IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

(LABOUR DIVISION)

AT MOSHI

APPLICATION FOR LABOUR REVISION NO. 2 OF 2021

(Originating from Labour Dispute Number: CMA/KLM/MOS/ARB/97/2020 of the Commission for Mediation and Arbitration for Kilimanjaro at Moshi)

ALOYCE FELIX MARO.....1ST APPLICANT

MINICA TEMBA.....2ND APPLICANT

Versus

ADNAN MEHBOOB SADIQ, ADIL MEHBOOB

SADIQ AND ABID MEHBOOB SADIQ (*as Legal Personal*

Representatives of the Mehboob M. Sadiq

***T/S M/S Mehboob M. Sadiq & Company)* ..... RESPONDENT**

JUDGEMENT

24th February, 2022 & 29th March, 2022

MWENEMPAZI, J.

The applicants being aggrieved by the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. MOS/CMA/ARB/97/2020, dated 11th December, 2020 sought Revision to this

Court under section 91 (1)(a), 91 (2)(a) (b) (c), and Section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (the ELRA) read together with Rule 24 (1), (2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c) (d) and Rule 28 (1) (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 the entire records, inspect and examine the record of the Commission in the Labour Dispute No. CMA/KLM/MOS/ARB/97/2020 and revise the findings and an Award delivered by Hon Arbitrator G.P. Migire on 11th December, 2020, for being improperly procured, illegal, irrational, irregular, tainted with errors and acted beyond jurisdiction.

2. That, this Honourable Court be pleased to make any other relevant and appropriate orders in the circumstances of this application, as it deems fit and just to grant in the interest of justice.

3. Cost of the Application be provided for.

Briefly the back ground to this matter is that the applicants herein were once employed by the Respondent for a contract of unspecified period on different dates. The first applicant was employed in the year 1999 and the second one in 2010. They both worked for the respondent until 7th August 2020 when the Respondent terminated their contracts due to decrease of great number of clients and adverse economic situation resulting from COVID 19 causing a drop in the Respondent's income. The applicants felt that their termination was unfair based on procedure thus proceeded to open a claim

at the CMA challenging the termination of employment and claimed for compensation. The CMA made a finding that the termination was fair in both substance and procedure and proceeded to order for payment by the Respondent of a total sum of Tsh. 7,938,459/= being terminal benefits entitled to the applicants. The Applicants were aggrieved by the award of the Commission and have preferred the present application for revision of the award in this court.

On 3rd December, 2021 parties prayed to proceed with hearing by way of written submission. It was then ordered for parties to file their written submissions as scheduled. The applicants filed their written submission through Mr. Wilhad Kitaly learned counsel whereas Mr. Pius L. Ndanu did so on behalf of the respondents.

Briefly, the counsel for the applicants submitted that the CMA award was improperly procured, illegal and erroneous on the following grounds:

1. That, the honourable arbitrator erred in law and facts for holding that the reason and the procedure for retrenchment were fair and award the applicants Tshs. 7,938,459/=.
2. That, award of the honourable Commission was illegal, improperly procured and tainted with errors.
3. That, the honourable arbitrator erred in law and fact for failure to evaluate and address properly the evidence given during the hearing.
4. That, the honourable arbitrator erred in law and facts for failure to give weight the evidence of the applicants.

5. That, the honourable arbitrator erred in law and facts by delivering an award which is unlawful and irrational.

Submitting on the 1st, 2nd and 5th grounds collectively Mr. Kittaly stated that retrenchment on operational requirements has been provided under section 38 of the Employment and Labour Relations Act, 2004 (the ELRA) read together with Rule 23(1)(2)(3)(4)(5)(6) and (7) of the Employment and Labour Relations Code of Good Practice GN. No. 42 of 2007. Mr. Kitaly submitted that for retrenchment to be fair the employer must follow the procedure as provided for by the law. He further stated that the employer in the present case failed to prove whether the procedure as provided under section 38 of the ELRA was followed. He pointed out that in the records of CMA, there was neither the notice of intended retrenchment prior to the retrenchment nor was there minutes of the meeting for retrenchment. It was his submission that this proves that there was no proper consultation since there was no agreement reached on the said retrenchment. He submitted further that the respondent being the employer was required by the law to refer the matter to CMA for mediation but she did not comply with that mandatory requirement of the law.

It was his further submission that even the reason for the said retrenchment was not fair because there was no evidence tendered before the CMA to prove that the respondent suffered economic hardship and that there was no alternative measure employed to rescue the situation. The learned counsel argued that the court is tasked to ensure that operational reasons are not used by employer as a cover up to terminate employees unfairly thus

circumventing employee's rights. It was therefore Mr. Kitaly's submission that the honourable Arbitrator erred in law and in fact for a fair holding that the reason and the procedure for retrenchment were fair because it was not. He contended that the termination was both substantively and procedurally unfair. He insisted that the applicants were entitled for a fair compensation.

With respect to the 3rd and 4th grounds Mr. Kitaly submitted that the honourable Arbitrator failed to evaluate and address the entire evidence properly. While referring to the evidence given by the applicants with respect to the amount of salaries they were given as opposed to the evidence given by DW3 on employer's side, he stated that the applicants had testified to the effect that they were given their monthly salaries in terms of cash and that they were not given any document witnessing payments. He submitted further that DW3 also did not tender any document evidencing payment o salaries to applicants. Mr. Kitaly argued that based on the provision of section 96(2) of the ELRA, it is the responsibility of the employer to keep all documents evidencing payment of salaries of their employees for the period of five years. He further submitted that since the employer failed to keep proper documents of employees, he prayed that an adverse inference be drawn against the respondent and a finding that the correct monthly salaries for the applicants are Tshs.1,680,000 per month for the 1st applicant and Tshs.1,000,000/= per month for the 2nd applicant.

It was also Mr. Kitaly's submission that the honourable arbitrator failed to address properly the relief entitled to the parties. It was his vies that since the termination was substantively and procedurally unfair therefore the

applicants are entitled to compensation of not less than twelve months remuneration as provided under section 40(1)(c) of the ELRA, 2004.

Mr. Kitally also submitted that the applicants are entitled to one moths' salary in lieu of notice because they were not given notices of termination for a period prescribed by law. He said the notices of termination were given on the date of termination. Submitting further Mr. Kitally stated that the applicants were also entitled to payment of severance allowance as provided for under section 42(1) (2) (4) of the ELRA, 2004. Another relief entitled by the applicant the learned counsel said was payment of unpaid annual leave since they did not take their annual leave and that the respondent did not prove if the applicants were paid their annual leave.

Concluding his submission Mr. Kitally prayed for this court to grant the application.

Responding to the submission Mr. Ndanu, learned counsel for the Respondents submitted that the grounds for revision of award by the Applicants together with the notice of application have no merit at all because the award was properly procured. While giving the brief history of the matter Mr. Ndanu submitted that the applicants were employed by the Respondent for the contract of unspecified period of time. That due to the circumstances of COVID-19 pandemic and drop of number of customers and eventually decline of business, the respondent took further steps terminating Applicants' employment via smooth retrenchment. That after retrenchment, the applicants referred the dispute at CMA to determine fairness of the retrenchment where the CMA delivered an award in Applicants' favor

ordering the respondent to pay the applicants Tshs. 7,938,459/=. That the applicants were aggrieved by the CMA award hence referred the dispute for revision before this court. The learned counsel argued that the grounds for which the revision was preferred are baseless.

Responding to the 1st ground Mr. Ndanu submitted that the procedure for retrenchment was fair in the sense that during hearing the Applicants admitted that the information for retrenchment was earlier communicated to them since March 2020 and were given opportunity to think and decide but never objected until August, 2020 when retrenchment came into effect. Again, he added that it is undisputed that the 1st Applicant was 70 years above the retrenchment age while the 2nd Applicant was given an opportunity to discuss with fellow secretary on who was to start with retrenchment. All this was in his view proof that there was fairness of procedure.

Stressing on following the procedure, the Respondent's counsel cited the case of **Brian Celestine and 19 Others vs. The Salvation Army Tanzania Territory** which cited with approval the case of **Benard Gindo & Others vs. TOL Gases Ltd**, Revision No. 18 of 2017 at Dar es Salaam. Based on the cited case, the learned counsel submitted that it was very hard for the respondent to apply all stages in checklist fashion rather to ensure that consultation was fair and adequate.

With respect to the 2nd ground, the learned counsel submitted that the ground is irrational because the Applicants via their testimonies admitted that the Respondent faced considerably decline of customers and they were

called to the office to discuss the situation of COVID-19 Pandemic therefore the Award was lawful, properly procured and correct in terms of contents.

Moving on to the 3rd ground regarding evaluation of evidence, Mr. Ndanu submitted that all evidence adduced at the time of hearing were properly evaluated in terms of contents and the situational circumstance of COVID-19 Pandemic and how to rescue economic status of the Respondent in that particular time in the sense that retrenchment was inevitable.

On the 4th ground where the applicants counsel complained that the honourable Arbitrator erred by not giving weight the evidence of applicants, Mr. Ndanu submitted that the ground lacks merit because the Applicants' evidence was given weight by the Arbitrator that is why they were awarded with Tshs. 7,938,459/= in accordance with law as provided under section 44 of the ELRA, 2004.

Finally on the 5th ground Mr. Ndanu submitted that based on material particulars and evidence presented at the time of hearing where the Applicants did not dispute the reason of retrenchment but procedure, the award was lawful and rational. In the end the learned counsel prayed for the dismissal of the application with cost.

Having read the records of the CMA and the submission from both parties, I will now proceed to examine the merit or otherwise of the application based on the grounds as put forward by the Applicants. Basically, based on the grounds of this revision application the Applicants have argued that the termination was not fair because the respondent did not follow the procedure

as required by the law and that the Arbitrator failed to evaluate the evidence when addressing the issue. Therefore, the issue to be determined here is whether the termination of the applicants' employment was fair.

The applicants' employment contracts were terminated by way of retrenchment. Retrenchment is termination of employment necessitated by operational requirements. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer. This is covered under section 38 of the ELRA read together with rule 23,24 and 25 of the Code of Good Practice GN. 42 of 2007. For retrenchment to be fair it must be substantively and procedurally fair. Retrenchment is said to be substantively and procedurally fair when the reason for the same is fair and the procedure is followed. Therefore, the employer must give fair reason for making the decision to retrench and also follow the procedure as provided by the law otherwise the retrenchment may be considered unfair.

In the present scenario based on records the reason for retrenchment according to the witnesses DW2 and DW3 and termination letters exhibit B3 and B4 was caused by financial constraints due to lost in number of customers resulting from non-service of the clients because of the illness of Mr. Mehboob M. Sadiq. This reason falls under the provision of rule 23(a) of the Code which states that economic needs that relate to financial management of the enterprise may form as a legitimate reason for termination. Therefore, based on evidence on record it was proved that the employer had valid reason for termination.

With respect to the procedure for retrenchment, the position of the law is provided for under Section 38 of the ELRA read together with Rule 23 and 24 of GN. 42 as cited above. The employer is supposed to first give notice of any intention to retrench as soon as it is contemplated, secondly disclose all relevant information on the intended retrenchment for the purpose of proper consultation and third is to consult prior to retrenchment. In a proceeding concerning unfair termination of an employee by the employer the law has placed the burden of proving that the termination was fair to the employer see Section 39 ELRA. It is therefore imperative that the employer provides proof that all these retrenchment procedures were complied with as provided in the law for termination to be fair.

In the present case, I had time to go through the proceedings of the CMA and noted that besides DW2's testimony there is nothing on record to prove that applicants were given notice of the intended retrenchment. On page 12 of the typed proceedings DW2 is recorded to have said that,

> *"...from the meeting of February 2020 whereby boss called me and said we can reduce one secretary let us discuss who to be reduced. In March 2020 he called us again each one with his time and said customers have reduced so it is likely all of us (2 secretaries) would be retrenched but our rights will be paid."*

What is gathered from the above evidence is that some of the employees were informed of the intended retrenchment via a meeting which was held on one-on-one basis which means each one was called separately. This is however not enough proof that there was proper notice given as required

by the law. It is possible that other employees were not given proper notification as the applicants who denied to have been given notice of the intended retrenchment. Even DW3 who testified for the Respondent on page 19 of the types proceedings when he was asked whether there was a notice of retrenchment, he said that there was no notice of retrenchment. It was the duty of the employer to provide proof that the employees were duly notified as the law requires. Section 39 is relevant on this part also. In the circumstance, it is therefore right to conclude that there was no notice of retrenchment as required by the law.

The Employer was also required to disclose all the relevant information on the intended retrenchment for purposes of proper consultation. Now as discussed above if there was no proper notice it is even doubtful that all the relevant information concerning the retrenchment was disclosed to the applicants to enable them understand the situation and also allow them to have a proper consultation.

Consultation is another important element in retrenchment procedure as provided by the law under section 38 of the ELRA. The law provides that in order to have a proper consultation, employer must disclose to the relevant employees all the relevant information concerning the retrenchment. The purpose of consolation according to Rule 23(4) GN. 42 OF 2007 is to permit employers and employees to undertake a joint problem-solving exercise so as to reach an agreement on the following: -

a) the reasons for the intended retrenchment (i. e the need to retrench)

b) any measures to avoid or minimise the intended retrenchment such as transfer to other Jobs. early retirement, voluntary retrenchment packages, lay off etc
c) criteria for selecting employees to be retrenched
d) the timing of the retrenchment
e) Severance and other conditions for terminating employees' contracts.
f) steps to avoid the adverse effects of the termination such as time off to seek work.

If proper consultation is done as provided by the law, then parties are expected to reach an agreement and suppose no agreement is reached after consultation then the law directs under section 38(2) for the matter to be referred to mediation.

Based on what is discussed above and what I have examined from the records of CMA, it is my finding that since there is no evidence of notice of the intended retrenchment neither is there record of minutes for the meetings said to have been held nor agreement that was reached by parties regarding the retrenchment then there was no consultation as required by the law. Which means the procedure was not properly adhered by the employer. Which made the whole termination process unfair for the applicants. The employer who is the respondent in this case has in my view failed to prove that the termination was fair as required under section 39 of the ELRA.

The law under Rule 23(3) GN. 42 OF 2007 requires the court to scrutinize a termination based on operational requirement carefully in order to ensure

that the employer has considered all the possible alternatives to termination before termination is affected. In light of this provision, I find that the termination of the applicants in this case was unfair and therefore they deserve to be remedied as provided under section 40(1)(c) of the ELRA.

This irregularity of not adhering to the procedure, is in my view sufficient to allow the revision. I hereby proceed to quash and set aside the decision of the Commission for Mediation and Arbitration at Moshi in Labour Dispute No. CMA/KLM/MOS/97/2020. It is so ordered.

Dated and delivered at Moshi this 29th day of March, 2022

T. M. MWENEMPAZI

JUDGE

Judgement delivered in the presence of the applicants and Mr. Pius Ndanu, learned advocate for the Respondent.

T. M. MWENEMPAZI

JUDGE