IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 31 OF 2020

(C/F Employment Dispute No. CMA/ARS/ARB/50/2019)

THE AGA KHAN UNIVERSITY.....APPLICANT

VERSUS

JOYCE KINYANGE.....RESPONDENT

JUDGMENT

28/06/2021 & 30/08/2021

GWAE, J

The applicant, **the aga Khan University** dissatisfied with the award of the Commission for Mediation and Arbitration (CMA) for Arusha at Arusha has filed this application under the provisions of Section 91 (1) (a), (2) (a), (b) and (c) of the Employment and Labour Relations Act, No. 6 of 2004, Rules 24 (1), (2)(a), (b), (c), (d), (e), (f), (3)(a), (b), (c) and (d), 28(1)(a), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007, praying for the following Orders:

1. That, this court be pleased to call for and examine the records of CMA Award delivered on the 24th April 2020 in Labour Dispute No.

CMA/ARS/ARB/50/2019 by Arbitrator Lomayani Stephano for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein and revise and set aside the same.

2. That, any other relief this court deems just and fair be granted.

The application is supported by an affidavit of the late **Advocate Eliufoo Loomu Ojare,** may his soul rest in eternal peace. The respondent on the other hand, seriously challenged the application through the counter affidavit sworn by the respondent herself.

Brief background facts of the dispute between the parties are best apprehended as follows; the applicant and the respondent were in an employment contract whereas the respondent was initially employed as an Administrative Coordinator from 4th day of July 2016 (DE1) which she was later on changed to Site Administrator for an unspecified period. However, on 25th November 2018, the respondent was ground with a termination letter (AE3) where her employment was terminated on the reasons of change in strategy for the development of the Campus in Arusha.

Aggrieved by that decision, the respondent referred the matter to the CMA which procured its award in favour of the respondent on the ground that, the termination was both substantively and procedurally unfair.

The applicant was consequently ordered to pay the respondent 48 months' salaries compensation, 3 months salaries in lieu of notice, severance pay, daily subsistence allowance based on monthly remuneration from the date of termination (25/11/2018) until the date of repatriation to her place of recruitment and clean certificate of service.

The applicant was dissatisfied with the arbitral award, he has therefore filed the present application praying for its revision on a total of ten (10) grounds, which are: -

1. That, the Arbitrator's award was highly irrational and improper for finding that there were no substantive reasons which led to the termination/retrenchment of the Respondent employment.
2. That, the Arbitrator's award was improper for making a finding that there was no consultation and that the Respondent was not consulted before her retrenchment.
3. That, the Arbitrator's award was improper for failure to make finding that there was no selection procedure, while on evidence

on record, the whole campus building project was in fact closed down.

4. The Arbitrator's award was improper for failure to make finding that the Respondent's termination was in fact done after her leave had already been completed.

5. The Arbitrator's award was improper for failure to make finding that the Respondent refused to take an alternative job position offered by the Applicant.

6. That, the Arbitrator's award was highly prejudicial, illogical and irrational for making a decision on the non-ground of discrimination, without considering the evidence adduced by the parties and without affording the parties a right to be heard thereon.

7. The Arbitrator's award is irrational and improper for making a finding that the respondent was entitled to repatriation costs and subsistence allowance.

8. The Arbitrator's award was improper and contrary to law for making a finding that the Respondent was entitled to severance pay in the sum of **TZS. 16,620,000/=** instead of the lawful sum of **TZS. 366,000/=**.

9. The Arbitrator's order that the Applicant comply with the Award within 21 days was patently illegal and highly partisan.

10. The Arbitrator's award was highly irrational and improper for failure of the Arbitrator to analyze and consider the testimonies of the parties thus arriving at a wrong and unjust decision.

Following the passing away of the late Senior advocate Mr. Ojare, the applicant was subsequently able to secure another legal services from **Mr. Kelvin Edward Kwagilwa**, the learned advocate, while the respondent was represented by **Mr. Mnyiwala Mapembe**, also an advocate of this court and subordinate courts save primary courts. With leave of this Court, hearing of the application was by way of written submissions which will be considered while determining the grounds of this revision together with the CMA records and Labour Laws.

To begin with the **first ground** for revision, I fully concur with the Arbitrator's findings for the reasons to follow. The law is not silent on termination basing on operational requirements. Section 38 of the ELRA and Rule 23 (1) & (2) of the Employment and Labour Relations (Code of Good Practice) GN 42 2007 provide for circumstances that might legitimately form the basis of termination on operational requirements. Essentially, the provisions of law entail that for this kind of termination to be fair it must be

based on the economic, technological, structural or similar needs of the employer.

In the matter at hand, the reason for retrenchment of the respondent was based on economic crisis. The applicant's witnesses, Murad Jivan **(RW1)** and Terry Ramadhani **(RW2)** gave two (2) major reasons when testifying before the CMA and stated that, the reason for retrenchment was due to, **one**, financial constraints (economic crisis) that necessitated halt of the construction project; and **two,** misunderstandings between the applicant and the Government of Tanzania. The applicant's counsel also submitted that the applicant faced financial crisis that led to the closure of the construction project of the University.

I have gone through the entire proceedings of the CMA together with the exhibits tendered and I find no reason to fault the findings of the trial Arbitrator as there is no cogent proof that the applicant was facing economic crisis except mere assertion. To my view, this is a fundamental omission on the part of the applicant (employer). If at all the applicant was suffering economic hardship there could have been some documents to support the claim. I have further taken into consideration the testimony of RW2 who

stated that there were misunderstandings between the applicant and the Government of Tanzania. She stated and I quote;

Qns: What was the state of the project of building the University since 2016?

Ans: The project was going well, in 2017/2018 there was misunderstanding between the project and Government until 2018 everything stopped.

Qn: Thereafter what happened to employees?

Ans: It resulted to the end of contracts to some employees such as Engineers, project managers, Architects

I have also gone through all the exhibits tendered by the applicant, I have not seen any sort of proof such as written correspondences between the applicant and the Government of Tanzania substantiating existence of dispute, failure of which the said applicant's claims remain mere assertion. To this end, I join hands with my fellow judge **(Aboud, J)** in the case cited by the Arbitrator of **KMM (2006) Entrepreneurs Ltd vs. Emmanuel Kimetule**, Labour Division SBWG, Labour Revision No. 19 of 2014. Reported in the labour Court Cases Digest 2015 where it was stated and I quote;

> "In the present situation, what transpired at CMA was that prior retrenchment the applicant served the respondent a one-month notice as reflected on Exhibit "D1" to the CMA records which states the reason for the termination of the respondent is for operation requirement. However, apart from the notice

there is no any other record or evidence in record which establishes that the termination was indeed for operation requirement. I am of the view that the applicant failed to prove that operation requirement was a genuine reason justifying termination. It was a mere pretext justifying the termination of the respondent. The applicant failed to meet the requirement established in the case of **Bakari Athuman Mtandika vs. Superdoll Trailer Ltd,** Labour Revision No. 171 of 2013 (unreported) which impose the duty to the employer to prove the existence of operational requirement. Therefore, the first ground as to whether operational grounds were genuine reason for the employee's termination is answered in negative."

I have also recently decided the same ground in the case of **New Life Outreach Limited vs. Kurwa Timoth Sengi**, High Court, Labour Revision No. 49 of 2019 at Arusha which this court held employer's failure to produce cogent documentary evidence to prove financial crisis is fundamental omission and if at all the applicant was suffering from economic hardship there could have been some documents to support the claim. In our instant dispute the applicant had failed to sufficiently prove that operation requirement was a genuine reason justifying respondent termination but rather a mere pretext.

The applicant counsel cited the case of **Janeth Mshiu vs. Precision Air Services Limited,** High Court Labour Revision No. 588 of 2018 Labour Division (DSM) in line with this case the counsel has argued that there was no need to produce cogent documentary evidence to prove financial crisis faced the applicant. However, I subscribe to Mr. Mapembe's submissions that the case is distinguishable in the sense that the Respondent thereat (Precision Air Services Limited) tendered in evidence the Report on Evaluation on Productivity and Financial Status of the Company of 2017 as Exhibit PA1 substantiating poor financial performance of the company for the past Six (6) Months while in the present case, out of a total of five (5) exhibits produced by the applicant witnesses (AW1 and PW2), no financial report or minutes of the August 2018 Budget Cycle Meeting or communication between the applicant and the Government was tendered in evidence at the Commission to prove poor financial performance and misunderstandings. That being decided, the first ground is therefore answered in negative.

The **second ground** touches procedures for retrenchment in particular prior consultation. The same is provided for under section 38 (1)(c) of the Act read together with Rule 23 (4) of GN. No. 42 of 2007 (Code). I have

carefully perused the entire CMA records and exhibits. However, I find that there are irregularities on consultation with the respondent. The law mandatorily requires employers to consult prior to retrenchment with employees where such employees are not members of the Union or there is no Trade Union which is a bargaining agent of the employees in the given work premises which is the case in the present dispute.

Having gone through parties' evidence, AW1 stated that he met with the respondent over the lunch at AIM Mall on 06/09/2018 and informed the latter that she was no longer needed to be back to work on 03/10/2018 because of budget deficit. On the other hand, the respondent vigorously contended that she did not attend the said lunch meeting since she was not aware of the said meeting. For quick reference, I wish to quote parts of the evidence (at pages 5 and 6 of the proceedings) where AW1 stated;

Qns: Did the applicant return to job on 3 October, 2018

Ans: No because we have to reduce our budget

Qns: What happened thereafter

Ans: I met with the Applicant Sept, 2018. I met with Applicant at AIM for lunch so to explain to her that we didn't have much work and we were reducing out budget, so we don't want her to return to work

Qns: Was her position as Site Administrator still existing

Ans: No, it became redundancy

Qns: What was the main content of discussion with Joyce (Applicant)

Ans: To tell her workload was reduced, also we need to reduce our budget so I told her no need for her to come back to job.

During cross examination by counsel for the respondent, AW1 testified as follows at page 16 of the proceedings and I quote;

Qns: How did you arrange such meeting

Ans: Phone conversation

Qns: Did you explain to her you were going to discuss her Employment status

Ans: No

Qns: When was Applicant informed of her Employment status

Ans: The day we met at AIM Mall for lunch

Qns: When you met Applicant at AIM Mall you said her position as Site Administrator was already redundant

Ans: Yes

Qns: So, it means her position was redundant before you met with her

Ans: Yes, because she was on leave

What is grasped from the testimonies above and contents of Exhibit-P1 is that, the allegedly lunch meeting between RW1 and the respondent was a mere passing of termination information to the latter as correctly observed by the Arbitrator.

The respondent denies to have ever attended the alleged lunch meeting at AIM Mall. With this revelation, the burden lied to the applicant that the

respondent attended the said meeting by producing minutes of the meeting to prove its existence but who would bother since the alleged meeting itself was for lunch, as stated by AW1. I am left with nothing as proof of the consultation meeting. I have found no evidence to that effect. It is for this reason an adverse inference which ought to be made against the applicant as nothing reflects consultations between the parties.

Counsel for the applicant has stated that another proof of consultation is Exhibits P4 and P5. I have gone through the exhibits and discover that, exhibits-P4 is the handover document dated 3rd December 2018. It only proves the respondent handed over applicant's belongings that were in her possession, therefore the same is not about the requisite consultation. Exhibit-P5 are email correspondences dated 27/09/2018 between the respondent and RW2.

Another procedural aspect the applicant attempts to fault the CMA award is the ground of selection criteria **(third ground)**. It is in evidence that retrenchment affected approximately Eight (8) employees, including the respondent. The Arbitrator came into conclusion that the applicant did not disclose what criteria were used to select those terminated and those reassigned to another applicant's campuses in Nairobi (Kenya) and Kampala

(Uganda) as claimed by the respondent, there an element of discrimination, which touches the **sixth ground** of revision.

Another piece of evidence that made the arbitrator to reach into a conclusion that there was discrimination, is the fact that all employees who were Tanzanians were terminated despite the applicant's claim that there was a vacant Human Resources position in DSM campus and reassign foreigners (Amina and Caroline) to Nairobi and Kampala. RW1 stated and I quote;

> **Qn**: Can you identify the names of staff who are retrenched.
>
> **Ans**: Project director Arusha Lavia, Director of campus development transferred.... Nurse manager was terminated namely; Imran, also project Architect M/s Amina transferred to Nairobi, also project engineer was terminated, Also Caroline she was re-assigned to another position and A. Machele a farm manager was terminated.
>
> The respondent also testified on the selection criteria and stated as follows;

Qn: How many employees affected with such situation

Ans: 8 employees including me

Qn: what are their races

Ans: Two Asians, one cocagern (sic) and 5 Tanzanians

Qn: What happened to the foreigners

Ans: One Asian and 1 cocagern (sic) they are reassigned to Aghakhan Kampla, one Asscans (sic) assigned to aghakhan Nairobi.

Qn: What about the 5 TZ

Ans: 4 offer same offer of settlement but I was terminated I find this be dissemination (sic)

I have gone through the entire proceedings and noted that counsel for the applicant did not cross examine the respondent on this particular aspect hence I am inclined to agree with the Arbitrator that non-Tanzanians were reassigned to other campuses outside Tanzania and 5 Tanzanians were terminated including the respondent and that the applicant has failed to prove selection criteria hence in breach of Section 38(1)(c)(iii) of the Act.

Another procedural ground is, that the applicant intends to fault the CMA award is found in the **fifth ground** that, the respondent refused to take alternative job position. In this complaint, the arbitrator found that the applicant failed to prove that the respondent refused to take the Human Resources position in Dar es Salaam. Evidence on record does not support the applicant's claim that they offered her that alternative job and the respondent refused to take the position. I say so because throughout the trial, the applicant did not produce any evidence to prove to that effect as

depicted by the testimony of RW1 at page 18 of the typed CMA Proceedings and I quote –

> Qns: Do you have any proof of Alternative Employment you offered the Applicant
>
> Ans: No
>
> When RW2 was cross examined, she stated the following on alternative job offer at Page 22 of the CMA Proceedings –
>
> Qns: Did you communicate with the applicant about the alternative job he wanted to offer in Dar es Salaam main office
>
> Ans: No
>
> AW1, the Respondent stated the following when she was testifying at Page 27 of the CMA Proceedings –
>
> Qns: What can you say the offer given to you to be the HR in Agha khan DRS
>
> Ans: I am not aware of such offer
>
> RW1 further stated the following at Page 30 of the CMA Proceedings –
>
> Qns: Did the Agha khan offer you alternative job position Agha khan Dar es Salaam
>
> Ans: No

All these testimonies from RW1, RW2 equally AW1 proves that, the applicant offered no alternative job position in favour of the respondent and that the alleged alternation job was never communicated to the respondent as there was no proof that the same was offered. Some are admissions from the applicant themselves. The applicant has stated that Exhibit-P2 proves that they offered her alternative job at Dar es Salaam. This is not the case

because Exhibit-P2 is an email from Nizar Somji to Carol Ariano and the respondent was not part of such email correspondence. With the above scrutiny of the evidence on record and findings thereof, I find no reason to fault the arbitrator's finding in this aspect.

On repatriation and subsistence allowance **(seventh ground)**, I am also persuaded to agree with the arbitrator's findings that the applicant has failed to prove that respondent was recruited from Arusha (place of termination) and not from Moshi as she claims. Sections 15 (1)(b) and (6) of the Act obliges the applicant (employer) with the duty to supply the respondent (employee) with the particulars of place of recruitment.

Apart from the respondent oral evidence that she was recruited from Moshi pursuant to her referral Form No. 1, respondent's opening statement filed on 27/03/2019, employment contract (Exhibit P1) and the termination letter (Exhibit P3) all mention the respondent's address as Moshi.

Section 43 of the Act requires the applicant to incur the respondent costs of transportation since the contract of employment (Exhibit P1) was terminated at Arusha while the respondent was recruited from Moshi and in the event the former refuses to ground such allowance at the time of

termination, they are liable to pay the latter subsistence allowance for the whole period she was not repatriated to her place of recruitment, nevertheless my cautious scrutiny of the exhibits tendered by the respondent and admitted by the Commission (AE1-AE5) and those tendered by the applicant (RE1-RE1) particularly, contract of employment, termination letter, handing over letter and letter requesting for employment status credibly established that the respondent was at Moshi prior to her employment engagement and even before her termination of her employment following her sickness followed by maternity leave. In that premises, the respondent is entitled to be repatriation as per section 43 (3) of ELRA, herself and her family and her personal effects. However, I do not see any reason as to why she should be entitled daily subsistence (monthly salary from the date of termination to the date of repatriation. Having cautiously looked at the documentary evidence as mentioned above and the fact that the respondent was in Moshi, one would think that it will not be fair and just to order payment of daily subsistence equal to monthly salary from the date of termination to the date of transportation and be of a thought that it could be ordered as found by the arbitrator if it was established that since

institution of this dispute the respondent **was and is still** in Arusha. Provision of section 43 (1) (c) of the Act reads and I quote;

> "(c) Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment"

Dealing with similar situation, the Court of Appeal of Tanzania when interpreting section 43 (1) (c) in **In Attorney General v Ahmad R. Kakuti and two others**, Civil Appeal No. 49 of 2004 (unreported), stated inter alia that;

> "From its wording, the section does not in our view, have a condition tying an employee to the place of his employment for the whole period until the date of transportation. In that regard Mr. Mtembwa conceded the employee's entitlement to subsistence is not conditional upon confinement to the place of his employment pending payment of his transportation"

Having carefully looked at the wordings of the statute quoted above and judicial jurisprudence cited above, I have not reason to fault the

impugned award in respect of the respondent's entitlement from the date of termination to the date of repatriation.

The **eighth ground,** shall not detain me long because the applicant does not dispute that the respondent is entitled to severance pay rather quantum. Section 42 of the Act entitled the respondent with 7 days' salary for the years she was in employment with the applicant. 1 day's salary out of the respondent monthly salary of TZS. 5,540,000/= equals to TZS. 184,700 hence 7 days' salary is TZS. 1,292,900. Since the respondent worked for 2 years (2016-2018), then her severance pay is TZS. 1,292,900. The arbitrator's figure of TZS. 2,171,680/= is substituted with TZS. 1,292,900 as the correct quantum of severance pay.

Coming to the **ninth ground**, the arbitrator is entitled under section 88 (4) (a) of the Act to conduct arbitration in the manner he considers appropriate to determine the dispute expeditiously. In this ground, I agree with counsel for the respondent that an order that the award be fulfilled within 21 days has not prejudiced in anyway the applicant. The applicant has failed to demonstrate miscarriage of justice they have suffered out of that order.

The **tenth ground** is on the applicant's dissatisfaction of the award of the 48 months' compensation. They claim the award is exorbitant and it has been awarded out of inexistent reasons. It is the position of the law as it has been decided in number of decisions of this Court that the Arbitrators have discretional powers to grant compensation above 12 months salaries but such powers are to be supported with reason(s) for such awarding. I have carefully read the CMA reasons for the award of 48 months' salaries that the respondent was terminated while she was on an extended sick leave and that the respondent's dismissal was to a great extent both substantively and procedurally unfair.

This Court has in a number of occasions ruled extent of termination justifies an award of compensation in excess of 12 Months salaries as provided in Rule 32(5)(b) of GN 67 of 2007. In **North Mara Gold Mine Ltd vs. Khalid Abdallah Salum**, High Court Labour Division, Revision No. 25 of 2019 (MSM) and **Tanzania Cigarette Company Limited vs. Hassan Marua,** High Court Labour Division, Revision No. 154 of 2014 (DSM) (reported in 2014 LCCD) this Court made findings that if termination is to a greater extent unfair both substantively and procedurally, the Arbitrator is justified to order compensation above 12 Months' salaries which this court

would not interfere the said discretion. In these two decisions this Court awarded 48 months' salary compensation.

As I have decided in the **fourth ground** above, the respondent was informed of her termination and that prior to termination she was ordered not to report back to work sometime when she was on leave attending her prematurely born babies and the noted discriminatory act by the applicant. I have found these to be aggravating reasons warranting an award of forty-eight **(48)** months' salaries compensation by the arbitrator instead of twelve months' salaries compensation which is statutory minimum compensation awardable by virtue of section 40 (1) of ELRA. I have also considered decisions of similar circumstances and cases as I have elaborated as per Rule 32 (5) (e) of GN 67 of 2007. Nevertheless, I have considered the outbreak of Corona-19 (Pandemic) and its negative impacts as to the world economy. For that obvious reason, I hereby find it to be just and fair if the respondent is paid months' salary compensation (5, **540, 000/=x24=132, 920, 000/=).**

I have found it worth noting that, the Commission should have maintained consistency in marking or naming complainant or applicant and his or her witnesses during arbitration proceedings to be either Applicant's

witness-AW1, AW2 or complainant's witness-CW1, CW2 and so on and so forth **instead of** DW1, DW2 and so on. Equally, the respondent/employer ought to be marked as RW1, RW2 or DW1, DW2 instead of PW1 as wrongly depicted in the proceedings of this dispute. And when applicant or complainant tenders an exhibit that exhibit should be received as AE1 or CE1 or exhibit A1 or exhibit C1 instead of exhibit D1 or DE1. It is my considered view, that having consistencies or known systems in admission of exhibits matters a lot as it smoothens determination of disputes while in revisional stage. The Commission is therefore highly urged to be carefully while dealing with witnesses and exhibits during arbitration proceedings.

Consequently, the CMA award is confirmed, remains undisturbed save to the order of compensation which is now reduced from 48 months to 24 months' salary compensation (5,540,000/=x 24=**132, 920, 000**/=), the award of severance pay Tshs. 2,171,680/=awarded by the Commission which now is substituted with TZS. **1,292,900**/=. No order as to costs is made.

It is so ordered.

THE HIGH COURT OF TANZANIA

M. R. GWAE
JUDGE
30/08/2021