IN THE HIGH COURT OF THE UNITED REPULIC OF TANZANIA

(LABOUR DIVISION)
AT ARUSHA

REVISION APPLICATION NO. 22 OF 2019
(Originating from CMA/ARS/ARB/100/2017)

STEPHEN REUBEN MGANA ..... 1st APPLICANT

RAMADHAN RASHID NYAWAYA ..... 2nd APPLICANT

LOMNYAKI LAZARO LAIZER ..... 3rd APPLICANT

LIZE JONATHAN MBISE ..... 4th APPLICANT

SIMON LARIHON MUNGA ..... 5th APPLICANT

JANETH SWAI HEZEKIA ..... 6th APPLICANT

SAMSON THOMAS LINZA ..... 7th APPLICANT

RAJAB JAMAL GEUZA ..... 8TH APPLICANT

DAUD ABASS DAUDI ..... 9TH APPLICANT

UPENDO LAZARO MAPHIE ..... 10TH APPLICANT

Versus

KENYA KAZI SECURITY (T) LTD ..... RESPONDENT

JUDGMENT

24th August & 26th October, 2021

Masara, J.

The Applicants herein were employees of the Respondent, Kenya Kazi Security (T) Ltd, famously known as KK Security. The Applicants were employed at diverse dates and in various administrative capacities. They filed a dispute of unfair termination in the Commission for Mediation and Arbitration for Arusha (herein "the CMA"), vide CMA/ARS/ARB/100/2017. The CMA dismissed the matter holding that the Applicants' retrenchment was both substantively and procedurally fair. That award aggrieved the Applicants. They preferred this application seeking to set aside the CMA award. The application is supported by affidavit of Mengo Sichilongo, the Applicants' representative from TUICO, who also represented them in this Court. The record shows that the Respondent

did not file counter affidavit. In this Court, the Respondent was represented by Mr. Fidel Peter, learned advocate.

Brief facts culminating to this Application are as follows: The Respondent had contracts with various companies to whom she supplied security services, one of them was North Mara station. It happened that in August 2016, the said North Mara, who was the Respondent's major customer, ended its contract with the Respondent. That termination led to significant financial loss to the Respondent. According to the Respondent, running offices in Arusha and Moshi depended heavily on revenue generated from North Mara. Following such loss of income, the Respondent could no longer run smoothly. It therefore decided to retrench some of its employees, including the Applicants herein. The employees were issued with retrenchment notices in December, 2016. Various consultative meetings between the Respondent and the Applicants' representative, TUICO, were convened. The Applicants did not agree with the intended retrenchment; thus, there was no agreement. The matter was referred to the CMA for mediation but the mediation was unsuccessful. Notification of retrenchment was issued on 14/2/2017 and the Applicants were retrenched. All retrenched employees were paid terminal benefits, which included one month salary, payment of salary in full until 14/2/2017, severance pay for four completed years, 38 days accrued leave and certificate of service.

The Applicants were dissatisfied by the retrenchment claiming that the reason for retrenchment was not genuine, since it was only fall of profits and not loss of profits. They further claimed that after retrenchment the Respondent employed other staffs in their positions. They filed their dispute of unfair termination in the CMA on 8/3/2017. Their claims were payment of 24 months' salary and other employment benefits. They further claimed to be reinstated.

As already stated, their claims before the CMA were not upheld. On 24/8/2021, when the matter came up for hearing by agreement, the advocate for the Respondent and the Applicants' representative prayed that the application be disposed of through filing written submissions, and the Court acceded the prayer. Filing schedule was set as follows: Written submission by the Applicants was to be filed by 31/8/2021, reply submission by the Respondent was to be filed by 7/9/2021 and rejoinder submission was to be filed by 14/9/2021. The matter was set for judgment on 12/10/2021. Surprisingly, until the time of composing this judgment, neither of the parties had filed their written submissions. There is also no record that the Applicants or their representative sought for extension of time to file the submissions. The Respondent's counsel, quite understandably, also decided to remain mute. It is against that background that I have decided to proceed with composing this judgment, absence of the written submissions notwithstanding.

I have already stated hereinabove that the Respondent did not file a counter affidavit. However, that does not always mean that the application is not contested. It has been held by Courts that failure to file a counter affidavit does not mean that the application is uncontested and the Respondent can still appear and contest the application. The Court of Appeal in **The Editor Msanii Africa Newspaper vs. Zacharia Kabengwe**, Civil Application No. 2 of 2009 (unreported), held:

> *"So, if a respondent decides not to file such an affidavit that should not be taken to mean that the application is uncontested. On the contrary, in the absence of an affidavit in reply a respondent may still appear and contest the application."*

The same position was reiterated in **John Dongo and 3 Others vs. Lepasi Mbokoso**, Civil Application No. 14/1 of 2014 (unreported). In the case at hand, the Respondent did not file counter affidavit, but they appeared through Mr. Fidel Peter, learned advocate, to contest the application. It is quite unfortunate

that they also could not file any document to contest the Application due to the failure of the Applicants to file their submissions.

It is trite law that failure to file written submission by a party as ordered by court, is tantamount to failure to enter appearance in court on the day the case is set for hearing. This has been restated in a number of decisions, including the decision of the Court of Appeal in **National Insurance Corporation of (T) Ltd & Another vs. Shengena Limited**, Civil Application No. 20 of 2007 (unreported) where it was observed that:

> *"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... **It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case.**"* (Emphasis added)

In the application at hand, the Applicants' representative did not file written submissions as directed by the Court, and no reasons have been advanced for such failure. The implication is that he defied the Court order. Courts in a number of occasions, stand firm that court orders must be respected and complied with. See **Tanzania Breweries Ltd vs. Edson Dhobe and 19 Others**, Misc. Civil Application No. 96 of 2000 (unreported).

For the above inaction, it would have been sufficient for me to dismiss the application at this stage. Incidentally, for the interest of justice, I find it appropriate to determine the merits of the application on the basis of the affidavit of Applicants. I take this position considering the fact that an affidavit is evidence which the Court should not ignore unless it is contested. That is the spirit anchored in the Court of Appeal decision in **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006 (unreported).

Having so stated, I proceed to determine the application on merits. The main grievances put forth by the Applicants' representative is stated under paragraph 4(i)-(iv) of the affidavit. The first grievance faults the award for not considering

the Applicants' evidence tendered at the hearing leading to unjust decision. Although this is not substantiated, I will right away disagree with the Applicants. First, having perused the CMA record and the award in particular, I am satisfied that the evidence of both parties was thoroughly considered in the award. At pages 5 to 7 of the typed award, the Applicants' evidence was subjected to analysis. At page 8 of the award, while determining the first issue, the learned arbitrator referred to the Applicants' evidence, that they challenged that the retrenchment procedure was unfair on the ground that there was no agreement after consultation. The learned arbitrator did not agree with this evidence, his finding at page 9 is as follows:

> *"I do not find this challenge as a reasonable defense. In consultation parties do not need to reach an agreement. Where there parties (sic) do not agree after consultation the employer may proceed with retrenchment whereby if (sic) employees are aggrieved can challenge its unfairness. The rationale for consultation is not to reach agreement but for each party to be informed the problem so as to give views and if applicable, to avoid or limit retrenchment impacts."*

The learned arbitrator then concluded that the procedure by the Respondent was adequate and fair and, therefore, the Applicants were fairly terminated.

While dealing with the second issue on the substantive part of the termination, the learned arbitrator referred to the Applicants' evidence at page 10. On that part, the Applicants challenged the data presented by the Respondent on the ground that it was only fall of profits from 12% to 7%, but there was no loss. They also claimed that the Respondent did not agree with the measures they had suggested in order to avoid the retrenchment. This was well deliberated by the learned arbitrator at pages 10 to 12. He came to a conclusion that there was significant loss of profit which was a good ground for retrenchment. For the above analysis, the complaint that the Applicants' evidence was not considered is not well grounded. It is my finding that the learned arbitrator

thoroughly considered it in reaching the ultimate decision. This complaint is devoid of merits.

The second complaint hinges on the reasons for retrenchment. The Applicants complain that a mere fall of profits, in absence of direct loss of profit affecting operation of the Respondent's duties, was not a fair reason for retrenchment. According to the evidence of PW2 and exhibit P10, before North Mara station had terminated the contract, the Respondent earned TZS 805,000,000/= from them; but, after the termination of contract, income dropped to TZS 551,000,000/=. Profit before was TZS 145,229,784/= and after ending the contract it dropped to TZS 53,379,537/=. In terms of percentage, it was 17% before the exit of North Mara but it dropped to 2% after terminating the contract and after retrenchment the profit rose to 8%.

With the above data, it cannot be said that loss of income from 17% to 2% is not significant. With loss of income, one cannot expect that the company would still run smoothly. Correctly as held by the learned arbitrator, when income decreases, substantial loss is created thus the Company would not be able to pay salaries to its employees the way it did before or run its daily businesses as it had operated before. It is not disputed that the Applicants did not disagree with the Respondent that the contract between the Respondent and North Mara had ended and that by ending that contract there was significant loss of income of the Respondent.

In considering whether retrenchment for operational reasons is fair, the employer needs only to prove that it was on fair reasons. This was restated in the case of **Moshi University College of Cooperative & Business Studies (MUCCOBS) vs. Joseph Reuben Sizya**, Labour Revision No.11 of 2012, where the Court held:

> *"The first objective is to ensure that such terminations are substantively fair, meaning, operational grounds are not used as a smokescreen to mask*

termination based on prohibited grounds, otherwise unfair terminations. That is why to win in such a dispute ***the employer must establish that operational requirements were the real reason and not a pretext for terminating the involved employee."*** (Emphasis added)

That is also the spirit of section 38(1)(c)(i) of the Employment and Labour Relations Act, Cap. 366 [R.E 2019]. With the fall of income from 17% to 2%, I agree with the learned arbitrator that such fall amounts to loss of income. Such loss of income also justifies retrenchment which ultimately befell the Applicants. Therefore, the second grievance is found devoid of merits.

The third and fourth grounds raised by the Applicants fault the decision of the arbitrator contending that the procedure for retrenchment was not done in good faith. The Applicants further contend that the Respondent did not agree with their proposal to have their salaries reduced so as to avoid retrenchment. As far as the procedure is concerned, there were three consultative meetings; namely that September and December, 2016 and February 2017. In those consultative meetings, the Applicants were represented by their Trade Union, TUICO. Further, notices of the intended retrenchment were communicated to the Applicants prior to retrenchment and the reasons for retrenchment communicated to them. As alluded to above, the Applicants did not dispute the fact that the contract between the Respondent and North Mara came to an end, and the fact that the Respondent suffered loss. That apart, prior to retrenchment, the Applicants were paid all their terminal benefits and certificate of service issued to them.

In their evidence, the Applicants complained that before and after their retrenchment, there were other new staffs employed to take their positions. However, there was no proof tendered to substantiate this allegation. To prove that the retrenchment was on operational reasons, in the notification of retrenchment of 14/2/2017, the Applicants were advised to apply for any vacancies that the company may advertise, if they qualified. Further, the

respondent retrenched more than 30 employees, not only the Applicants. In the circumstances, it cannot be said that the retrenchment was not made in good faith.

Regarding the proposal made by the Applicant to have their salaries reduced, I note that this was not stated in their evidence at the CMA. What is on record is that the Applicants suggested that the package allowances of the managerial cadre and senior managers be deducted so as to avoid retrenchment. That opinion was considered not to be a viable solution because it would lead to breach of the terms of contracts of those designated managers. This was stated by PW1 in her evidence. Also, according to the evidence of PW1, the Applicants thought of another alternative; namely, to transfer some of the security officers to Dar es Salaam branch to avoid retrenchment. However, that alternative was not found workable, since it could not apply to the officers in the administration posts to which the Applicants belonged. This leads me to conclude that the 3rd and 4th complaints are without merits.

From what I have endeavoured to discuss above, this application is devoid of merits. It is dismissed in its entirety. I confirm the award by the CMA arbitrator. Considering this to be a labour dispute, I make no orders as to costs.

Order accordingly.

HIGH COURT OF TANZANIA

Y. B. Masara
JUDGE
26th October, 2021.