IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
(HIGH COURT LABOUR DIVISION)

AT SHINYANGA

REVISION APPLICATION NO. 13 OF 2020

(Arising from an award of the Commission for Mediation and Arbitration of Shinyanga in Labour Dispute No. CMA/SHY/220/2019)

ELIZABETH JOHN MPONEJA ..... APPLICANT

VERSUS

G4S SECURE SOLUTIONS (T) LTD.....RESPONDENT

JUDGMENT

Date of the last Order: - 30th June, 2020
Date of the Ruling: -28th August, 2020

MKWIZU, J.:

Applicant, Elizabeth John Mponeja was employed by the respondent G4s Secure Solutions Tanzania Limited as a security administrator in a one year fixed term contract from 18th January, 2018 to 17th January, 2019. The contract was then renewed by default from 18th January 2019. On 4th December, 2019 her employment contract was terminated pursuant to retrenchment agreement and after she had refused to accept the alternative post offered.

Aggrieved by the termination, applicant challenged the retrenchment at the Commission for Mediation and Arbitration that it was un procedural and without fair and valid reasons. Her claims was as follows:

i. Damages for pre mature termination 1,100,000
ii. One-year leave.....550,000
iii. Severance pay.....275,000
iv. One-month salary in lieu of notice.....550,000
v. Bus fare 22,000
vi. Transport costs.....487500
vii. Compensation of 12 months' salary.....6600,000

CMA heard the parties at the end, the dispute was dismissed for lacking in merit. Aggrieved, applicant has filed the present revision through notice of application and chamber summons made under section 91 (1) of the Employment and Labour Relations Act, 2004, Rules 24 (1) (2) (3) and Rule 28 (1) (c) (d) and (e) of the Labour Court Rules, 2007, Applicant filed this application for revision of the CMA award in Labour dispute No CMA/SHY/220/2019

The application is supported by an affidavit sworn by Elizabeth John Mponeja on 16th March, 2020. The Respondent contests the Application, hence the counter affidavit sworn by Imelda Lutebinga on 3rd April, 2020.

By the leave of the court, this revision was disposed of by way of written submissions. Applicant filed her written submissions in support of the application on 29th June, 2020 whereas the reply submissions were filed by Mr. Zuri el Kazungu counsel for the respondent on 13th July, 2020 and rejoinder submissions were filed on 30th July,2020.

In her written submissions, Applicant narrated facts which led to the dispute between the parties. She said nothing substantial on why she is challenging the arbitrator's decision except for the seven issues itemized at page 7 of her written submissions which are similar to the issues outlined in paragraphs 7, 8,9,10,11,12,13 and 14 of her affidavits in support of the application. The referred paragraphs read:

7. That Arbitrator failed to correctly record the correct date of the commencement of the applicant's contract. The arbitrator recorded that Applicant was employed from 17/01/2019 while her contract commenced on January 18th 2018 and was expected to end on January 17th 2019.
8. That the CMA misunderstood the applicant's submission that there was an agreement between employees and employer that all

female employees, CCTV, Drivers, Systems, Administrator and Plant security sections would not be affected by the retrenchment. Inversely, arbitrator recorded that the above section would be affected.

9. That, the CMA failed to obtain and examine the reason given on why applicant failed to report on duty on 30th November, 2019 to December, 2019.

10. That, the CMA erred in receiving in evidence and evaluate a letter for change of role from Administrator to security officer dated 26th November 2019.

11. That, the CMA erred by accepting the respondent's evidence to the effect that applicant was terminated on retrenchment on 04th December, 2019, and therefore on 06th December, 2019 did not report at work.

12. That, the CMA accepted the respondent's claim that Flavia Felician was employed by G4S on the position of security Administrator at the time of retrenchment while not.

13. That, the CMA failed to understand applicant's retrenchment was done so as to rescue Flavia Felician's employment who was working in a section that was affected by the retrenchment.
14. The, CMA erred and failed to inquire more about the pending investigations on sexual harassment by contract manager for G4S.

In response, to the first issue that the Arbitrator erred to record the date of the commencement of the applicants' contract as 17/01/2019, instead of January 18th 2018, *Mr.* Kazungu counsel for the respondent submitted that, the Arbitrator was not in error. He counted from the date of renewal, and not from the commencement of the already expired contract. The first fixed term contract began on January 18th 2018 was concluded on 17th January, 2019 followed by another contract which came by default on the same date 17th January, 2019. The new contract and which is at issue, stated the learned counsel, was supposed to end on 17th January, 2020 but was terminated on 4th December, 2019 by retrenchment agreement.

Regarding the second complaint that female employees would not be affected by the retrenchment Mr. Kazungu submitted that, the ground is misconceived, unfounded and devoid of merits. The respondent's counsel argued that the retrenchment agreement signed by the applicant has no term to the effect that, all female employees would not be affected by the retrenchment process. He suggested that applicant is trying to bring in a new term to the retrenchment agreement through her submissions. He generally supported the arbitrator's decision on this point.

On whether the arbitrator failed to obtain and examine the evidence adduced on why applicant failed to report on duty on 30th November, 2019 to December, 2019, the respondent counsel submitted that the allegation is frivolous and devoid of merits. He said applicant submissions failed to point out evidence adduced but not examined by the arbitrator. He explained further that, retrenchment agreement was effective from 05th November, 2019 with one-month notice which was to end on 04th December, 2019.During the notice period, applicant was offered an alternative position vide a letter dated 25th November, 2019 pursuant to item No. 2 the ***"Other***

terms and conditions" clause of the retrenchment agreement which offer she refused.

On the issue posed that the Commission for Mediation and Arbitration erred in receiving the evidence of letter for change of role from Administrator to security officer dated 26th November, 2019, Mr. Kazungu said, the said letter was tendered by the applicant herself and was admitted as Exhibit P-3 without objection from the respondent. The challenge over its admissibility by the applicant is illogical, vexatious and frivolous, as the Arbitrator acted fairly and legally.

On the fifth ground where the applicants faults the CMA for accepting respondent's evidence that applicant was terminated on 4th December, 2019, and at the same time agreeing that on 6th December, 2019 the applicant did not report at work ,the respondent's counsel response was that this grounds was just raised in the affidavit and never argued in the applicant's submissions. The applicant ought to have shown how did the trial Arbitrator erred as she alleged. He said, the decision of the CMA indicates that the trial Arbitrator accepted that the applicant was terminated 04th December, 2019,

but nothing in the said decision suggests that the Commission ruled out conclusively that on 06th December, 2019 the applicant did not report at work except for the summary of the respondent's testimony contained therein.

Respondent's counsel argued grounds sixth and seventh together. He explained that, the retrenchment process was not aimed at favouring anybody The Arbitrator correctly and properly analysed that Flavian Felician was the first to be employed as he was employed in 2017, while the applicant was employed in 2018 as their employment contacts depict. The selection criterial on the retrenchment process was not targeting a certain unit or department or person, but based on FILO and it was not to be applied selectively rather was applicable across all business units and departments. Thus, it was right for Flavia as a senior Security Administrator to occupy the post and the applicant to be retrenched as junior under the FILO/LIFO and Bumping principle stressed Mr. Kazungu. He concluded that the retrenchment of the applicant was justified.

On the complaint that the arbitrator failed to inquire on the pending investigations on sexual harassment by contract manager for G4S. Mr.

Kazungu was of the view that, the applicant was duty bound to prove her allegations. He expounded that after all, whether or not there had been an issue of sexual harassment, it had nothing to do with the retrenchment process which was duly and properly undertaken by the respondent as held by the trial Arbitrator.

Respondent submitted further that applicant was fairly terminated and she was paid all her terminal benefits. He prayed for the dismissal of the application on its entirety.

In her rejoinder submissions, Applicants reiterated her submission in chief and expressed her disagreement to the respondent's submission.

I have given the revision a thorough scrutiny. The main issue here is whether the CMA's decision was properly arrived at. This is because looking at the affidavit in support of the application and the applicants' written submission, all talk of the arbitrator's blunder in considering the applicants claim. Thus, I will determine all issues raised in the affidavit one after the other.

My understanding of the records is that the applicant is complaining of the retrenchment process. The major concerns were on (i)) how she was included in the retrenchment process while the retrenchment agreement was in exclusion of female employees; (ii) that applicant's position was not included in the retrenchment: (iii)how Flavian Felician was placed on the applicant's former position while demoting the applicants to another junior posts, and lastly (iv) that she was not paid her entitlements of the days worked. The arbitrator took into account all into account and finally arrived into one conclusion that the complaints have no merit.

The applicant has now come to this court with a complaint that the arbitrator failed to record the correct commencement date of her employment contract with the respondent. Exhibit P1 is the applicant's employment contract. It is a fixed term contract of one year commenced on 18th January, 2018 to 17th January, 2019.This contract was automatically concluded without any problem between the parties. However, as the record shows, the applicant contract was renewed by default on 17/1/2019 this time, the second contract was expected to end on 18.1.2020. Unfortunately, it was terminated by retrenchment process on 4 /12/2019

Indeed, at page 1 of the CMA's decision, arbitrator made reference to 17/01/2019 as the date of the commencement of terminated contract . As correctly submitted by the respondent's counsel, this was the date when the contract in dispute commenced, not the applicant's initial contract with the respondent which ended on 17th January 2019. There was nothing wrong with this date. The records are elaborative that applicant served two consecutive employment contracts with the respondent, the first one commenced on 18/1/2018 to 17/1/2019 and the second contract which came about by default on 17/1/2019 expected to come to an end on 17/1/2020, however, it ended up terminated on 4/12/2019 by retracement agreement. The arbitrator was therefore referring to this second contract.

On whether the arbitrator erred to record that female employees, CCTV, Drivers, Systems Administrator and Plant security sections would be affected by the retrenchment while the evidence was to the contrary, the records should be able to provide the answer. I have perused the records, the CMA's decision recorded the applicants to have said that the consultation meeting held on 2/11/2019 set FILO as a criterial to be followed on

retrenchment process and that female employee were not supporsed to be retrenched. She was also recorded to have said that the said meeting resulted into a retrenchment agreement which she herself signed. The arbitrator did not make any finding on this issue specifically. My further examination of the retrenchment agreement discloses that the statement by the applicant is not born by the said agreement. Exhibit P2, the retrenchment agreement says the company shall reduce the number of employees at Bulyanhulu site by way of retrenchment, there was nothing like specifying groups of people by gender or working departments/sections or unit who would be affected and who would not. So whether the arbitrator got it right from the applicant or wrongly it would have not affected the merits of the matter as the retrenchment agreement was the controlling document in execution of the said retrenchment. This grounds also fails.

Moreover, the applicant faults the CMA for failure to obtain and examine the reason given on why applicant failed to report on duty on 30th November, 2019 to December, 2019.I have perused the entire records including the opening and closing statements, and the parties evidence at the CMA, nothing was said explaining why the applicant was unable to be

on duty on 30th December 2019. There is nothing to blame the trial arbitrator on this.

Again, the complained letter dated 26th November 2019 is an offer issued to the applicants after the retrenchment agreement. It was shifting the applicant from her previous post to another available position. The letter was attached to the applicants opening statements and she tendered it as exhibit before then CMA. In tendering this document the applicant wanted to show the CMA that she was demoted. Thus it is inconceivable for the applicant to come back again complaining on why the arbitrator received it as exhibit. This is an afterthought which is bound to fail.

The evidence on the record is to the effect that, after the retrenchment agreement, affected employees were given notice of termination but they were to work on notice period up to 4th December 2019.Before that date, on 26th November 2019, applicant was offered another post, which she refused to on the pretext that she needed more time to read the contract. In his clarification at the CMA , DW1 testified that the offer letter stipulated that if applicant refused the offer, then termination of 4/12/2019 would be operative. The evidence went on to disclose that applicant did not work since

then to 7th December 2019 when she attempted to enter the officer but controlled by the respondent and was instructed to go to Mwanza for further clarification and steps. The arbitrator's decision contains summary of evidence by the parties there was no specific finding to the effect that applicant was terminated on retrenchment on 04th December, 2019, and on 06th December, 2019 did not report at work. There is nothing therefore to blame the arbitrator .

Applicant has brought another issue convincing this court to believe that the CMA accepted the respondent's claim that Flavia Felician was employed by G4S on the position of security Administrator at the time of retrenchment while not and that applicant's retrenchment was done so as to rescue Flavia Felician's employment who was working in a section that was affected by the retrenchment. This point should not detain the court. The retrenchment agreement was so specific on the procedure to be adopted on the process. FILO (First In Last Out) was the only criterion. Exhibit -P-2 the retrenchment agreement stipulated that :-

> *"Employee whose position will be affected and not retrenched due to the method of first in last out they will be shifted to*

available or previously designation and their salary will change to reflect the same as per designation employee has been shifted to"

In reaching its findings on this point, the arbitrator took into account the exhibit P2 and went on to say:

> *"There is no dispute, that Flavia F. Ferdinand with staff No (17269) and Mwajuma Msabila with staff No. (17297) as Security Administrator and Flora Msapa with staff No. (17272) as Security Administrator were employed by the Respondent in 2007 as Security Administrator as per Exh-D-4 while the Complainant was employed in 2018 with staff No. (17283) as Security Administrator.*
>
> *The Complainant is contesting as to why as Security Administrator was retrenched and her post was occupied by Flavia F. Ferdinand whose unit was closed during the retrenchment and advanced the issue of victimization and discrimination because Flavia was supposed to be retrenched as had formerly transferred to the other post that is liason office. However, looking what is written in the retrenchment agreement which the Complainant was among of the consulting party and the selection criteria was not targeted a certain unit or department or person but based on the FILO and it was not to be applied selectively rather was applicable across all business unit and department and the selection criteria was enough to include the application of bumping principle as per Exh-P-2. Therefore, it was right for Flavia as a senior security Administrator to occupy the post of Security Administrator and*

Elizabeth Mponeja to be retrenched as junior under the FILO/LIFO and Bumping principle"

I find nothing wrong with the arbitrator's decision. Exhibit D4 is an employment contract between the respondent and Flavian F Felician. Her contract commenced on 20th June, 2017 while applicant's contract of employment commenced on 18 January 2018.Going by FILO principle, Flavian was rightly accommodated as per the retrenchment agreement. The record is silent on how the applicant's retrenchment was aimed at victimising her. The record speaks loud that applicant was involved in the retrenchment process from its initial stage of notification, consultative meetings and finally implementations of the party's agreement. The applicant's complaint lacks merit.

Lastly, applicants challenge the CMA's decision for failure to inquire about the pending investigations on sexual harassment by contract manager for G4S. I have gone through the opening and closing statement and the evidence on the records. This issue did not form part of the applicant's complaint at the CMA. It is a new issue raised on revision. By any standards cannot be used to discredit the findings by the arbitrator. On his part,

respondent's counsel was of the view, and rightly so that whether or not there had been an issue of sexual harassment, it had nothing to do with the retrenchment process which was duly and properly undertaken by the respondent as held by the trial Arbitrator

In the upshot, the unmerited revision is hereby dismissed in its entirety with no order as to costs.

Order accordingly.

DATED at **SHINYANGA** this 16th day of October, 2020

E.Y.Mkwizu
Judge
16/10/2020

Right of appeal explained.

E.Y.Mkwizu
Judge
16/10/2020