IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT BUKOBA.

LABOUR REVISION NO.2 OF 2018

(Arising from the Original Award Decree No. CMA/BUK/97/2017)

BETWEEN

JUNIOR CONSTRUCTION COMPANY LTD.....APPLICANT

VERSUS

REVOCATUS BEBILE..... RESPONDENT

RULING

21/10/2020 & 30/11/2020

KAIRO, J.

Aggrieved by the award of the Commission for Mediation and Arbitration (herein after to be referred to as CMA), the Applicant Junior Construction Company has filed this application under the provision of rule 24(1),(2)(a)(b)(c)(d)(e) &(f),Rule 24(3)(a),(b),(c) &(d) ;and Rule 28(1)(d) &(e) of the Labour Court Rules GN NO.106 of 2007 and Sections

91(1)(a),(2)(c),(4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, No.6 of 2004 seeking the following reliefs:

(i) *That the honorable court be pleased to call the records of the proceedings and award in the Commission for Mediation and Arbitration in the labour dispute No.CMA/BUK/97/2016 revise and set aside the award of the Commission for Mediation and Arbitration delivered on 17th January 2018 by Hon.Ndimyake L.Mwabeza; an Arbitrator*

(ii) *That the Honorable court be pleased to grant costs of this application.*

(iii) *That the Honorable court be pleased to make such any other orders as it may deem fit.*

The application was supported by an affidavit sworn by the Principal Officer of the Applicant; one Suleiman Masoud Suleiman whereas the Respondent; Revocatus Bebile opposed the application through his counter affidavit.

The facts of this matter albeit briefly are that the Respondent was employed by the Applicant in April 2016 in a capacity of Production Supervisor. That on 1st November 2017, the Respondent was given a notice of termination on the ground of operational requirement. The Respondent approached the CMA for unfair termination. Upon hearing and evaluating the evidence, the CMA reached its conclusion that there was no valid reason for termination as there was no proof for operation requirement/economic reasons. Besides, the procedure for retrenchment

was not complied with by the Applicant even if the reason could have been fair. In the circumstances the Respondent was unfairly terminated and consequently awarded the payments to the tune of 5,400,000/=. Hence, the current application for revision.

It was submitted by Mr.Mashauri; the Applicant's advocate that section 37(2) (a) & (b) of the Employment and Labour Relation Act, No.6/2004 clearly specifies valid reasons for termination of an employment and that retrenchment is among them. Further that the Applicant tendered exhibit **JCCL1** at the CMA as notice for termination evidencing termination for retrenchment purposes.

Mr. Mashauri further elaborated that the nature of the employment was a fixed term contract which was subject to renewal after every three months period depending on the capability of the employer. According to the nature of the business of the Applicant, which solely depended on the availability of tenders, it was impossible to give the Respondent a permanent contract. He further argued that to be the rationale behind Regulation 8(2) (a) (b) (c) of GN No.42/2007 which recognizes reasons for termination and termination procedure for fixed term employees as opposed to a permanent term employee's contract. He went on that it was an error for the Arbitrator to have treated the employee as a permanent one while he had worked for two fixed terms of three months each and one month for the third term, thus worked for a total of 7 months.

The Advocate further stated that the procedure for retrenchment is to have an employee agree for early termination which according to law is done

through providing a notice to an employee as the Applicant did. That the said notice indicated the reason for termination which was explained to be due to economic reasons as the company needed to restructure its organization to enable it runs profitably. However, the Arbitrator rejected the employer's testimony that the employer had financial constraints as testified by DW1 at the CMA. The Applicant further submitted that the Arbitrator rejected the notice into which the employer contemplated the retrenchment. Besides, the Arbitrator rejected the package which was deposited in the Respondent's account as well. He also argued that the law on Regulation **9 of GN No.42/2007** imposes the burden of proof of a contract to the employer and the standard being the balance of probabilities. The Applicant was to the effect that by proving that the Respondent had a fixed term contract and proving that his termination was for operational requirement, the standard was met and the Applicant discharged his duty.

It was Mr.Mashauri's further submission that after disclosing the intention of retrenchment in the notice which also stipulated compensation package, the Respondent had the opportunity to negotiate the same. However, there was nothing on record to show that the Respondent rejected the offer nor appealed to the CMA as required by section 38(2) of Employment and Labour Relation Act, instead he skipped the said step and rushed to the CMA claiming unfair termination. The Applicant backed up his argument by citing the case of **Resolution Insurance Ltd vrs Emmanuel Shiyo and Others**, Labour Rev.642/2019(pg 17 of the decision).

Replying to the Applicant's submission, the Respondent submitted that it was correct for CMA to decide as it did after analyzing the evidence and answered the following framed issues: -

1.Whether the conditions of employment contract was followed.

2.Were there valid reasons for termination.

3.Whether the proper procedure was followed during termination and other related laws were considered.

It was the Respondent's submission that at the trial all parties conceded that there was an employment contract but the Applicant submitted the same to be a three months renewable contract while the Respondent stated the same to be an oral and permanent one. He went on that according to section 15(6) of Act No.8/2006, the Applicant/employer failed to give a written contract to support his contention that the Respondent was employed on a fixed term. With regards to valid reason for termination, he submitted that it wasn't proved that the Company encountered financial constraints to justify termination so as to reduce operational costs, adding that the same was neither stated in the notice nor featured in his explanation at the CMA.

The Respondent submitted that even if there was a valid reason for retrenchment, but the procedure for retrenchment under section 38(1) (a), (b), (c) and (d) of ELRA No.6/2004 was not complied with. Besides, he did not consent to the said retrenchment, leave alone the fact that the notice is not legally qualified to be so called, as it had no date among others. The

Respondent went on to submit that, the employer had neither documentary evidence to prove the nature of the contract nor proved that he followed the termination procedure. He added that, even the deposited amount had no relation with this case as it was deposited in January 2017 while the case was instituted on 8/12/2016. He also denied to have been given a certificate of service as there is no proof to evidence that. The Respondent thus concluded that it was correct for the CMA to find out that the Respondent was unfairly terminated.

Submitting in rejoinder, Mr. Mashauri emphasized that the notice stipulated the intention for retrenchment and not for termination and that the same is normally issued when the employer contemplates retrenchment. He added that the said notice was addressed to the Respondent and was dated 1/11/2016, as such the contention that the same had no date is not true. The Advocate dismissed the argument that the said notice had no reason, as the first paragraph of the notice had the following words "Sababu *zilizo nje ya uwezo wa kampuni"* which he argued that the same could be translated to mean *"operational requirement"*

Responding on the relationship between the package repayment and this case, the learned counsel submitted that in the first paragraph of the notice the company categorically stated that the company will pay November 2016 salary and other entitlements would follow since negotiation was yet to commence. Surprisingly, the Respondent skipped negotiation step and instituted the suit which was an incorrect procedure. Thus, prayed the court to grant the Applicant's prayers.

After going through the record and hearing both parties, the question for determination is whether this revision is meritorious. In so determining the court will address the following questions:

1. **What was the nature/ type of the Respondent's employment?**
2. **Whether the reason for termination was valid. If yes**
3. **Whether the employer followed valid procedure**
4. **What reliefs are parties entitled to?**

With regard to the first issue, the Applicant in his submission has insisted that the Respondent was employed on a fixed term of three months renewable. That the Respondent worked for seven months, which was equal to two complete terms as the third one wasn't completed due to retrenchment. While the Respondent on his part claims that the contract was oral and permanent in nature.

Section 15(1) of the Employment and Labour Relations Act, No.6/2004 imposes a mandatory requirement to the employer to supply an employee with a contract when an employee commences employment.

The said provision has enumerated the following particulars to be contained in that written contract:

(a) *Name, age, permanent address and sex of the employee,*

(b) Place of recruitment,

(c) Job description,

(d) Date of commencement,

(e) Form and duration of the contract,

(f) .... N/A...

(g) .....N/A....

(h) Remuneration, the method of its calculation, and details of any benefits or payments in kind, and,

(i) Any other prescribed matter.

It is my judicial interpretation that failure by the employer to supply the employee with a written contract at the commencement of the contract was contrary to the law and it is on that ground that it becomes difficult for the employer to claim that the employee was employed in a fixed renewable term while in fact had not put that in writing. It was the Respondent's contention that he requested for the written contract to no avail, the fact which was conceded by the Applicant at the CMA through "DW1" testimony; one Yahaya Masoud Suleiman on pg 10 of the proceedings who testified to the effect that the contract was at the process of being prepared. I paused to ask whether it needs 7 months for the same to be prepared? The answer is in the negative! To say the least, the Applicant was negligent in discharging his burden in this aspect to his detriment.

The case of **A-one Products and Brother Ltd V Flora and 32 others** (2015) LCCD, 734 sufficiently underscored the issue of burden of proof on the employer in labour matters. I wish to quote its holding as here under:

"*I am persuaded with the holding that* "***the burden of proof in Labour Laws is on the person who has failed to keep record required by any Labour Law under Section 15 of the Act; ELRA Act No 6/2004".*** *(emphasize added).*

For easy reference regarding the said duty: section 15(6) of the ELRAprovides:

> *"If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer"*

Basing on the above authorities, I have no hesitancy to rule out that failure by the employer to prepare a written employment contract between him and the employee which is the duty casted on him by law has made the court to draw an adverse inference against the Applicant to the effect that the nature of employment contract between them is as it was alleged by the Respondent. The finding of the first issue therefore is that the Respondent's nature of his contract with the Applicant was a permanent one.

The second issue which is whether there was a valid reason which culminated to the termination of employment. After evaluating evidence

from the Applicant at the trial, the Arbitrator found that Applicant failed to substantiate the claim that the company was facing an economic hardship. As such the question of operational requirement didn't arise and in the same veins, there was no valid reason to warrant the said termination. On page 6 of the typed judgment, the CMA reasoned as quoted hereunder: *"Kitendo cha mlalamikiwa kushindwa kuthibitisha juu ya gharama za uendeshaji kinafanya aonekane kisheria kwamba amesitisha ajira ya mlalamikaji bila sababu yoyote. Kama sheria ingewaruhusu waajiri kusema tu kwamba wamesitisha ajira kwa gharama za uendeshaji bila kuthibitisha basi hakika waajiri wengi wangetumia mwavuli huo kujificha ili wasiwape wafanyakazi haki zao ambalo si lengo la sheria"*

According to the findings of the CMA to which I concur with, the mere assertion that the operating costs of the company was high without any evidence to that effect is legally not enough to rule out that the Applicant has discharged his burden of proof as far as fair reason is concerned. The dictate of section 37(2) (a) (b) (ii) of ELRA No.6/2007 requires the employer to prove and in my conviction, mere assertion is insufficient to so prove.

I am aware that the standard of proof as per Rule 9(3) of GN no.42/2007 is that of balance of probabilities as rightly argued by the Applicant. Nevertheless, the Applicant was to further substantiate and not to simply asserts as he did.

Further to that, even the wording of the notice **(Exhibit JCCL1)** did not inform the Respondent on the contemplated operational requirement

through termination. Neither did it indicate the company need to restructure its organization to enable it runs profitably as the Applicant's counsel wants this court to believe. According to the Applicant counsel argument, the words *"kwa sababu zilizo nje ya uwezo wa kampuni"* should be interpreted to mean operation requirement. But with due respect to the Applicant's counsel, the said phrase is vague and can mean anything like incapacity or even incompatibility apart from the said interpretation.

In my view the notice ought to be clearly informing the employee on the specific valid reason for termination. For the said vagueness/ambiguity, I am inclined to agree with the trial Arbitrator that the reason for termination wasn't operational requirement but other unknown reasons. As such it can't be termed to be a lawful/valid reason. The second issue is therefore answered negatively.

I now revert to the third issue to the effect that; *Whether the employer followed valid procedure.* I wish to point out that with the negative findings on the 2nd issue, the need to deal/determine the 3rd issue is obsolete as where the valid reason lacks, automatically the purported procedure becomes invalid as well .

Nevertheless, I feel obliged to address it for the purpose of giving future guidance. This is so because the Applicant has repeatedly submitted that the notice was to call the Respondent for negotiations on retrenchment but the Respondent overstepped to the CMA for unfair termination which was incorrect procedure. Section 38 of ELRA No.6/2004 read together with rule 23 of GN No.43/2007 provides for procedure to be followed when the

employer wants to terminate an employee on operational requirement. For easy of reference, I wish to quote it hereunder in verbatim:

38.-(1) In any termination for operational requirements, the employer shall comply with the following principles, that is to say, be shall - on operational requirements

(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;

(iv) the method of selection of the employees to be retrenched;

(v)(iv) the timing of the retrenchments; and

(vi) (v) severance pay in respect of the retrenchments,

(vii) (d) shall 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 with members in the workplace not represented by a recognised trade union; (iii) any employees not represented by a recognised or registered trade union.

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

The wanting question is whether the Applicant complied to the above quoted provision. Exhibit JCCL-1 tendered at the CMA is what the Applicant argues to be a retrenchment notice. He submitted that the said notice was an invitation to the Respondent to commence negotiations with the employer on the contemplated exercise. Instead the Respondent went to file a claim of unfair termination at the CMA which according to the Applicant was a premature move. The rival argument by the Respondent was to the effect that the notice was not inviting him for negotiation but it was a termination one adding that even if it would have been a termination notice for operational requirement, the same did not follow the laid down procedure. The CMA evaluated evidence and came to its finding that the procedure for retrenchment was not followed to which I concur. With due respect to the Applicant's counsel, the wording of the said notice, *ipso facto* terminates the employment. To say the least, the notice fits to be called a "termination letter" and not "notice for the contemplated retrenchment" as the Applicant's counsel wants this court to believe. There is nowhere in that notice where the Respondent was invited for or availed a room for negotiation. Further nowhere his trade union or co-employees were notified to come for negotiation. To verify that the Respondent was terminated in the purported notice, I wish to refer to the wordings in the last two paragraph of the notice which was written; *"Mwisho,unatakiwa*

kurudisha mali za kampuni ulizokabidhiwa ikiwa ni pamoja na kitambulisho cha kazi. Tunakutakia kila la heri na fanaka katika ujenzi wa Taifa". Sincerely, these words were not inviting the Respondent for negotiations in my view. Rather the notice was a unilateral decision to terminate the Applicant. Legally termination of an employee for operational requirement without following the above stipulated procedure becomes unfair, regardless whether the reason was valid or not. Worse in this matter even the reason was not valid. There are a plethora of authorities on that, **See Clare Haule vs Water aid Tanzania**, Revision No.13/2009, High Court of Tanzania,Labour Division, at Dar es salaam(Unreported). **Jasson Peter Lwiza and 2 others v Christian Council of Tanzania**, Revision No.18/2013, High Court Labour Division at Dodoma (Unreported). Therefore, the cited case by the Applicant's counsel **of Resolution Insurance Ltd** (Supra) is distinguishable from this case. This is because the Respondent herein could not have referred the matter to the CMA as required under section 38 (2) of ELRA (supra) since substantively operational requirement was not a valid reason for the termination and there was no conducted procedure for retrenchment. The third issue is therefore answered negatively as well.

The last issue is based on the parties' reliefs.

It is the court's findings that the Respondent was employed on permanent terms contract and was terminated unfairly. Parties are at one that the Respondent has worked for 7 months (above 6 months). It is also not in dispute that his monthly salary was Tshs.900,000/= and the package of

Thsh.900,000/= in lieu of notice was paid already to the Respondent despite being paid a year later. In the said circumstances, I concur with the CMA on the reliefs given to the Respondent to the tune of Tshs. 5,400,000/= under section 40(1) (c) ELRA No.6/2004. Having worked below 12 months, the Respondent is not entitled to any more remedy than the ones awarded by the CMA.

All in all this revision lacks merit and is hereby dismissed in entirety and the court the CMA decision remains undisturbed. No cost is awarded.

It is so ordered.

L.G.Kairo

JUDGE

30/11/2020

R/A is Explained.

L.G.Kairo

JUDGE

30/11/2020.

Date: 30/11/2020

Coram: Before Hon. Kairo,J

Applicant: Advocate Myasi Mashauri

Respondent: Present in person

B/C: Gosbert Rugaika

Court: The matter is for ruling and the same is read over in chambers before the parties as per today's coram.

L.G. Kairo

Judge

30/11/2020