IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 17 OF 2021

(Arising from the decision of the Commission for Mediation and Arbitration at Mwanza, Labour Disputes No. CMA/MZ/ILEM/118/2020/51/2020)

BETWEEN

BIG DADDY'S WHOLESALLERS LTD..... APPLICANT

VERSUS

NAZMEEN ALLY MASOUD.....1ST RESPONDENT

JOYCE M. MAFFA .....2ND RESPONDENT

JUDGMENT

17th August, & 11th September, 2021

TIGANGA, J

This judgment is in respect of an application for revision namely Labour Revision No.17 of 2021 filed by a notice of application and chamber summons supported by an affidavit of **Vedastus Msirikali**, who introduced himself as the Principal Officer of the applicant who is conversant with the fact of the case.

The application was preferred under section 91(1)(a) or (b) and (2)(a) or (b) or (c) 94(1)(b)(i) of the Employment and Labour Relations Act

No. 6 of 2004, read together with Rule 24(1), (2),(a)(b)(c)(d)(e)(f) & (3)(a)(b)(c)(d) and Rule 28 (1) (a) or (b) or (d) or (e) of the Labour Court Rules, 2007 GN No. 106 of 2007 and any other enabling provisions of the law.

The applicant herein calls upon this court to grant the following orders;

(i) To revise the award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/MZ/ILEM/118/2020/51/2020,

(ii) Any other relief and/or further orders the Court may deem just and equitable to grant.

(iii) Costs of this application be provided for,

Briefly, the background of this dispute as reflected in the record and affidavit sworn in support of the application is that the respondents namely Nazmeen Ally Masoud and Joyce M. Maffa hereinafter referred to as the 1st and 2nd respondents respectively were employed as cashiers by the applicant under the employment contract for the term of one year. The 1st respondent was employed since 01st May 2016, up to 28th March, 2020

when his employment was terminated while the 2nd respondent was employed on 04th December 2017 but was terminated on 28th March, 2020, the same date when the 1st respondent was terminated.

The reasons for termination according to the letters of termination were that, the applicant being business firm, had its business fall down due to COVID 19 pandemic, the facts which forced some of the employees being redundant, therefore their employment contract had to be terminated on operational ground. According to the applicant, before such termination on 23/03/2020, the applicant convened the meeting between the employer and all employees including the respondents herein, the main agenda being to inform the employee the economic hardship and difficulties pertaining in the business. Having been so informed in the meeting, some of the employees including the respondents were handed over the termination letters.

Having so terminated, the two respondents referred the matter to the CMA where they filed Labour Dispute No. CMA/MZ/ILEM/118/2020/51/2020

Before the CMA, it was found that the termination of the employment of the respondents was unlawfully and consequently the applicant was

ordered to pay the 1st respondent a total of Tshs. 1,822,000/= while the 2nd respondent was awarded a total of Tshs. 1,791,000/=. The amount cumulatively included the payment in lieu of notice, severance pay and 12 months salaries compensation in terms of section 40(1)(c) of the Employment and Labour Relations Act (supra).

Aggrieved by the said award, the applicant has now applied to this Labour Court to have the award revised basing on the legal issue that;

(a) Whether the Arbitrator had rightly exercised his discretion to treat the dispute of retrenchment as unfair termination hence order 12 months compensation.

The application was opposed by the respondent by filing a notice of opposition and the counter affidavit sworn by the 2nd respondent, who was represented by Mr. Anyimike A. Mwamsiku, Advocate. The record does not reveal as to whether the 1st respondent filed the counter affidavit. The counter affidavit filed by the 2nd respondent opposed the application and deposed that, the respondent termination did not follow procedure and did there was no valid reasons for termination of their employment. She deposed that, there was no meeting that was convened by the applicant with the employees including the respondent.

That, the issues from the above facts are:-

(a) Whether the applicant has shown a good cause to secure its application

(b) Whether the applicant's application is frivolous and vexatious.

At the hearing of this application, the applicant was represented by Mr. Anthony Kombe, Human Resource Officer, while the respondent was represented by Anyimike A. Mwansiku, learned counsel.

The applicant's representative adopted the affidavit filed in support of the application and argued that, the applicant's business is betting and that business was banned during the out break of Corona Virus Pandemic. The banning affected the applicants business therefore necessitated the redundancy to some of the employees.

Following that state of affairs, on 23rd March 2020 the applicant called the meeting with employees and discussed the business condition in which the employer informed the respondent that, with effect from 28th March 2020 the retrenchment exercise would start. He went further and submitted that, when it reached at 28th March 2020 the employment contract of some of the employees including the respondents were terminated due to business economic hardship and the respondents were

served with the letter of termination which was accompanied with their entitlements but the respondents refused to receive them.

Following that refusal to receive their entitlements, on 03rd April 2020 the respondent filed labour complaint subject of this revision which was allowed thereby declaring the termination of the respondent to be unlawful and awarding the respondents what is contained in the award which is challenged. He submitted further that, what the Arbitrator awarded is a misconception in law, and ended at prejudicing the applicant as at the time of termination the employment contract of the respondent had left only two months for their contract to expire.

The representative of the applicant referred to the opening statement of 05/08/2020, and said had the Arbitrator based on the opening statement as required by rule 24(4) of The Labour Institutions Act (Mediation and Arbitration Guideline) Rules, 2007 G.N No. 67 of 2007 which provides that if the opening statement and the testimony are different then, the court must rely on the opening statement. Therefore he insisted that basing on the opening statement, the Arbitrator was supposed to award the respondent only two months which was the remaining period of their contract.

Further to that, he submitted that the applicant raised the preliminary objection, challenging the dispute as the procedure adopted to refer the matter to the CMA was not proper; however the CMA dismissed the objection without deciding the core of the objection. Basing on the above submission he prayed the court to revise the award to the extent explained herein above.

Replying to the submission in chief, the counsel for the respondents submitted that, there was no retrenchment within the meaning of the law. His arguments based on the facts that, the procedure for retrenchment was not followed.

The counsel referred this court to section 37(1) of the Employment and Labour Relations Act, 2004. He referred to the procedure provided under section 38 of the same Act, but that procedure were not followed, he relied on the authority in the case of **Dynamic vs Fatuma Lwambo**, Revision No. 427 of 2013 at page 6 of the judgment where it was held that, the retrenchment procedure must be followed. He submitted that since the procedure for retrenchment was not followed, then the termination did definitely not follow procedures, therefore the CMA was

correct to award what it awarded. On that base he asked the appeal to be dismissed for want of merits.

In rejoinder submission, the representative of the applicant insisted that, the procedure for retrenchment was followed, and if the Arbitrator found the procedure to have not been followed then, the CMA was supposed to award the remaining period of their employment. He in the end asked the application to be allowed, the award be revised as prayed.

The applicant in the evidence before the CMA and affidavit before this Court, as well as the submission made in support of the application, argued and invite this court to believe that the termination by the respondent was based on the operational requirement.

In law, termination by operational requirement has its peculiar procedure which is provided under section 38 of the Employment and Labour Relations Act, which for easy reference I find it pertinent to quote it in extenso.

> *"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-

(ı) any trade union recognized in terms of section 67;

(ii) any registered trade union which members in the workplace not represented by a recognised 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 (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect

and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment.

Looking at the evidence given by the applicant before the CMA, it goes without saying that the retrenchment procedures were not followed. This finding is based on the fact that, the meeting allegedly convened by the applicant on 23rd March 2020 aimed at discussing the issue of economic difficulties not to do consultation in terms of section 38 cited above. In all standards, it was called to inform the employee, that is why their employments were terminated in five after such alleged meeting.

This leads to the conclusion that, failure to observe the conditions stipulated under section 38, then termination was not based on the operational requirement, but was supposed to fulfill the conditions provided in section 37 of the Employment and Labour Relations Act (supra). For easy reference, the same is hereby reproduced as hereunder;

"(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason if it-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure.

(3) N/A

(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any ***Code of Good Practice published under section 99.***

(5) N/A"[emphasis supplied]

The code of good practice referred to in subsection 4 of section 37 is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 and the relevant provision which was also relied upon by the arbitrator is Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which was not adhered to.

In this case there is no misconduct by the respondent alleged and proved in evidence, this means that the termination of the employment of the respondents had no valid reasons and was not done in accordance with fair procedure.

What remains in issue is whether what are the parties entitled after such termination?

What the court should do after finding that the employment of the employee was terminated unfairly is provided under section 40(1) of the Employment and Labour Relations Act, which is either to order the employer 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 in terms of paragraph (a) of the subsection 1, or to re-engage the employee on any terms that the Arbitrator or Court may decide in terms of paragraph (b) of subsection 1 ; or to pay compensation to the employee of not less than twelve months remuneration in terms of paragraph (c) of subsection 1 of section 40 referred to herein above.

Under subsection (2) of the same section, an order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.

In this dispute, CMA opted to order payment of compensation for 12 months salaries, however the applicant contends that if the CMA so

decided then, and since the contract was of a fixed terms then, the payment was supposed to be of the remaining period of the said contract.

It is a principle of law that, the rights of the person employed under permanent terms of employment are different to those of the employee who is under the fixed terms contract. This is based on the facts that, as the employee in permanent employment has his term of service indefinite, the term of the fixed term contract is known and limited by the contract of employment between parties. In the case of **Good Samaritan vs Joseph Robert Savari Munthu,** Labour Revision No.165 of 2011 reported in the High Court Labour Digest No. 09 of 2013 it was held inter alia that,

> *"When an employer terminates a fixed term contract the loss of the salary by the employee of the remaining period of un expired term is a direct foreseeable and reasonable consequence of the employer's wrongful action. Therefore in this case, a probable consequence of the applicant's action was loss of salary for the remaining period of the employment contract which was 21 month."*

Since the employment contracts of the respondents were of fixed term contracts which started 01st May 2016, and was automatically renewing itself every date of its end, in respect of the 1st respondent it was

supposed to end on 30th April 2020 and up to the date when the same was terminated, that is on 28th March, 2020, the remaining period was one month and few days, which approximately can be computed to be two months, while in respect of the 2nd respondent, the contract started on 04th December 2017 it was to end on 03rd December, 2020, therefore when she was terminated on 28th March, 2020, she still had about nine months of un served period.

Now basing on the principle in the case of **Good Samaritan vs Joseph Robert Savari Munthu** (supra) the respondents were supposed to be paid compensation of the remaining period of their employment contracts, not 12 months salaries. That means, the 1st respondent was supposed to be compensated two months while the 2nd respondent was supposed to be compensated nine months. That said, I find merit in the application, the award is revised to the extent of setting aside the amount of twelve months salaries made in favour of the respondents, instead the 1st respondent be paid compensation of two months salaries while the 2nd respondent be paid nine months salaries for the remaining period of their contract of employment. Other orders remain intact.

It is accordingly ordered.

DATED at **MWANZA** this 17th day of September, 2021

J. C. Tiganga

Judge

17/09/2021

Judgment delivered in open chambers in the presence the representative of the parties on line through audio teleconference.

J. C. TIGANGA

JUDGE

17/09/2021