IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT TANGA

REVISION NO. 3 OF 2018

(From the Original Decision in Labour Dispute No. CMA/TAN/81/2017 of the Commission of Mediation and Arbitration for Tanga)

BETWEEN

PILI MOSHI SABURI .....1ST APPLICANT

MARIAMU MPEWA RUWA .....2ND APPLICANT

HELENA B. MKWAMA .....3RD APPLICANT

STELLA JACOB NASSARI .....4TH APPLICANT

SAUMU HATIBU HOZA .....5TH APPLICANT

MARIAMU JUMA SHABANI .....6TH APPLICANT

VERSUS

RUSHABH INVESTMENT (T) LIMITED .....RESPONDENT

JUDGMENT

MKASIMONGWA, J

PILI MOSHI SABURI, MARIAMU MPEWA RUWA, HELENA B. MKWAMA, STELLA JACOB NASSARI, SAUMU HATIBU HOZA and MARIAM JUMA SHABANI (Applicants) were on 14/11/2016 employed as packers by the Respondent one RUSHASH INVESTIMENT (T) LTD. Their employments were later on 31/7/2017 terminated by the employer for the reason that

the business was not going well. The Applicants were aggrieved by the decision of the employer, hence went to the Commission for Mediation and Arbitration at Tanga and instituted a Labour Dispute against their employer. In their complaint the Applicants alleged that the termination was not fair for the procedure (towards termination) was not adhered to and that there was no justified cause for termination, which facts according to them rendered the termination a breach of contract. In the matter the Applicants sought for the following reliefs:

1. Payment for underpaid leave.
2. Reinstatement or payment of compensation.
3. Overtime payment for June and July, 2017.
4. Repatriation payment.

The Respondents disputed to the Application and after hearing the parties, the Arbitrator found the reason for termination of the employment was not proved and that the employer did not fully comply with the provisions of Section 38 of the Employment and Labour Relations Act and Rule 23 of the Employment and Labour Relation (Code of Good Practice) Rules (GN 42 of 2007) when terminated the employment.

As to whether there was breach of contract, the Arbitrator in the first place found that there was no written employment contract exhibited to the Commission and that it was the employer's duty to do so. The records before him, he said, were clear that the Applicants were recruited at Tanga and as such were not entitled to payment for repatriation outside of Tanga. The learned Arbitrator was also satisfied that the Applicants basic salary was Tshs. 100,000/= and therefore they were entitled to payment of Tshs. 100,000. = for leave contrary to Tshs. 70,000/= paid by the Respondent. The later as such was found liable to pay Tshs. 30,000/= (not paid) to each Applicant.

As regards to the claims for overtime payment the Arbitrator was of the view that; apart from the fact that the same were not proved the claimant of overtime ought to have claimed for it monthly. He added that overtime payment is not among the terminal benefits recognized by the law. As such they were dismissed. The Arbitration also dismissed the claim for compensation for break of contract because it was not established by the Applicants. All in all, the Arbitrator Awarded the Applicants as follows:

"Kwa kuzingatia mazingira hayo ninaamuru mwajiri awalipe walalamikaji wote fidia ya mishahara ya miezi mitano yaani

Tshs. 500,000/= (kwa kuzingatia mshahara wa Tshs. 100,000/= kwa mwezi ... Pia mlalamikiwa anaamuriwa kuwalipa walalamikaji wote nyongeza ya Tshs. 30,000/= kwa kila mmoja ikiwa ni likizo iliyopungua baada ya kulipwa Tshs. 70,000/=".

The Applicants are dissatisfied by that Award of the Arbitrator hence this Application which is based on grounds shown in the Affidavit and duly argued by Mr. Yona Lucas (Adv) who appeared on behalf of the Applicant. In arguing the Application Mr. Yona contended that the Arbitrator erred in law and fact when he held that the Respondent did not breach the employment contract. He said, in the matter there was ample evidence that the contracts of employment entered by the parties were reduced in writing and the Respondent did not tender to the Court and disprove them. He added that, in the matter the Arbitrator found the Applicants were recruited while were at Tanga. As such they were not entitled to the payment for repatriation. He so decided upon relying on the documents annexed to the Respondent's Opening Statement which were, however, not tendered to the Court as evidence. Mr. Yona submitted that Annexures to the pleading cannot be relied on by the Court until when they are tendered and admitted in evidence. He cemented the argument by citing

the decision in the unreported case of **Ismail Rashid v. Mariam Msati;** Civil Appeal No. 75 of 2015 (CAT). In that premise of the matter Mr. Yona prayed the Court that it grants this Application.

As to the second ground, the same revolves around the rate of salary of the Applicants, which the Arbitrator applied in imposing the compensation awarded to the Applicants. Mr. Yona contended that the evidence on record is clear that the Applicants were being paid a Tshs. 300,000/= salary per month. The Respondent did not challenge that evidence as she did not tender to the Court the Particulars of Employment. It follows therefore tat, the Arbitrator erred when he determined the salary to be Tshs. 100,000/=.

Regarding to a five months compensation, Mr. Yona contended that in the circumstances of the case Section 40 (1) (c) of the Employment and Labour Relations Act provides for compensation at a tune not less than twelve months. That provision of the law was also echoed by the Court in the case of **Tarsis Kaliwesigaho v. North Mara Gold Mine Limited (2015) LCCD1 No. 27.** He added that compensation of less than twelve months' salary may only be awarded in a fixed term contract of employment as it was well explained by the Court in the case of **World**

which is not the case in the matter at hand. Mr. Yona submitted that when the Arbitrator granted five months compensation, he faulted the provisions of the section of the law above.

The learned advocate concluded that the Applicants do partly agree with the Award of the Arbitrator and they are dissatisfied with it to the extent shown above hence pray the Court that it grants the Application.

On the other hand Ms. Zainab, advocate who appeared for the Respondent, contended that in the submission made by Mr. Lucas advocate for the Applicants, the learned advocate faulted the Commission's decision alleging that the Arbitrator had relied upon documents, not tendered before him as exhibits. Ms. Zainab submitted in response to the contention that the Arbitrator did so rightly in terms of Section 88 (4) of the Employment and Labour Relations Act which empowers the Arbitrator to deal with the matter without being bound by the legal technicalities. Similarly, Rule 23 (7) of the Government Notice No. 67 of 2007 empowers the Arbitrator to determine the matter brought before him/her basing on the documents/pleadings. This is what the Arbitrator did in this matter hence he established and found that the Applicants were all recruited

herein Tanga. As such they were not entitled for repatriation to the place of recruitment.

As to the amount of the Basic Salary paid to the Applicants which the Arbitrator found to be Tshs. 100,000/= Ms. Zainab submitted to the effect that, the testimony given by PW1 as well as the Paymaster Salary tendered to the Court and admitted marked as **Exhibit C2** all show the Basic Salary paid to the Applicants was Tshs. 100,000/=. It is again shown evidenced by the exhibit that the amount of 10% of the Basic Salary deducted from each applicant's salary for the PPF Contribution purposes was Tshs. 10,000/=. In light of the evidence adduced to the Court the Arbitrator did rightly find the Basic Salary of the Applicants being Tshs. 100,000/=. Ms. Zainab added that there was no any time had the Applicants complained over the salary and even the amount deducted and submitted to the PPF.

Regarding to the compensations of five (5) months' salary for the unfair termination, Ms. Zainab submitted that the Arbitrator awarded that tune of compensation which was less to that prescribed by the law because there was no, per-se, a declaration by the Arbitrator that the employees were unfairly terminated. This is because the Arbitrator was satisfied that

due to operational requirements retreatment was inevitable and that the Respondent had complied with all the procedure towards retrenchment. As such the Arbitrator granted five months compensation. Ms. Zainab concluded by requesting the Court that it finds no merit in this Application and the same should therefore be dismissed.

In a short rejoinder, Mr. Yona submitted that going by the Award, at pages 13 and 14 the Arbitrator responded to the question whether the termination was fair looking at both the reasons for termination and adherence to the procedure for termination. As to the Basic salary, Mr. Yona contended that **Exhibit C2** does not determine it. It is the contract which provides for the Salary. At page 22 of the typed proceedings DW1 was heard telling the Commission that the Applicants were being paid Tshs. 300,000/= Salary per month.

In respect of documents not tendered in evidence Mr. Yona submitted by way of rejoinder that Rule 27 referred to by his learned sister does not apply in this matter. The same is on the Powers of the Arbitrator to address issues. Similarly, Section 80 of the Employment and Labour Relations Act, same does not support that one need not to be heard. The learned counsel reiterated his prayer to have this Application been granted.

I have considered the submissions made by the learned Counsels representing the parties along with the record. It is evident from the record and the submissions that the Applicants were the employers of the Respondent. Their employments were later on terminated by the employer by retrenchment on operational requirement ground. This was complained of by the Applicants and when the matter landed in the Commission for Mediation and Arbitration, Hon. U. N. Mpulla Arbitrator, ruled out that the Applicants were unfairly terminated. This was not contested by the Respondent. In the reliefs sought by the Applicants regarding the termination the Commission was asked to make an order reinstating them or that which awarded them with compensation. The Commission did not think of reinstating the Applicants hence made an order for payment of compensation. The Arbitrator awarded each Applicant with a five month's salary compensation to that effect. He did so upon having considered the circumstances of the case. At this juncture I find it is important to note that where it is proved that termination of employment was unfair Section 40 of the Employment and Labour Relation Act [Cap. 366 R. E. 2019] provides for discretionary alternative remedies which are to reinstate the employee from the date the employee was terminated without loss of remuneration

during the period that the employee was absent from work due to the unfair termination **or** to re-engage the employee on any terms that the Arbitrator or Court may decide **or** to pay compensation to the employee of not less than twelve months remuneration. In the matter at hand upon having found that the Applicants were unfairly terminated the Arbitrator exercised his discretion and he found that payment of compensation would be a just remedy for the termination. This was not disputed by the Applicants. The dispute revolves around the amount of compensation. In my considered view in terms of Section 40 (1) (c) of the Employment and Labour Relation Act, whereas it is the discretion of the Arbitration or Court to order for payment of compensation the Arbitrator or the Court has no discretion in awarding the amount of the compensation. The Arbitrator or Court must award the compensations which is stipulated as being not less than twelve months remuneration. It follows therefore that when the Arbitrator, in the case at hand, ordered for five months remuneration he faulted the mandatory provisions of Section 40 (1) (c) of the law referred to herein above.

As to the basic salary paid to the Applicants by the employer (Respondent) indeed there was no written contract tendered to the

Commission which showed the terms of the employment agreed by the parties. In evidence Mariam Mpewa Ruwa (PW1) tendered to the Court the Paymaster Salary for July, 2017 to be exhibit. The same was so admitted and marked **Exhibit C2.** Going by the Exhibit it is very clear that the Applicants' Basic Salary was Tshs. 100,000/= and that the Applicants were paying Tshs. 10,000/= PPF contribution being 10% of the Basic Salary deducted from it. Indeed in the Notice of Termination of Employment the Employer indicated the salary as being Tshs. 300,000/=. I have considered that deduction from the employee Salary by the Employer for purposes of contribution to the Pensions Fund is a mandatory requirement of the statutory law. As stated by Ms. Zainab (Adv) there was no time the Applicants had complained of the amounts deducted for PPF Contributions purposes. In the premise I find the Arbitrator was justified when he held the Basic Salary to be Tshs. 100,000/= and that the compensation ordered should be calculated from that amount.

In the event this Application is partly granted. It is granted to the extent the order for payment of compensation for five months is vacated and replaced that for payment of twelve months remuneration compensation.

DATED at **TANGA** this 13th day of January, 2021.

E. J. Mkasimongwa

JUDGE

13/01/2021