IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

CONSOLIDATED LABOUR REVISIONS NO. 4 AND 13 of 2022

(*Arising from CMA an arbitral award by Hon. Igogo M. Mediator, dated 20.12 .2021. In Labour Dispute Ref No.CMA/MZ/ILEM/852/2017/82/2021*)

SYLVESTER VALENTINE MAGORWA ..... 1st APPLICANT
CHRISTINA KIMASHI MASHA ..... 2nd APPLICANT
GEORGE S.K SHEMDOE ..... 3rd APPLICANT
KAPILYA LAMECK HARUNI ..... 4th APPLICANT
DR. JOHN CHAGULA ..... 5th APPLICANT
DOMINIC TITO ZUMBA ..... 6th APPLICANT

VERSUS

TANDABUI INSTITUTE OF HEALTH
SCIENCE AND TECHNOLOGY(TIHEST) ..... RESPONDENT

RULING

1st July & 12th September, 2022.

ITEMBA, J.

This ruling arises from revisional proceedings preferred by both the applicant and respondent, against the award issued by the Commission for Mediation and Arbitration (CMA, issued on 20th December, 2021). The applicants were employees of the respondent. They were employed as different dates in different capacities. On 1st April, 2017, their employments were terminated for reasons of operational requirement.

Feeling hard done by the termination, they instituted a labour dispute in the Commission for Mediation and Arbitration (CMA) Mwanza, to challenge the termination, on the ground that the same was substantively and procedurally unfair. It was the CMA's view that the termination was justified course of action, given the fact that there was retrenchment. In consequence of all that, the arbitrator ordered compensation of two months' salary for each applicant (1st, 2nd, 3rd, and 6th). The 4th and 5th did not appear before the CMA therefore their complaints were not considered.

On 28th of January, 2022, the applicants, filed this application for revision no. 4.2022. On 7th of February, 2022, the respondent, filed an application for revision no. 13.2022. as mentioned, the two applications were consolidated as they emanate from the same labour dispute Ref No.CMA/MZ/ILEM/852/2017/82/2021. Due to the fact that the grounds and arguments are related both applications will be answered jointly.

At the hearing, the matter was argued orally. Both parties were represented by learned counsels Mr. Alfred Daniel was for the applicants while Mr. Charles Kiteja appeared for the respondent.

The issue raised by the respondents were:

i. Whether the arbitrator was legally correct to grant an award as a compensation of two months salary per each applicant

ii. Whether the arbitrator was legally correct to rule that severance cannot be paid to employees who have specific contract.

Arguing in support of the application Mr. Daniel submitted that, if the CMA was certain that the procedure for termination was not followed and that the applicants had a contract of three years and they worked for six months, therefore CMA is supposed to issue compensation of the remaining months.

On the second issue it was submitted that, Rule 26 (1) of the ELRA GN. 42.2007, provides for severance pay and sub rule (2) provides for condition where employer is not entitled to severance pay. However, the 6th applicant worked for more than three years in the earlier contract, so he qualifies to severance pay. In this, he cited the case of ***Mtambua Shamte & Others Vs Care Sanitation Supplies, Revision no. 154.2010***. He therefore prayed for the Court to allow his prayers.

Responding to the application Mr. Kiteja submitted that the applicants were not entitled to any payment as the termination emanated from retrenchment and section 38 of the Employment and Labour Relations Act was complied with. He submitted that, the CMA clearly established that the respondent had valid reasons to terminate the applicants, awarding compensation of two months' salary was unreasonable as explained in the case of **NBC v George Antansio**

Makanye. Revision Application No. 7.2013 and **Good Samaritan v Joseph Savari Munthu,** Rev. No. 165 of 2011 (unreported)**.** He argued that the applicants were consulted at a group level as well at individual level. He added that all retrenched employees were paid their terminal benefits according to the law. The learned ccounsel strongly submitted that, according to the award which is based on the evidence produced at the CMA, the applicant's termination was fair.

The learned counsel submitted that, regarding the 2nd ground, severance is governed by section 42 of the ELRA and rule 26 of GN. 42.2007. That, the law states that severance pay is for employee who has worked for at least one year and the 6th applicant had failed to prove his long-term services. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Daniel reiterated his submission in chief and argued that, the long-term service of the 6th applicant is shown at page 3 of the CMA award. He therefore prayed for the application to be allowed.

Arguing for application no. 13/2022, Mr. Kiteja referred paragraph 8 of the applicant's affidavit which I will reproduce hereunder;

'That, the Arbitrator has acted with material irregularities and that there has been errors material to the case occasioning injustice to wit: -

(a) That, the Arbitrator stated that, the Applicant was supposed to have a contract with the respondent setting an agreement on early termination.

(b) That, the Arbitrator converted with confusion on the procedures for termination in normal circumstances and the procedures for termination based on operational requirement (retrenchment).

(c) That, the Arbitrator embarked on extraneous matters requiring the Applicant to tender a termination contract signed by both parties which was never a complaint of the Respondents and was never tested in examination in chief or cross-examination.

(d) That, the Arbitrator misdirected herself in law and fact thereby occasioning material irregularity when she discussed and reasoned that there must be a written contract signed by both parties in effecting retrenchment process.

(e) That, the Arbitrator occasioned material irregularities when she reasoned that, apart from oral evidence of presence of collective bargaining agreement, the Applicant had to tender the said in the commission for Mediation and Arbitration'.

He further submitted that the CMA findings were to the effect that the applicant's employment was both substantive and procedurally fair. However, the findings at page 18 of the award were also that the applicant did not agree to the termination because there were no copies of signed collective bargaining agreement produced before the court. He faults this finding stating the CMA misled itself because it is not a legal requirement

to have the said signed agreement. He therefore concludes that the applicants' termination was justified and they were not entitled to any compensation.

In reply, Mr. Daniel agreed that it is not a legal requirement to have such written agreement. However, he stated that the applicants neither testify nor cross examined on that aspect of collective bargaining it just featured in the award, therefore they were condemned unheard on that aspect. He added that the applicant's did not agree on retrenchment that what was presented before the court was minutes of the meeting but agreement must have been made through a Trade Union.

In rejoinder, counsel for the respondent stated that the applicants' counsel did not dispute that section 38 was complied with and he did not file a revision against that he added that there was no evidence that the applicants belonged to any Trade Union.

Having gone through parties' oral submissions, CMA and court records with eyes of caution, I believe the issues for determination are;

i. Whether there was valid reason for retrenchment.
ii. Whether the procedure for retrenchment were adhered.
iii. Whether the applicants were entitled to compensation.
iv. To what relief are the parties entitled.

Starting with the first issue as to whether the respondent had valid reason for retrenchment; it is trite law that termination have to be fair both substantially and procedurally. Rule 23 of GN 42 of 2007 provides for circumstances that might legitimately form the basis of a termination under operational requirement and I quote:

'Rule 23:-

(1). A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination 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 the workplace;*

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 businesses, a change in the nature of the business, more* effective ways of working, a transfer of the business or part of the business.' [Emphasis supplied].

Having gone through the records, the grounds for termination advanced by the respondent through his testimony as DW1 are financial difficulties. It is undisputed that Ministry of Health instructed the respondent to move some of her students to other institutions and that some of the courses were closed. DW1 had stated that the main course of clinical medicine which had 450 students was also closed. This is also evidenced by the letters from Ministry of Health (exhibit D1, D2, D3 and D4. It was submitted that; the respondent had even failed to pay salaries of for 3 to 4 months and failed to service her loan at Twiga Bancorp which led to a penalty of Tshs. 250,000,000/=.

In support of the finding that termination was substantively fair, I will be guided by the decision of a South African case in **Hendry v. Adcock Ingram (1988) 19 IU 85 (LC) at 92 B-C** where Judges and Arbitrators are cautioned not to interfere with the legitimate business decision of the employer in deciding whether termination under the ground of retrenchment was fair. The court had this to say:

> *'When judging and evaluating an employer's decision to retrench an employee, the court must be cautious not to interfere to the legitimate business decision taken by employers who entitled to restructure.'*

Likewise, in the case of ***Moshi University College of Corporative & Business Studies (MUCCOBS) v. Joseph Rueben Sizya, Lab Div. DSM Rev. No. 11/2012*** it was held that: -

"Retrenchments or termination for operational grounds are defined under section 4 of the Employment and Labour Relations Act, 6.2004 (the Act) to include.... requirements based on the economic, technological, structural or a similar need of the employer. In my view the objective of the law in regulating termination disputes arising from retrenchments is not to interfere with the employer's managerial prerogative, regarding the decision to terminate on operational grounds... Rather, it is my opinion that the functions or objective of the law is twofold.

i. *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 termination. 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.*

ii. *In my opinion, the second objective is a policy one, it reflects the need to shield employees from vagaries of job loss by ensuring that the decision to retrench is not rightly resorted to by employers, and that when it must be taken, efforts are*

made to minimize its impact on affected employees. The concern is basically the reason the law mandates procedural fairness in retrenchment.'

The CMA arbitrator was satisfied that the termination was fair. Without many words, as the respondent depended on the school fees paid by students for operations, removing a big number of students will eventually affect the income and the said operations. I join hands with the CMA arbitrator that this kind of situation fits under rule 23(2)(a) of GN 42 of 2007, that the economic status of the respondent necessitated the retrenchment. The issue is answered in affirmative.

Moving to the second issue, the procedures for retrenchment is provided for under section 38 of ERLA. I will quote the relevant section for easy of reference: -

'38 (1) *-(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 which members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognized or registered trade union.

The section is in *pari materia* with Rules 23 and 24 of GN 42 of 2007.

Going back to the records, it was evidence before the CMA that the applicants were given a notice of intention to retrench dated 30/12/2016 (see **exhibit D8**). The part of said notice reads:

'NOTICE TO ALL STAFF:

Invitation to Commence with consultative process:

You are hereby informed that the management is contemplating a restructuring of the institution. The restructuring of the institution my result in some retrenchment taking place.....'

It is also in evidence that after the said notice was issued there was announcement of the meeting scheduled on 27/3/2021 (exhibit D9). The list of participants of the said meeting show that the 1st and 2nd applicants were present in the said meeting. (Exhibit D11) and that the 3rd and 6th applicants were absent but were informed about the details of the meeting. The minutes of the said meeting (exhibit D10) reflect that the consultation was done to the employees prior to retrenchment. Among others, the method proposed for retrenchment was early retirement for elder staff, last in first out (LIFO) style, reducing the number of Human Resources officers and consideration of re-employment in future opportunities. The timing of retrenchment was said to be in 3 months, between December 2016 and March 2017. Also, the respondent was ready to accept employees who will work as volunteers or will accept half salary but they all denied that offer. They also discussed on the type of benefits for those who will be retrenched. Based on this evidence, I am of the firm view that the respondent complied with the procedure stipulated under section 38 of the ELRA.

There is an issue which was raised by the CMA that there was no evidence of signed contract or agreement of collective bargaining, therefore there was no proof that the applicant agreed to the consultation. I would agree with the counsel for the respondent that there is no legal requirement

for having an independent signed agreement. What was produced in court, were the minutes of the consultation meeting dated 24/3/2017 and the agreement for retrenchment was within the said minutes. There are signatures of all the participants who were in the meeting and that the minutes were read to them, including all 4 applicants. Therefore, the minutes contained agreement and the names of the applicants showing that either they participated or the minutes were communicated to them and they approved the agreement therein.

Another issue raised by the applicant is the fact that for consultation to be proper, the employees must be represented by a Trade Union. As mentioned earlier there was no evidence whatsoever to prove that any of the applicant belonged to a Trade Union. Besides as quoted above, Section 38 (1)(d)(iii) of the ELRA, recognises employees who can proceed with termination procedures without being represented by a Trade Union. Therefore, the respondent was not at fault due to the absence of a Trade Union in the retrenchment process. To sum on procedural fairness when it comes to retrenchment, I will quote the decision in **Rweikiza and 11 others v Bs Stanley Mining Service** Revision no. 23/2012 Hon. Rweyemamu, J (as she then was) had dealt with section 38 at length and she stated *inter alia* that '*section 38 read together with Rules 23 and 24 of GN 42/2007 provides for various stages of retrenchment but are not*

meant to be applied in a checklist fashion, rather are meant to provide guidelines to ensure that consultation is fair and adequate.'

Having said that, I am satisfied that termination of the applicants was fair both procedurally and substantively.

The last two issues are about the reliefs. In the CMA Form 1 the applicants had prayed for remaining months salaries as compensation for unfair termination and severance allowance for 6th applicant. The CMA had ordered that the applicants be paid a compensation of two months' salary, the respondent had objected to the same.

The termination letters reveal that after termination, the applicants were paid notice pay and certificate of service and that is undisputed. The law is settled and it has been an established principle and practice of this Court that where a contract of employment is unfairly terminated before expiry of the agreed period, the employee is entitled to salaries of the remaining period of the contract. This position is well explained in the cases of **Tanganyika Farmers Association Limited v. Njake Oil Company Limited**, Civil Appl. No. 40 of 2005, **Good Samaritan v. Joseph Savari Munthu,** Rev. No. 165 of 2011 (unreported) and also in **Jonas Oswady v. Cost Data Consultation Limited,** Labour Revision No. 3 of 2020, Mwanza.

Since I found that retrenchment was fair both substantively and procedurally and taking into consideration that the applicants were under a fixed term contract, the applicants are not entitled to payment of salaries for the remaining period of a contract as claimed. For the same reasons, there is no justification in awarding the applicants compensation for two months.

As for the 6th applicant, in his CMA form no.1 he broadly claims for 'breach of employment benefit'. The copy of contract produced before the CMA shows that his contract was from 1/10/2016 to 31/11/2017 therefore by the time of termination which was 1st April 2017, he had worked for 5 months. However, he had testified before the CMA that he started working since 2012 through an oral contract, then it was later changed into one year contract and by the time his employment was terminated he was under a three years contract. It means, at the time of termination, he had worked for 4 years. Based on this evidence, as the 6th applicant has worked for 4 years, he is entitled to severance payment according to section 42(2)(a) of the ELRA and item 9.1 of his contract.

Consequently, I fault the arbitrator for ordering compensation to each of the applicant because the applicants are not entitled as per the law.

I hereby set aside the order of the respondent to pay each of the applicant's compensation of equivalent salary of two months.

The respondent is ordered to pay the 6th applicant severance payment for 4 years.

In the upshot, application no. 4 of 2022 is hereby partly allowed in respect of the 6th applicant and application no. 13 of 2022 is allowed to the extent shown.

It is so ordered.

DATED at **MWANZA** this 12th day of September, 2022.

L.J. ITEMBA
JUDGE

Ruling delivered under my hand and seal of the court in chambers in presence of the 3rd applicant in person and Ignas, RMA and in the absence the 1st, 2nd and 6th applicants and the respondent.

THE HIGH COURT OF TANZANIA
MWANZA

L. J. IITEMBA
JUDGE
12/9/2022