IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT SONGEA

APPLICATION FOR REVISION NO. 08 OF 2020

(Originating from Labour Case No. CMA/RUV/SON/55/2019 at the Commission for Mediation and Arbitration for Ruvuma at Songea)

SAID HANGO ..... APPLICANT

VERSUS

NOKIA SOLUTIONS AND NETWORK (T) LTD ..... RESPONDENT

JUDGMENT

Date of Last Order:16/3/2021

Date of Judgement:13/4/2021

BEFORE: S. C. MOSHI, J

The applicant has filed an application for revision by way of Notice of Application under rule 24 (1), (2) and (3) of the **Labour Court Rules of 2007**, G.N No. 106 of 2007 and Chamber application under the provisions of S. 91 (1) (a) (b), 91(2) (b) (c), 94(1) (b) (i) of the **Employment and Labour Relations Act** [Cap. 366 R. E. 2019], Rule 24 (1) (2) (a) (b) (c) (d) (e) (f),3 (a) (b) (c) (d) and 281 (c) (d) (e) of the Labour Court Rules, G.N No 106 of 2007. The chamber summons is supported by an affidavit sworn by the applicant. The applicant is challenging an award which was issued by the Commission for Mediation and Arbitration of Ruvuma in respect of Labour Dispute NO.

CMA/RUV/SON/55/2019 delivered on 13th of August, 2020. The grounds for the application as contained in the notice of application as well as in the chamber application are thus:

a. *That, the Honourable arbitrator erred in law and facts to hold that the retrenchment was reasonable.*
b. *That, the Honourable Arbitrator erred in law and facts to hold that the retrenchment was procedural.*
c. *That, the Honourable Arbitrator erred in law and facts to hold that the criteria for retrenchment were adhered.*

The third ground was dropped at the instance of the applicant's advocate at the beginning of hearing.

The respondent opposed the application, it filed a notice of opposition and a counter affidavit which was deponed by Ameleye Nyembe, respondent's country human resources manager.

At the hearing of the application the applicant was represented by Mr. Makame Sengo, advocate whereas Ms Bupe Kabeta acted for the respondent.

The issue is whether the arbitrator has acted in the exercise of its jurisdiction illegally or with material irregularity; or that there has been an error material to the merits of the subject matter involving injustice.

The matter revolves around a retrenchment exercise which was undertaken by the respondent based on operational requirements.To begin with, for termination of employment to be lawful the employer is required to have a valid reason for termination and the circumstances that might legitimately form the basis of termination are provided under rule 23 (2) of the Employment and Labour Relations (Code of Good Practice),G.N. 42 (Code of Good Practice); they are:-

a) *economic needs that relate to the financial management of the enterprise;*
b) *technological needs that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of work place;*
c) *structural needs that arise from restructuring of the business as a result of a number of business-related causes such as the merger of business, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.*

Second component is fairness of procedure. For retrenchment to be lawful, the employer must adhere to procedures as stipulated under section 38 of the Employment and Labour Relations, Act No. 6 of 2004 Cap.366 R.E. 2019 (ELRA); it reads thus:

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

(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;

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

(iv) the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments,

(d) 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 recognized trade union;

(iii) any employees not represented by a recognized 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.

(3) Where, in any retrenchment, the reason for the termination is the refusal of an employee to accept new terms and conditions of employment, the employer shall satisfy the Labour Court that the recourse to a lock out to effect the change to terms and conditions was not appropriate in the circumstances.

Generally, the applicant was of the view that termination of his employment vide retrenchment was unfair. Mr. Makame Sengo interalia substantiated on first ground that, rule 23 (2) of the Code of Good Practice shows circumstances under which the employer may retrench employees. He enumerated three (3) instances which may necessitate a retrenchment; Economic needs, Technological needs and Structural needs. He argued that, before entrenchment exercise the employer is duty bond to give reason for retrenchment. The employer is duty bound to issue information relating to the exercise. The respondent said that it retrenched employees due to Economic reasons and structural need because it needed to add key performance indicator (KPI). In this case, the respondent was supposed to show its financial status before starting the exercise; current and previous status. However, he did not do so.

He contended that, the employer also said that it wanted to add efficiency (KPI), in this respect, it was supposed to put it clear whether the applicant was inefficient or he had failed to meet the goals which

were set by the company; in this respect he cited the case of **V. Marche Limited V. Fitina Rashid Mlooka,** Rev No. 371/2019 where Wambura, J at p.12 stated that: -

> "*.....the employer has to disclose to the employee the economic status of the business".*

He said that, in the case at hand, the employer failed to show that he was suffocating financially, he didn't show this fact neither at work place nor before the Commission for Mediation and Arbitration. Furthermore, it didn't show whether the applicant's performance was below company's target. He argued that failure to show that, shows that the employer had no valid reason to retrench.

Concerning second ground, he contended that, section 38 (1) (a) (b) and (d) of Employment and Labour Relation Act, Cap. 366 R.E. 2019 requires a written notice, it's mandatory to give unambiguous notice regarding the exercise, it should also show reasons for facilitation of proper consultation.

He also cited Art. 14 (1) of the **International Labour Organization Convention No. 158** which is in pari materia with section 38 of the Employment and Labour Relation Act, Cap 366 R.E 2019 and it reads thus:- When the employer contemplates termination for reasons for economic, technological, structural or similar nature he

accordance with national law and practice the competent authority thereof as early as possible giving relevant information including a written statement for reason of terminations; number of category of workers likely to be affected and a period which termination is expected to be carried out".

He winded up his submission in chief by saying that the respondent said that he issued a notice but the notice wasn't according to the law. The notice did not include crucial information and didn't show the reasons for retrenchment. It did not show if his performance was below the standard or whatever. Therefore the hon. Arbitrator erred by deciding that the employer observed the procedural and legal requirement.

Ms. Bupe responded to the first point that, the Arbitrator considered both sides evidence. The award is just and parties' statements and testimonies were considered. The **Employment and Labour Relation Act**, section 38 Cap. 366 R.E. 2019 provides for a procedure to be followed by the employer if it intends to terminate employees through retrenchment. The law allows the employer to retrench employees if he intends to restructure or intends to increase efficiency. The law requires it to follow the procedure stipulated under section 38 of the **Employment and Labour Relation Act.**

She said that, the evidence before the Commission for Mediation and Arbitration as seen at page 16 – 17 of the award, the arbitrator explained in detail that the reason was to enhance its performance and increase efficiency of the company. This reason was revealed to the applicant and the notice was received as exhibit D.2. It was general notice to all employees, including the applicant. The Commission for Mediation and Arbitration found that the reason was valid as long as the employer followed the procedure.

Regarding second reason, she stated that, the evidence which was adduced showed that all procedures were followed. Section 38 of the **Employment and Labour Relations Act** subsection one, item (a) requires the employer to issue notice to the employees when the employer contemplates need to retrench employees.

The employer issued notice to all the workers at the time when retrenchment was contemplated. The notice was tendered and admitted before the CMA as exhibit D.2. Section 38(1) (b) provides that, the employer must disclose relevant information relating to the retrenchment exercise for proper consultation, subsection (c) requires consulting with affected employees on the intended retrenchment. The employer did the consultation. She notified the applicant, they discussed

with him and informed him of the intended retrenchment, how the affected employees would be selected, the time and payment.

She also said that, the applicant was also given individual notice. It was admitted as D.3 and there was an audio teleconference which involved the discussion between employer and affected employees.

She contended that, consultations were also made with a Trade Union because the applicant was also a member of COTWU. The applicant was engaged in the discussion. He was selected by his co – workers to be their representatives, negotiation's minutes were admitted as exhibit D.7. The arbitrator's considered this and held that consultation was dully done in accordance with the law.

She submitted further that, there was a dispute as the employees and employer did not reach at a mutual agreement however the employer referred the matter to the Commission for Mediation Arbitration Dar es Salaam - Kinondoni per section 38(2) of Employment and Labour Relation and Arbitration. They finally reached to a mutual agreement and it was decided that the employer should proceed with the exercise and pay benefits to all affected employee, the settlement was admitted as D. 13. Therefore, it's obvious that the employer did consult the applicant.

She explained that, above all, the applicant was dully paid his benefits in accordance with the law. The evidence as a whole proves that all the retrenchment criteria were followed. Therefore, the applicant is not entitled to any relief.

That was it from the parties' submissions.

It is common ground that the employer had anticipated to retrench some employees for operational requirement whereby the organizational structure would be changed for increasing efficiency. The changes involved management and field operations. The applicant was among the employees who were selected to be retrenched and after consultations; the employer retrenched the applicant and dully paid his terminal benefits per the mediation agreement. I have observed that, the arbitrator's reasoning and analysis of evidence did correctly base on section 38 of the ELRA as well as rule 23 of the Code of Good practice. There are pieces of tangible evidence which shows compliance with section 38; notice, Exh. D-2, Individual notice to the applicant, Exh. D.3., teleconference audio Exh. D-3 and e-mail communication, Exh D-4. There were consultative meetings whereby the Trade Union, COTWU was involved, Exh. D-7. The applicant was fully involved as he was also selected to represent other employees who were affected. The parties failed to reach to an agreement hence, the matter was referred to the

CMA in terms of s.38 (2) of the ELRA for striking a mutual agreement, exh. D-11. The agreed terms were set in item 4 of the agreement; the employer complied with the agreement and the applicant was dully paid his terminal benefits per the agreement, see p. 23 of the award.

Considering the foresaid, I without a flicker of doubt find that the arbitrator did not err. The reasons for termination were dully communicated and consultative meetings were dully held in accordance with the law. It is obvious that Mr. Sengo's argument that the employer did not disclose relevant information is a new complaint which was neither reflected during the consultations nor at the CMA. Besides, retrenchment is not about individual employee's performance rather its yardstick is organization's operational requirement.

That said, I find that the application has no merits.

Wherefore it is dismissed in its totality.

Right of Appeal is Explained.

S. C. MOSHI

JUDGE

13/04/2021