IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LABOUR REVISION NO. 23 OF 2020.

[Originating from Dispute No. CMA/TAB/TBRMJN/55/2020 of the Commission for Mediation and Arbitration Tabora.]

1. SAVORGNAN WILLIAM SOSOMA
2. PETER KULWA
3. UMMY ELBAJUN
4. FROLA MIHAYO
5. JACKSON NGATTA
6. KASUBI SENGELEMA
7. DELIANA KASIMILA
8. FEBRONIA ANTHON
9. ZAHARA MNYAMOGA
10. MOSHI WILLIAM **...APPLICANTS**
11. HUSNA IDDI
12. MARIAMU KITINDI
13. MWANAIDI RAMADHAN
14. RAMADHANI KAMKUKI
15. SAKINA RAMADHANI
16. SALUMU KAOMBWE
17. SALOMA UDANGU
18. MWAMVITA MASHAKA
19. EREST LYOBA

VERSUS

MKURUGENZI ORION TABORA HOTEL ..... RESPONDENT

RULING

Date of Last Order 01/07/2022

Date of Delivery 14/12/2022

AMOUR S. KHAMIS, J.

The applicants made this application for revision under Section 91(1)(a),(b),(c) and 91(2)(a),(b),(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, No .6 of 2004 (herein ELRA) read together with Rules 24(1), 24(2)(a),(b),(c),(d),(e),(f), 24(3)(a),(b),(c),(d) and 28 (1)(a),(b),(c),(d) and (e) of the Labour Court Rules, Government Notice No. 106 of 2007 (herein Rules).

The application is supported by a joint affidavit sworn by Miss. Flavia Francis, the advocate representing all the applicants and the respondent challenged the application through a counter affidavit.

The applicants pray for this Honourable Court to revise the proceedings and set aside the award made by the Commission for Mediation and Arbitration at Tabora in Labour Dispute CMA/TAB/TABRMJIN/55/2020 and any other relief the Court deems fit.

Briefly, the background of the dispute as per the records shows that the applicants were employed by the respondent at Orion Tabora Hotel on different dates as per their employment contracts. On 30/04/2020 the applicants were retrenched from their employment, basing on the respondent's economic reasons that the business was making loss due to the Covid 19 pandemic thus adjustments had to be made.

Upon their termination, the respondent agreed to pay the applicants severance pay, 9 days leave, salary up to 30/04/2020 and certificate of service. Dissatisfied by the respondent's proposed payment schedule, the applicants referred the dispute to CMA and the CMA decided on the respondent's favour that the respondent had a valid reason to retrench the applicants and the procedures were followed.

In the CMA award, the respondent was ordered to pay the applicants severance pay and leave for nine (9) days. Aggrieved by the CMA's award, the applicants filed the present application seeking for the Court to set aside the said award.

The application proceeded by way of written submissions, the applicants were all represented by Ms. Flavia Francis, Advocate and the respondent enjoyed the services on Mr. Kelvin Kayaga, Advocate.

Submitting in support of the application, Ms. Flavia prayed for the contents of the affidavit to form part of the applicants' submission.

She stated the proceedings of the CMA show that some of the applicants were denied the right to be heard as they did not testify before the Commission. She clarified that only the 1st applicant only was heard and the rest were condemned unheard.

Ms. Flavia averred that the right to be heard as stipulated in the Constitution of the United Republic of Tanzania under Article 13(1) which ensures equality before the law and gives a person the right to be heard.

The learned Advocate further stated that the applicants did not agree upon their termination with the respondent and there was not evidence adduced to support the same in the Commission by the respondent. She went ahead and quoted page 13 of the decision ***"Hivyo kwa muongozo huo hapo juu, na mazingira ya shauri hili ni wazi kuwa utaratibu ulifuatwa kwa kua wafanyakazi walishirikishwa katika kikao na kufanya mazungumzo na kufikia muafaka japo hayakuwa ya maandishi".***

From that paragraph, Ms. Flavia averred that it is clear that there was no agreement between the applicants and the respondents, therefore the trial arbitrator erred when she ruled out that there was an agreement on termination even though it was not written, yet the applicants insisted that there was no agreement.

Ms. Flavia submitted that the arbitrator erred in law and fact by ordering the payment of 9days of leave instead of 28days yet the applicants are not supposed to be paid on notice contrary to Section 29 and Section 38(1) of the Employment and Labour Relations Act, 2004.

The learned advocate also submitted that the arbitrator did not consider that the applicants had to be paid the remaining 7 months' salary upon termination before the end of their contract, therefore that was unfair termination. Therefore, that was against Section 37(1) of the Employment and Labour Relations Act.

She concluded that the applicants are required to be compensated due to the respondents unfair termination.

Replying to the applicant's submission, Mr. Kayaga the respondents advocated submitted that in the affidavit supporting the application, the applicant did not raise complains over the denial of the right to bring evidence during Arbitration or violation of the right to be heard. Yet the same has been featured for the first time in their submission.

He cited the cases of ***TANZANIA FISH PROCESSORS LIMITED VS EUSTO K. NTAGAALINDA, CIVIL APPLICATION NO.41/08 OF 2018, CAT AT MWANZA*** (unreported) and ***DAUDI KANAGWA VS IZAMU ABDUL & ANOTHER, BK CIVIL APPLICATION No.3/2011, CAT AT MWANZA*** (unreported) where the Court of Appeal faced the same scenario and stated that:

> *"Furthermore, we are settled in our minds that the claim that service was made on 6th February, 2010 is an afterthought. Had it been true, this would have been reflected in his counter affidavit lodged on 24th May, 2012."*

Thus, relying on the above position of law, Mr. Kayaga contended that the complains over violation of the right to be heard is an afterthought and out of context in this application.

Moving on, the respondent's counsel averred that the applicants were not fired, the term that was used by the applicants, but rather they were retrenched. And the reason for their retrenchment was valid as it was due to the covid 19 pandemic that affected the business of the respondent.

He further stated that the procedures for retrenchment were substantively complied with according to Section 38 of the Employment and Labour Relations Act [Cap 366 R.E 2019] and

Regulation 23(1), (2), (3) and (4) of the Employment and Labour Relations (Code of Good Practice) G.N No.42/2007.

He argued that it was proved by evidence that the parties had participated in more than five consulting meetings exploring the options to go about and this was never disputed by the parties.

The learned counsel asserted that the applicant's argument that Section 38(1) of the ELRA (Supra) was not complied with has no merit.

He cited the case of ***BRIAN CELESTINE & 19 OTHERS V THE SALVATION ARMY TANZANIA TERRITORY, CONSOLIDATE REVISION NO. 68 & 69/2017, HC (LABOUR DIVISION) AT MBEYA*** (unreported) where the Court addressed a situation similar to the case at hand.

Mr. Kayaga submitted that the trial Arbitrator relied on the decision of ***BRIAN CELESTINE*** case (supra) and the applicants did not submit anything to challenge the Arbitrator's reliance on the said decision in delivering the award.

He contended that the evidence on record supported the arbitrator's findings on an order for payment of leave at 9 days salary and severance pay.

He concluded by praying that this Court be pleased to hold the case of ***BRIAN CELESTINE*** (supra) is relevant and upholding the award of the Arbitrator and dismiss the application for lack of merit.

Having examined the submissions from both parties, and records of the Commission, it seems to me that the issue for determination is whether the applicants' termination of

employment on retrenchment was based on a valid reason, whether the stipulated procedures was followed and what reliefs are the parties entitled to.

It is trite law that retrenchment must be based on a valid reason for retrenchment. The respondent stated that the reason for retrenchment was deterioration of the business due to the global pandemic (Covid19).

As a result, she couldn't handle the salaries of all employees at that time. In my opinion, that was a sound reason for retrenchment of the applicants.

The other issue for determination is whether the stipulated procedure for retrenchment was followed. That procedures has been detailed under *Section 38 of* ***THE EMPLOYMENT AND LABOUR RELATIONS ACT, CAP 366 R.E 2019*** as follows:

> *"38(1) – in any termination for operation requirements (retrenchment), the employer shall comply with the following principles, that is to say, be 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;

v) Severance pays in respect of the retrenchment."

In the application at hand, the applicants submitted that the retrenchment procedures was not followed and that the Arbitrator erred in law by ruling out that the applicants are entitled to payment of 9 days leave without any reason for doing so.

The records of the Commission's award and proceedings show that the applicants were informed of the retrenchment on 17/04/2020 through a meeting with their trade union (CHODAWU).

It was alleged that CHODAWU officers were informed by the respondent on the impending redundancy on 03/04/2020.

It was also alleged that the applicants never objected to that.

On that point, I am of the view that the applicants were notified about the impending retrenchment by their employer as required by the law.

The applicants asserted that the procedure for consultation was not properly followed. The proceedings of the Commission for Mediation and Arbitration reveal that the respondent tendered exhibits before the Commission to prove consultation meetings were held (D6) and that the applicants attended the said consultation meetings.

The reason for these meetings is to enable parties to reach an agreement on certain terms as stipulated under Rule 23(4) of the ***EMPLOYMENT AND LABOUR RELATIONS (CODE OF GOOD PRACTICE) G.N NO.42/2007*** as:

"The obligations placed on the employer are both procedural and substantive. The purpose of the consultation required by section 38 of the Act is to permit the parties, in the form of a joint problem-solving exercise to reach agreement....".

Proceedings of the Commission show that the applicants never reached any agreement in the alleged consultation meetings as stipulated in the law, a reason which prompted the applicants to object toward admission of the said minutes.

Records also show that minutes of the alleged consultation meetings signed by the applicants were admitted as Exhibit D6 on 23/06/2020.

However, upon careful perusal of the Commissions record, I did not find the alleged Exhibit D6. It is not clear why the same is missing but its absence means there is no evidence to prove that the applicants attended the alleged meetings and aired out their views on the matter of retrenchment.

In absence of records for such meetings, it is obvious that there is no evidence to prove that the applicants were consulted on redundancy during the alleged five (5) different meeting.

In my view, although the applicants were informed of the impending redundancy, they were not properly consulted on retrenchment as required by the law.

At this point, I should point out that retrenchment like any other form of termination of employment must be fair in terms of the procedure.

Section 38 of the ***EMPLOYMENT AND LABOUR RELATIONS ACT*** (Supra) clearly stipulates the requisite procedure for retrenchment.

As earlier on stated, the employer is required to notify the employees of his intention to retrench as soon as he contemplates to do so.

In notifying the employees about retrenchment, the employer must disclose the reasons(s), timing and other relevant information, the purpose of which is to have a proper consultation with the employees.

An employer proposing to retrench must consult with the employees who are at risk of being reduced from employment.

The law presupposes that the employer will meet with the employees in person or through their trade union in a conducive environment at the work place or elsewhere as parties agree.

According to Section 38(1) of the Employment and Labour Relations Act, the consultation should begin immediately upon proposition for retrenchment is done by the employer.

The law provides that the consultation must focus on ways of avoiding the proposed retrenchment, how the employer could reduce the number of proposed employees to be retrenched and mitigating the consequences for the proposed retrenchment.

The general purpose of consultation is to ensure that the employer and the affected employees do agree on the alternative way(s) to minimise the intended retrenchment.

Such alternative ways could be transfer of employees to other assignments, transfer to other employers, voluntary retrenchment packages, early retirement plans and many more.

According to Section 44 of the Employment and Labour Relations Act, where no alternative measures are possible, parties should agree on terminal benefits such as transport allowance to places of domicile severance pay and other statutory rights.

According to Section 71 (3) of the Employment and Labour Relations Act if parties agree on retrenchment, the agreement will be binding as a collective agreement.

Rule 24(1) of the Employment and Labour Relations (Code of Good Practice) Rules provides that the employer and employees should agree on the criteria for selection of employees to be retrenched.

If that is not agreed upon, the criteria used by the employer shall be fair and objective provided that it is not based on discriminatory grounds.

The practise advocated for by the International Labour Organisation (ILO) is two folds: Last in First out (LIFO) and First in First out (FIFO).

It is expected that the employer will be focused on retaining key jobs, experience or special skills, affirmative action and qualifications (see Rule 23(4) of the Employment and Labour Relations (Code of Good Practice) Rules).

In the present case, the above detailed procedure for consultation has not been adhered to by the respondent employer.

Under such circumstances, I have no hesitation to say that the applicants were not properly consulted and they never agreed to their termination by retrenchment.

There is nowhere in the records of the Commission to that show how the respondent disclosed to the applicants on the

criteria to be followed in suggesting the employees to be retrenched, retrenchment package and the like.

For the aforestated reasons, it is clear that the respondent did not comply with the mandatory procedures for retrenchment as required by the laws.

In the upshot, I find fault in the arbitrator's award and thus it cannot stand. The application is thus granted and the arbitrator's award is hereby quashed and set aside.

In the circumstances, each of the applicants is awarded twelve (12) months' salaries in terms of Section ***40 (1) (c) of the EMPLOYMENT AND LABOUR RELATIONS ACT NO. 6 OF 2004*** as compensation for unfair termination.

The applicants are also entitled to severance pay in terms of Section 42 (1) of the ***EMPLOYMENT AND LABOUR RELATIONS ACT.*** I make no order as to costs since this is a labour dispute.

It is so ordered.

AMOUR S. KHAMIS

JUDGE

14/12/2022

ORDER

Ruling delivered in chambers in presence of Ms. Flavia Francis, learned advocate for the applicants who are also present and in absence of the respondent.

Right of Appeal is explained.

AMOUR S. KHAMIS

JUDGE

14/12/2022