IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 86 OF 2021

(Application for Revision for an award by the Commission for Mediation and Arbitration of Arusha at Arusha in Labour Dispute No. CMA/ARS/ARS/304/20/176/20)

LUCAS KIMARO .....1ST APPLICANT

FRANAEL RAPHAEL .....2ND APPLICANT

FLORESTINE ANTONY SEKOU.....3RD APPLICANT

VERSUS

ASILIA LODGES AND CAMPS LTD ..... RESPONDENT

JUDGMENT

04/08/2022 & 29/09/2022

KAMUZORA, J.

The Applicants in this application being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1), (a) and (b), 91(2) (a) and (b), 91(4) (a)(b) and section 94(1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004, Cap 366 R.E 2019 and Rule 24(1) 24(2) (a) (b) (c) (d) (e) (f) and 24(3) (a) (b) (c) (d) and Rule 28(1) (b) (c) (d) & (e) of

the Labour Court Rules GN. No. 106 of 2007 and any other enabling provisions. The Applicants prays for this Court to be pleased to call and examine the records of the proceedings and award of the CMA in labour dispute number CMA/ARS/ARS/176/20 for the purpose of satisfying itself as to the regularity, legality and propriety thereof and revise the arbitrator's award on the following terms: -

1. *That, there were errors material to the merit of the matter before the commission for mediation and arbitration involving injustice.*
2. *That, the learned arbitrator failed to properly analyse the overall evidence adduced before him, in finding that the retrenchment was both substantively and procedurally fair despite the overwhelming evidence adduced by the Applicants' side demonstrating violations made by the Respondent.*
3. *That, the court may make such decision and order as it deems fit in the justice of the matter.*

When the matter was called for hearing, both Applicants appeared in person unrepresented and Mr. Salvatory Mosha and Mr. James Mushi appeared representing the Respondent.

Submitting in support of the application the first Applicant briefly stated that, they were the employees of the Respondent in different period since 2020 before their employment was terminated. He argued that, the termination did not follow the procedures as the Respondent

was unable to submit exhibits proving that they agreed to the deduction of their salaries or if they consented to the termination. He alleged that, they were paid half of their salaries instead of full amount and the CMA did not look into evidence to verify their claims. He thus prayed for this court to go through the records and find out the error committed by CMA and award the Applicants' prayers. The second and third Applicants had nothing to add to what was submitted in chief by the first Applicant.

In his reply submission, the counsel for the Respondent Mr. James Moshi started by addressing the point of law that the Applicants' application did not comply to the legal requirement under Regulation 34 (1) of GN No. 47 of 2017, the Employment and Labour Relations (General) Regulations. That, the law provides that where an application for revision is filed in the High Court, that person must file notice of intention to seek revision, CMA F10. That, the requirement to comply to that provision is insisted in the case of **Frank Msingia and 14 others Vs. Tanganyika Wilderness Camps Ltd,** Revision No. 49 of 2021 where revision application was struck out for failure to comply to the law by filing the notice of intention to seek revision. The counsel prays that, since the Applicants in this case did not comply to that requirement, this

court should strike out this application for failure to comply to the legal requirement.

Submitting on the merit of the application Mr. Salvatory Mosha argued that, before the payment of 50 percent of the Applicant's salary, the Applicants had meetings with the employer and they agreed on the mode of payment. That, the said agreement was admitted before the CMA as Exhibit D7. The counsel contended that, the affidavit by the Applicants in support of the application at paragraph 14, raised two legal issues; the propriety of the decision that the retrenchment was proper and in compliance to the law, and whether the Applicants signed any document to mandate the members of the staff committee to represent them in the consultation meeting with the employer.

He submitted that the employer followed all the procedures before the retrenchment. That, the Applicants were issued notice as the law requires and there were consultations and the meetings to which its minutes were tendered before the CMA as Exhibit D10. That, the Applicant Florestine Antony participated in the meetings and signed the minutes and the 2nd and 3rd Applicants signed the mandate forms that were admitted as exhibit D9 consenting to the appointment of the representative in the staff committee for the discussion before

retrenchment process could be carried out. That, the claim that the procedures were not followed is not true and the arbitrator was correct to state that the whole retrenchment process complied to all procedures.

On the claim that there was no full payment of terminal benefit, the counsel submitted that, the claim is baseless as they had agreement. He thus prayed this court to find this revision application as meritless and dismiss the same.

In rejoinder submission, the first Applicant responded to the point of law that they were assisted by the advocate in filing the application thus prayed for this court to consider the application. On the merit of application, he added that, they did not sign any agreement and did not allow the employer to deduct their salaries for three months. He insisted that, as they had permanent contracts the employer was supposed to ask for their permission before deducting their salaries. That, there could be no meetings to discuss deducting the employees' salaries as such deduction can be done only where there is individual negotiation. He added that, they were not issued with any notice on the retrenchment by the employer as they signed termination letters.

The second Respondent also re-joined that, their issue is not on the procedures for retrenchment rather on the errors done in paying

their entitlements. That, they did not sign anywhere authorising the deduction to their salaries. That, they were only phoned to attend a meeting on 03/06/2020 and on that meeting, they were informed that they were terminated from May and they received severance pay which is half the salary contrary to the law. Regarding exhibit D9 mentioned by the counsel for the Respondent the seconds Applicant claimed that, he had never met his employer since March 2020 until 03/06/2020 thus he did not sign anywhere.

The third Respondent also made a rejoinder regarding exhibit D10 that, in appointing the staff committee they were guided by Asilia policy which requires the employees to appoint their representatives in employment matters. He explained that, among the appointed employees there must be a chairman, secretary and three members who are appointed by the employees themselves to represent other employees. He disputed the argument that they agreed to the appointment of the representatives as the procedures for appointing the representatives were not followed.

Explaining about the procedure he submitted that, after the employees' meeting their resolution/opinion have to be sent to the manager who is supervising the respective department who will forward

the same to the management responsible to make decision. That, the management will give feedback on what have been agreed and what was not agreed and the feedback will be sent back through the manager who will communicate the same to the staff committee. That, the staff committee will discuss the feedback with other staffs and if there is anything else it will be communicated to the management through the same process. The third Respondent alleged that, all these are done in writing but, the procedures in exhibit D10 did not comply the procedure put in place. He added that, in appointing staff committee, no manager or head of department is allowed to be a member of the staff committee. He pointed out that, the committee referred to by the counsel for the Respondent included the manager and head or department contrary to the policy.

On the retrenchment he argued that, the procedures were not followed and he was not issued with notice for retrenchment until when he issued a termination letter on 03/06/2020. He was of the view that, since he was a permanent employee, the employer was supposed to issue him with a notice before the retrenchment. He thus considers that he was unfairly terminated.

I will start by addressing point of law raised by the counsel for the Respondent that there was non-compliance of legal requirement under Regulation 34 (1) of GN No. 47 of 2017, the Employment and Labour Relations (General) Regulations for Applicants' failure to file a notice of intention to seek revision under CMA F10. The Applicants had nothing much to respond to this but they only insist that their application was properly filed as they were assisted by an advocate.

Whether the notice was served or not it is matter that needed to be justified by the Applicants whom in this matter did not seem to understand the essence of what was brought by the Respondent's counsel. It is very understandable that, being lay persons, the Applicants needed time to Respondent to issue of law raised by the counsel. But raising that matter in course of submission to the application in my view, denied the Applicants proper opportunity to properly respond to the same. This matter was scheduled for hearing and the Applicants were only prepared for hearing on the merit of the application thus raising a point of law at the hearing stage is taking them by surprise as they did not have opportunity to refer their records and see if they real complied to the requirement of notice or not. I will therefore not bother to much evaluate on this objection as the same is dismissed.

Turning to the merit of the application, I have gone through the submissions by the parties, Labour laws and CMA records and the main issues for determination is whether retrenchment procedures were adhered to.

Procedures for retrenchment are provided for under Section 38 of the Employment and Labour Relations Act, 2004 (ELRA) read together with Rule 23 & 24 of the Employment and Labour Relations (Code of Good Practice) G.N 42 2007. Section 38 (1) of the ELRA provide that:

> *"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 minimise 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 recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

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

The above provision set out four principles for the retrenchment; **one,** the issuance of notice on the intended retracement, **two,** disclosure of all relevant information on the intended retrenchment, **three,** prior consultation with employees on the reasons for retrenchment, measures to minimise the retrenchment, methods to be used in retrenchment, timing and severance pay and **four,** the notice, disclosure and consultation with trade union or employees not registered by trade union.

From the records and submissions before this court, the Applicants' complaint is much based on the first three principles as they are faulting the retrenchment process claiming that they were not notified of the retrenchment and not fairly paid their entitlements. It is the submission by the Respondent and pursuant to Exhibit D5 that a notice was issued on 25th March 2020 to all stakeholders on CORONA outbreak and its financial impact. The document shows that the

management decided to minimise or close down some of its activities for sometimes and that, there was collective agreement with employees to reduce the salary by 25% for the month of March and by 50% if the situation could not improve. Based on the contents of Exhibit D5, the notice was issued after a collective agreement was made. It is the evidence of the Respondent again according to Exhibit D9 that there was consent from the employees authorising members of Staff committee to negotiate and sign all matters related to employment in relation to retrenchment purpose the said consent was issued by the employees between months of April and May 2020.

It is also in record that consultation meeting was held on 23rd April 2020 as per collective exhibit D10 collectively. Such meeting involved members of the staff committee as per item 2 of the minutes which shows to whom an invitation notice was served. Among the matters agreed in that meeting was to have a negotiating meeting which will involve few members of the staff committee. Based on item 9 of the minutes, 21 members were selected among 58 members of the staff committee. On 15th May 2020 a second consultation meeting was conducted and this time only 21 selected members of the staff committee attended. It is through these minutes, the reason for the

intended retrenchment was disclosed as per item 8 and 9 of the minutes as well as the number of employees likely to be affected by the retrenchment.

With the above analysis, I agree with the Applicants that, there was no notice to all employees of the retrenchment process the reason for the same due to the fact that, exhibit D5, the purported notice was issued to the public aiming at notifying the general public on the CORONA outbreak and its financial impact to the Respondent's business. The notice also states that, there was a collective agreement with the Respondent's staff to reduce salary by 25% in the months of March 2020 and if the situation will not improve the reduction will be up to 50%. Thus, it seems that by the time Exhibit D5 was issued on 25th March 2020, the decision was already made and nowhere is shown that the employee had consented to that. It seems that the decision referred to in exhibit D5 was made on 22nd March 2020 as per exhibit D7 but that was between the Respondent and staff committee. Exhibits D3 and D7 indicates that there was agreement entered between the Respondent and the Staff committee and Exhibit D9 which is referred as employee consent was issued on May meaning after the decision to deduct their salary was made.

In short there is no evidence showing that the employees were involved or served with a notice on the retrenchment process as required under section 38(1) (a) of the Act and Rule 23 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007. In other words, there is nothing showing how other employees who were not among members of the staff committee were made aware of the intended retrenchment process including the reasons and other necessary information.

This court is persuaded by the reasoning of the Supreme Court of Malawi in the case of **Malawi Telecommunications Limited Vs. Makande & Another,** Civil Appeal No. 2 of 2006 which was borrowed by this court in Labour Revision No. 7 of 2021, **NAS DAR AIRCO CO. Vs. Gift Robison & 8 Others.** The supreme court found that the restructuring process including the procedure, criteria, duration and consequences of retrenchment were not discussed with the employees in general except members of senior management who were involved in the making of recommendation and selection of employees whose employment contracts had to be terminated thereby. The supreme court agreed with the Court of first instance that there was no compliance with fair procedures for effecting redundancies and agreed with the

conclusion that the termination of employment of the Respondents was unfair.

As well pointed above, only some of members of the staff committee were involved in the discussion on the retrenchment process. I say so because only 21 among 58 members of the staff committee participated in that discussion. There is nowhere shown that the employees were notified on the discussion or received feedback from that discussion. Thus, it cannot be said that there was consultation between the employer and employee. In that regard, I find that there was violation of the legal procedures for retrenchment.

Having said so, I turn to the issue on the entitlements of the Applicants. The reliefs sought by the Applicants include one month notice, compensation for 24 months, unfair deduction of 50% of the salary, arears and overtime allowances. From the claim form CMA Form 1, the 1st Applicant Lucas Kimaro claims Tshs. 1,043,442 as one-month notice, Tshs. 25,042,608 as compensation for 24 months, Tshs. 1,304,302 as unfair deduction of 50% of the salary, Tshs. 1,000,000 as arears and Tshs. 1,000,000 overtime allowances. The 2nd Applicant Franael Nnko claims for Tshs. 394,000 as one-month notice, Tshs. 9,456,000 as compensation for 24 months, Tshs. 492,500 as unfair

deduction of 50% of the salary, Tshs. 1,000,000 as arears and Tshs. 1,000,000 overtime allowances. The 3rd Applicant Florestine Anthony claims for Tshs. 730,954 as one-month notice, Tshs. 17,542,896 as compensation for 24 months, Tshs. 813,692 as unfair deduction of 50% of the salary, Tshs. 1,000,000 as arears and Tshs. 1,000,000 overtime allowances.

The claims for one month notice, 24 months pay and unfair deduction of 50% of the salary are based on the basic salary of each of the Applicant. The Applicant does not compute being paid some of the entitlements including severance pay but their argument is that they were paid less than they were entitled. While I agree with the claim for one month notice, I do not agree on the compensation claim for 24 months. The law under section 44 of the ELRA only allows compensation not exceeding 12 months' salary on termination of employment. Severance pay is also computed under section 42 of the ELRA and Rule 26 of GN No. 42 of 2007 as 7 days basic wage for each completed year up to the maximum of 10 years.

The claim for Tshs. 1,000,000 as arears and Tshs. 1,000,000 overtime allowances were not proved by the Applicants hence not granted. The Applicants also claimed that, there was unfair deduction of

50% salary for three months, but the Respondent claimed that they consented to deduction due to economic hardship cause the outbreak of COVID 19 pandemic. The arbitrator referred exhibit D3 and D7 as binding agreement to the employees for payment of less amount. Looking into those exhibits, it becomes clear that exhibit D3 was signed by the members of the staff committee who I said from the beginning that their discussion could not be biding to others employees as there was no notice made to them for such discussion. Exhibit D7 is the consent for deduction of 25% and not 50%, which however does not prove that all employees consented to it. I therefore agree with the Applicants that the deduction of 50% of the salary for three months was unfair. Each Applicant is entitled to 50% of his salary for three months.

In concluding, the applicants are entitled to be paid by the respondent and the Applicants' entitlements are computed as below and it will take into consideration the amount paid to the Applicants as follows: -

1st Applicant Lucas Kimaro

One month notice: 1,043,422

12 months' pay: 12,521,304

50% of the salary for 3 months: 1,565,163

Severance pay: (basic salary 1,043,422÷7days) × 3 years of work = Severance pay of 447,189.42

Total: 15,577,078.42

Minus amount paid: 2,528,970.68

AMOUNT TO BE PAID: 13,048,107.78

2nd Applicant Franael Raphael Nnko

One month notice: 394,311

12 months' pay: 4,731,732

50% of the salary for 3 months: 591,466.5

Severance Pay: (basic salary 394,311÷7days) × 6 years of work= severance pay of 337,980.83

Total: 6,055,490.35

Minus amount paid: 1,283,000

AMOUNT TO BE PAID: 4,772,490.35

3rd Applicant Florestine Antony,

One month notice: 730,394.6

12 months' pay: 8,764,735.2

50% of the salary for 3 months: 1,095,592.5

Severance pay: (basic salary 730,394.6÷7days) × 8 years of work= severance pay of 834,736.68

Total: 11,425,458.98

Minus amount paid: 2,279,743.64

AMOUNT TO BE PAID: 9,145,715.34

In the upshot the revision Application is of merit and the same is granted as explained above. No order as to costs is made.

DATED at **ARUSHA** this 29th day of September 2022.

D.C. KAMUZORA

JUDGE