IN THE HIGH COURT OF TANZANIA
BUKOBA DISTRICT REGISTRY
AT BUKOBA

APPLICATION FOR LABOUR REVISION NO. 20 OF 2020

MGALA JONES RUKONGE.....1ST APPLICANT
AMINATHA CHARLES MNUNGULI.....2ND APPLICANT
MWITA MAKABE.....3RD APPLICANT
GERVAS THOMSON MHAKA.....4TH APPLICANT

VERSUS

ST. AUGUSTINE UNIVERSITY OF TANZANIA.....RESPONDENT
(Revision from Labour Dispute No. CMA/BUK/89/2019/06/2020 of Commissionfor Mediation and Arbitration, Bukoba)

JUDGMENT

5 & 16 July, 2021
MGETTA, J:

Dissatisfied with the decision of the Commission for Mediation and Arbitration at Bukoba (henceforth the CMA), through a legal service of Ms. Gisera Maruka, the applicants namely Mgala Jones Rukonge, Aminatha Charles Mnunguli, Mwita Makabe and Gervas Thomson Mhaka, have approached this court seeking to revise and set aside the Arbitration Award issued on 16/09/2020 by CMA in Labour dispute No. CMA/BUK/89/2019/06/2020.

The brief material facts to appreciate the context from which this revision was brought are not hard to comprehend as the applicants were employees of the respondent in different employment capacities employed for fixed term contract. They discharged their respective duties at Cardinal Rugambwa Memorial University College (CARUMCO) which was a branch of Saint Augustine University of Tanzania.

The record reveals that the government of Tanzania through its exclusive Agency TCU ordered the respondent's service in some branches among other CARUMCO branch inclusive at Bukoba where the applicants were employed to be closed for lack of qualifications to proceed with the provision of the services rendered among the branches.

The respondent complied with government order but conducted a meeting with all the employees before final closure of the Branch and tried various means to rescue the situation, without success and eventually attempted to pay repatriation costs to each applicant to place of domicile, paid three months salaries for the period the employees were not working as well gratuity of employment.

The respondent informed the applicants that they could not comply with normal retrenchment procedures while the closure was on

government order with no alternatives. Thus prayed the applicants' dispute be dismissed in its entirety, while the applicants alleged to be unfairly terminated.

When determining the dispute of both parties, the CMA in consultation with parties raised three issues:

(i) Whether there was a valid and fair reason the respondent to retrench or terminate the applicants' contract.

(ii) Whether the applicants followed fair procedures.

(iii) Whether there are any reliefs that both parties are entitled to.

After evaluating the evidence brought by parties, the CMA arrived at its findings that the reason why the respondent terminated the applicants was due to operational requirement that CARUMUCO's failure to have new students as TCU stopped supplying to it students and later on closed under government order. Therefore, the said branch denied of school fees of which they used to manage the institution, hence affecting economic needs that relate to the financial management of the enterprise. It was therefore the finding of the Commission that the termination was fair and the reason was valid.

With regard to the procedure arrived at before retrenchment, The Commission concluded that the respondent complied with the procedure of retrenchment as the applicants were consulted through consultative meetings.

Amplifying her adopted affidavit in this revision in all six grounds, Ms. Gisera Maruka, the learned advocate faulted CMA judgment that the termination was unfair as the three applicants (1, 3, 4) were given termination letters while they were on leave contrary to **section 41 (4) (a) of Employment and Labour Relation Act, Cap 366** (ELRA). That the 2nd applicant was denied of leave on the ground that he had obtained maternity leave already. She submitted further that the law requires an employee to be given 28 days leave annually as per **Section 31(1) of ELRA**. She also faulted CMA judgment that the termination was unfair as the termination letters to all applicants did not give reasons for termination contrary to **section 41(3)(i) of ELRA**.

She furthermore submitted that there was a delay in paying repatriation fare as 1st 2nd and 3rd applicants were terminated on 22/9/2019 while at Bukoba and were paid on 22/1/2020. Mwita Makabe (3rd applicant) had a wife, two children and a dependent, but he was given severance

allowance at a tune of Tzs. 418,152.78 for 4 months which Ms. Gisera Maruka finds to be insufficient. Similarly, she argued that the second applicant Aminatha was paid surveillance allowance of Tzs 399,972.15 for almost five months. The first applicant Mgala Jones and 4th applicant Gervase were repatriated on 18/10/2019 and on 6/11/2019 respectively and each was paid surveillance allowance of Tzs. 399,972.22 for two months stay in Bukoba without being repatriated. She concluded that the payment was not sufficient and therefore faulted CMA decision which ruled that termination was fair and with valid reason. That decision should be dismissed.

In reply, Mr. Innocent outrightly dismissed the arguments advanced by Ms. Maruka on the grounds that hinge on the framed issues by the CMA at the trial. That the issues were three concerning the valid reasons for termination or retrenchment, whether the procedure complied with and the rights of parties considered. Mr. Innocent supported the decision of CMA as it answered all three issues correctly. He also prayed this court to expunge paragraph 6 (i)-(ii) of the applicants' affidavit as are not facts rather issues of law which are not allowed to be placed in Affidavit contrary to provision of **rule 24(3) of Labour Court Rules, GN 106 of 2007**.

He further argued that the applicants did not know a nature of contract they were employed in. It was a definite duration contract. He buttressed his argument by citing the case of **Mtamba Shamte and 2 Others V. Shamilati Supplies; Revision** No. 154 of 2010 (HC) (DSM). He therefore submitted that there was no dispute that CARUMUCO, from 2016 up to 2019 were not allocated with students from TCU and it is not in dispute that there were bundle of correspondents between TCU and the SAUT which ultimately the government issued a notice of discontinuing CARUMCO from giving university services. He submitted furthermore that there was consultation meeting as per exhibit P3 where the employees and employer agreed for executable measures. He cited **Sandivick Mining Construction Tanzania Ltd V. Joseph Mlaponi**, Revision No. 27 of 2012 (HC) (Shinyanga).

It was Mr. Innocent argument that the circumstances of this case fall squarely to retrenchment which was arrived due to operational requirement in terms of **section 38 of ELRA** read together with **rule 23 of rule 24 of the ELRA (code of Good Practice) GN. No. 42 of 2007** which were on economic reasons, that it was the employer who initiated retrenchment.

With regard to the issue of notice not containing reason for termination, Mr. Innocent responded that the notice should not be read in isolation. That the procedure of retrenchment had already been initiated and carried on during consultation meeting and therefore the notice referred the employees on the previous consultation meeting which disclosed the operation requirement reasons to the employees.

That the issue before the CMA was termination and not severance pay. That the applicants were paid more and those who were not paid repatriation under **Section 43 of ELRA** did not submit Clearance forms as per the university rules. They were therefore negligent. He prayed the application to be dismissed.

In rejoinder, reacting on the objection of not complying with **rule 24(3) of Labour Court Rule GN. 106 of 2007** Ms. Maruka submitted that they complied. She responded that in **Matambua case** it was distinguishable as the contract was of 3 years renewable and the employee started in 2012. In the case of **Sandivick Mining construction** is distinguishable as there was no impossibility of performance in the case at hand showing such circumstances. She reiterated that termination was done while applicants are on leave and the notice had no reference of the

previous consultation meeting and it had no reason. That failure to fill clearance form could not be the reason of delay of payment.

I have considered the affidavit, rival arguments and the record of this revision. I feel obliged to directly dwell in the merit of this revision. The three issues framed at CMA upon reading the record and submissions of parties attract to be the same issues at this revision. The court therefore is called upon to determine the merit of this revision as hereunder:

(1) Whether there was a valid and fair reason the respondent to retrench or terminate the applicants' contract.

(2) Whether the respondent followed fair procedure.

(3) Whether there are any reliefs that both parties are entitled to.

Starting with the first issue, in order for the court to determine whether the reason which followed termination was valid or fair, **Section 37(2) of ELRA** is of assistance as it enumerates the grounds which if assessed, the court can come up with the finding whether termination was fair or unfair.

Among other reasons, operational requirement is the valid reason for fair and valid termination under **section 37(2) (b)(ii) of ELRA** as rightly referred by the CMA. The CMA accepted the circumstances of the situation

and ruled that CARUMCO branch had undergone operational requirement and therefore retrenchment was necessary. The respondent gave evidence to support it as it was government orders to stop their business order to curtail enrolment of students since 2016 up to 2019. This was proved by admitted exhibits which were not disputed by applicants.

It was the evidence from the respondent that they could not further collect fees and therefore suffered financial constraints. It was undisputed evidence that the effort to rescue the situation encountered a stumbling block and therefore the respondent had to go for retrenchment.

Without laboring much on this issue, I am in conformity with the CMA that there was valid reason for retrenchment acceptable as per above referred law and therefore issue number one is answered affirmatively.

The second issue is whether the procedure for retrenchment was followed. I must say something at the outset, that every reason for termination has its own procedure to follow prescribed by the respective law. Once the valid reason for termination is operational requirement, the procedure for retrenchment is governed by section **38(1)(d) of the ELRA** and **rule 24 of the ELRA (code of Good Practice) GN. No. 42 of 2007** as rightly referred by CMA and the respondent advocate. The most

important and unavoidable procedure which the employer has to comply with is disclosure of reason and consultation before to retrench the employees. The applicant's advocate did not dispute that the employees were not consulted or disclosed the reason in the meeting (exhibit T3) but her main argument was that the notice which came after the meeting did not disclose a reason. Thus, the applicants agreed to have conducted the meeting with the employer and on that date the reason was disclosed.

I see no need to venture in notice for termination as the notice came after consultation meeting had been carried out. Hence, this implies that prior to the notices which were calling employees including those who were on leave was not a notice to disclose the reason, but a notice to execute what they had previously notified and agreed with their employer. On this, I shake hands with CMA arbitrator that the applicants had knowledge prior and were actually contemplating retrenchment. With due respect to the applicants' advocate as the issue of unfair termination through those letters cannot arise here.

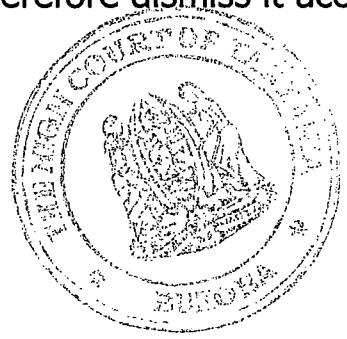
As the applicants' advocate concentrated merely on termination through letters and did not submit on whether retrenchment followed

procedure or not, I see no need to venture in her arguments which do not attack retrenchment procedure.

Concerning the payments which she thought were meagerly paid this court declines to determine them as the procedure was for applicants to go back to CMA to litigate on them as the issue before this court was on termination as rightly observed by respondent's advocate.

In the upshot, I am of the settled view that termination was with valid reason of operational requirement and the procedure for retrenchment was compiled with. I see no reason to disturb the decision of the trial CMA. I find no merit in this revision.

I therefore dismiss it accordingly. No order as to costs.

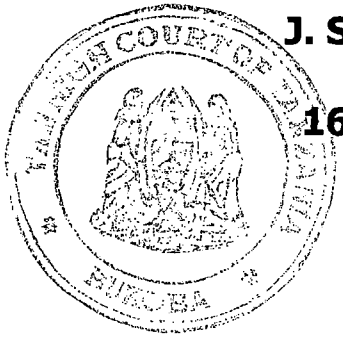


J. S. MGETTA
JUDGE
16/7/2021

COURT: This judgment is delivered today this 16th day of July, 2021 in the presence of Ms. Gisera Maruka, the learned advocate for the applicants, who is also holding a brief for Mr. Innocent Bernard, the learned advocate for the respondent.

J. S. MGETTA
JUDGE
16/7/2021

COURT: Right of appeal to Court of Appeal is fully explained.



J. S. MGETTA
JUDGE
16/7/2021