Mbeya to Dar es Salaam.

This position is well stipulated by this Court in the case of **Communication and Transport Workers Union of Tanzania COTWU (T) vs. Fortunatus Cheneko**, Labour Complaint No. 27 OF 2008 where the Court held that:

> *".....Section 43 (10) (c) (sic) (**correct is 43 (1) (c)** allows for duly subsistence expenses between the date of termination and the date of transportation unfortunately the Act did not*

prescribe the daily subsistence rate payable. Since applicant's salary (sic) is 370,000/= per month and the applicant has subsisting on the salty at the place of his work the daily subsistence allowance can be taken to be the daily wage calculated on the basis of the month salary was per Mandia, J (as he then was) (bolded words mine)."

Furthermore, the respondent has not been transported to his place of recruitment as the record shows. He is therefore entitled to the payment of subsistence allowance from the date he was terminated to when the applicant will pay the repatriation costs to the respondent back to Dar es Salaam place of recruitment.

The basis of awarding the subsistence allowance to the respondent comes from the decision of this Court in the various cases, for example in the case of **Ibrahim Kamundi Ibrahim Shayo Versus Tanzania Fertilizer Company Ltd (TFC)**, Labour Dispute No. 1 of 2014 (unreported) where the Court stated that:

"My understanding of the Court of Appeal decision is that, the employee is entitled to be paid subsistence allowance once employer failed to repatriate such an employee to his place of domicile and such employee continued to stay in the working place."

The same position is well re-stated by the Court of Appeal of Tanzania, in the case of **Paul Yustus Nchia vs. National Executive**

Secretary CMM and another, Civil Appeal No. 85 of 2005 (unreported) where the Court held that:

> *"Employee is entitled to repatriation cost, and subsistence allowances only if he was terminated on the place other than place of domicile; and employee remained on the place of recruitment, entitled with subsistence allowance for the period of remain."*

The question of substance allowance though was the one of the claims in the CMA F.1 but was not delt with. This can be inadvertently or willingly. But all in all the respondent is entitled to.

From the above observation, the respondent is entitled for payment of compensation for breach of contract of Tshs. 10,400,000/=, repatriation costs of Tshs.3,640,000/= and subsistence allowance which is Tshs. 71,250/= per month from the date of termination to the date of payment of repatriation costs.

In event, I revise the arbitrator's award to the extent shown above and I hereby dismiss this application. No order as to costs.

It is so ordered.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

D. B. NDUNGURU
JUDGE
30/09/2020

Date: 30/09/2020

Coram: D. B. Ndunguru, J

For the Applicant: Mr. Kapinga – Advocate

Respondent:

For the Respondent: Mr. Ireen Mwakyusa – Advocate

B/C: M. Mihayo

Ms. Ireeen Mwakyusa – Advocate:

We are ready for judgment.

Mr. Kapinga – Advocate:

We are ready.

Court: Judgment delivered in the presence of Mr. Kapinga advocate for the applicant and Ms. Irene Mwakyusa for the respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

D. B. NDUNGURU
JUDGE
30/09/2020

Right of Appeal explained.