

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT ARUSHA

REVISION APPLICATION NO. 10 OF 2022

(C/F Labour Dispute No. CMA/ARS/ARS/169/20)

WILFRED JOHANNE LUKUMAY.....1ST APPLICANT

JOHN SHAMSOWA WILSON.....2ND APPLICANT

MUSA ABDALLA SUYA.....3RD APPLICANT

DOUGLASS KUWAI MOLLEL.....4TH APPLICANT

VERSUS

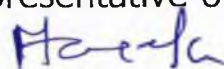
KER AND DOWNEY SAFARIS (T) LTD.....RESPONDENT

JUDGMENT

07/09/2022 & 09/11/2022

MWASEBA, J.

Being aggrieved by the decision of the Commission in Labour Dispute No. CMA/ARS/ARS/169/20 where the Commission held that it has no jurisdiction to entertain their dispute, the applicants herein filed this application seeking for revision of the said award. It was supported by an affidavit of Mr Leonard David, Personal Representative of the applicants



and opposed by a counter affidavit sworn by Mr Asubuhi Yoyo, counsel for the respondent.

Briefly, the applicants were employed by the respondent in diverse dates in different positions for the permanent contract until 13th June, 2020 when their contracts were terminated as evidenced by exhibit K1 collectively. The records reveal further that on diverse dates from 7th to 10th day of February, 2020 the applicants wrote letters of voluntary retirement to the respondent (exhibit K2 Collectively), however, instead of responding to their letters, the respondent decided to serve them with a retrenchment notice on 5th day of June 2020 (Exhibit K3 Collectively) and on 13/06/2020 they were served with the termination letter (exhibit K4 Collectively) based on the reason of retrenchment. Being aggrieved by the decision of their employer (respondent herein) the applicants referred their dispute to the Commission for Mediation and Arbitration (CMA) claiming to be paid according to Collective Bargaining Agreement (CBA) for the reasons that they wrote their resignation letter prior to the retrenchment. Upon the hearing of their dispute, Hon Arbitrator held that the Commission had no jurisdiction to entertain the matter since the law directs it to be referred to the High Court Labour Division after the mediation having failed according to **Section 77 of the Employment**

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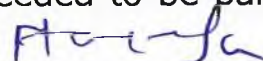
and Labour Relation Act, Cap 366 R.E 2019. That decision aggrieved the applicants who are now before this court seeking for revision of the same.

In their affidavit supporting the application the applicant raised one legal issue as depicted from paragraph 11 (a) which states:

- a) That the arbitrator erred in law and fact by relying on his own belief and contradicting himself by failing to award early retirement packages according to CBA a result which reached in the erroneous conclusion.

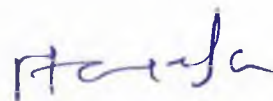
When the application was called for hearing on 27/7/2022, the parties agreed to proceed with the hearing of the application by way of written submission whereby Mr Leonard David, personal representative represented the applicants and Mr Asubuhi J. Yoyo, appeared for the respondent.

The applicants herein are challenging the act of the Hon Arbitrator not to award them early packages according to Collective bargaining Agreement (CBA). They submitted so, based on the fact that **Article 35 Clause II of the CBA** allows early retirement of the employee and **Article 35 Clause III of the CBA** shows the retirement benefits and the applicants submitted their notice of early retirement three (3) months prior to the retrenchment. After submitting the package needed to be paid to each



applicant, they invite this court to interpret their Collective Bargaining Agreement (CBA) and direct the respondent to pay the respondent based on the early retirement package as shown under CBA.

On his side, the respondent's counsel submitted that after facing the financial crisis following the outbreak of Corona Pandemic the respondent decided to retrench some of his employees including the applicants herein. The said decision aggrieved the applicants who referred their claim to the CMA. Having heard both parties it was decided that since the claim paved on early retirement which originate from Collective Bargaining Agreement (CBA) between CHODAWU and the respondent herein then it lacks jurisdiction as the same need to be determined by the High Court as per **Section 74 of the ELRA**. He added that, for the 3rd applicant (Musa Abdalla Suya) since he was not in any trade union he was awarded what he deserved after it was decided that the procedure and the reason for termination was fair. Thus, it was their submission that the trial Arbitrator acted within the law when he decided that he had no mandate to entertain the application. To support his argument, he cited the case of **James Kapyata vs MCC Limited**, Revision No. 198/2019 (HC Unreported).



He argued further that, the respondent did not even respond to the resignation letter and there was no proof of service since the document lacks the name of the receiving officer and an official stamp. The situation could have been different if the respondent accepted their resignation letter and then later on retrenched them. Further to that, after the Hon Arbitrator noted that he had no jurisdiction to entertain the application based on **Section 74 of the ELRA** he advised the applicants to follow the proper procedures. Additionally, he submitted that even the 3rd respondent was wrongly awarded since the Commission agreed that he was not a member of any trade union and did not authorize his employer to deduct any contribution from his salary. Thus, since the issue of jurisdiction is a serious matter, they prayed for the proceedings of the CMA to be nullified for being acted without jurisdiction. They prayed for the application to be dismissed and reverse the decision of paying the 3rd applicant.

In his rejoinder, the Personal Representative of the applicants reiterated what was submitted in his submission in chief and added that the Collective Bargaining Agreement (CBA) covered both Union and Non-Union Members at the work place, therefore the award given to the 3rd



applicant was justifiable in law. So, they prayed for the application to be allowed.

After considering both parties' submissions, court records as well as relevant applicable laws and case laws I find the following issue to guide my determination of this revision:

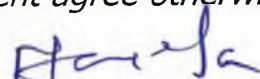
- a) Whether the CMA's decision that it has no mandate to entertain the matter was justifiable in law.

It is without flicker of doubt that the applicants are challenging the act of their employer not to award them their early retirement package as per **Article 35 of the Collective Bargaining Agreement (CBA)** which was entered between CHODAWU and the respondent herein. Their opening statement filed at CMA paragraph 2 and 5 provides that:

2. Walalamikaji wote kwa Pamoja madai yao yanafanana na wanamlalamikia mwajiri wa KER AND DOWNEY SAFARIS kuwa amekiuka kipengele cha 35.0 I, II, III cha Mkataba wa Hali Bora za Kazi na kipengele cha 17.0 (emphasis is mine).

As well argued by the Commission that it had no jurisdiction to entertain the matter based on **Section 74 of Cap 366 R.E 2019** which provides that:

"Unless the parties to a collective agreement agree otherwise -



(a) a dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the Commission for mediation; and

(b) if the mediation fails, any party may refer the dispute to the Labour Court for a decision."

The same was held in the case of **Tamico Vs Hussein Kombo Mwachikobe**, Revision No. 936 Of 2019 (HC- Unreported) that:

"In the matter at hand the respondent referred the dispute at the CMA claiming for payment of his terminal benefits in accordance with the Collective Agreement. The respondent's nature of dispute was on the implementation of the Collective Agreement. In the event, it is my view that the CMA had no jurisdiction to arbitrate the matter at hand as rightly contested by the applicant's Counsel. As provided in the provision quoted above the powers of the CMA on disputes concerning Collective Agreements are limited to the mediation process only. Therefore, after mediation had failed, any party was supposed to bring the matter to this Court for a decision but not for the CMA to assume the powers of the Labour Court and proceeded to determine the dispute without having jurisdiction."

See also the case of **Ngorongoro Conservation Area Authority (NCAA) Vs Veneranda Baraza**, Revision Application No. 72 of 2020 (Reported at Tanzlii) and **Ngorongoro Conservation Area Authority vs Daniel Ole Moti**, Revision Application No. 116 of 2018 (Reported at Tanzlii).



Being guided by the provision of the law and persuaded by the cited cases, this court do concur with the CMA's decision which clearly stated that after failure of mediation the matter was supposed to be referred to the High Court Labour Division for further adjudication.

As for the issue of the 3rd applicant the Commission awarded him Tshs. 5,057,631/= as a terminal benefit for the reason that, though he was not a CHODAWU member, the CBA agreement covered members and non-members of the Union. I am aware of Article 2.0 "INTERPRETATIONS" sub article (k) define Union Member to mean:

"any employee of the Company who pays CHODAWU membership contributions from the date of employment as per existing employment and Labour Relation Act and Labour Institutions Act."

However, **Section 71 (3) and (4) of the ELRA** provides that:

"A collective agreement shall be binding on –

(a) the parties to the agreement;

(b) any members of the parties to the agreement;

(c) any employees who are not members of a trade union party to the agreement if the trade union is recognized as the exclusive bargaining agent of those employees under section 67."



Therefore, that being the legal position, the Hon Arbitrator was correct in his decision that the 3rd applicant deserved to be awarded severance of 9 months as he was denied by the respondent for not being a member of a trade union since the law allows both members and non-members to be benefited by the CBA.

As a consequence, this court finds no reason to disturb the decision of the trial Commission. Hence, the application is dismissed for want of merit.

Ordered Accordingly.

DATED at **ARUSHA** this 9th day of November, 2022.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

N.R. MWASEBA

JUDGE

09/11/2022