IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

LABOUR REVISION NO.56 OF 2021

(Arising from the ruling of the commission for mediation and arbitration at Arusha in)

NGORONGORO RHINO LODGE..... APPLICANT

VERSUS

JOSHUA MOSSES BAYO AND 4 OTHERS..... RESPONDENTS

JUDGMENT

Date of last order:11-1-2022

Date of judgment:15-2-2022

B. K. PHILLIP,

The applicant, Ngorongoro Rhino Lodge was the respondents' employer. The respondents filed a complaint at the Commission for Mediation and Arbitration at Arusha on unfair termination of employment vide Labour dispute No. CMA/ARS/ARB/174/2020. The same was decided in favour of the respondents. Being aggrieved by the decision of the Commission for Mediation and Arbitration(" CMA"), the applicant lodged this application under the provisions of section 91(1) (a)(b),(2)(a) (b),(4) (a) (b) and 94 (1) (b) (b) (i) of the Employment and Labour Relations Act ("ELRA") and Rule 24)1),(2) (a) (b) (c) (d) (e) (f) (3) (a) (b) (C) (d) and 28 (1) (c) (d) (e) of the Labour Court Rules, 2007. The application is supported by

the affidavit sworn by the Mr Mathew Muthali, the applicant's Human Resource Manager. The Respondents' representative, from Conservation Hotel, Domestic and allied Workers Union ("CHODAWU") Mr Lawrence Mollel filed a counter affidavit in opposition to the application. In this application the applicant the pray for the following orders;

i) That the Honourable Court be pleased to revise and set aside the Arbitration proceedings , records and award issued by Hon. Mwebuga .O. (Arbitrator) on 8th day of June 2021, in respect of Labour Dispute No. CMA/ARS/ARB/174/2020 at the Commission for Mediation and Arbitration at Arusha.

ii) Any other relief that the Court may deem fit to grant

iii) Costs of the application be provided for.

Before going into the arguments raised by the parties, let me give a brief background to this matter. The Court's records reveal that the respondents were employed by the applicant in September 2018. Formerly the applicant were employed by a company known as "The New Rhino Lodge". The information available in the Court's records as well as the evidence adduced by the parties in this matter does not show how the applicant acquired " The new Rhino Lodge" . All in all as per the court records, it appears the respondent took over the business and the

employees who were employed by "The New Rhino Lodge". The respondents worked with the applicant until 22/6/2020 when they were retrenched and their contracts of employment were terminated by applicant on the reason of operational requirements.

Despite being paid their terminal benefits, the respondents were aggrieved by the termination of their employment on the ground that the procedure for the termination of their employment was flouted. Their Trade Union (Chodawu) was not involved in the process of their retrenchment and finally termination of their employment. So, they decided to lodge their complaint at the Commission for Mediation and Arbitration ("CMA"). Relying on the provisions of section 38 (1) ELRA , the Arbitrator ruled in favour of the respondent and ordered the applicant to pay each respondent compensation equivalent to twelve months salary on the reason that the applicant faulted the procedure for retrenchment of the respondents. Also, it was the finding of the Arbitrator that respondents were members of Chodawu, but Chodawu was neither notified nor involved in the process that lead to the termination of the respondents' employment contracts as required by the labour laws. The applicant was not amused with the award made by the Arbitrator. Thus, he lodged this application challenging the CMA's award on the following

grounds ;one the Hon. Arbitrator erred in law and fact by holding that the complainants were the members of Chodawu. Two, the Hon. Arbitrator erred in law and fact by holding that the termination of the respondents' employment contracts was procedurally unfair despite the strong evidence adduced by the applicant and three , the Hon. Arbitrator erred in Law and fact by awarding the respondent compensation equivalent to 12 months salary without justifiable reasons.

The applicant was represented by Elipidius Philemon, learned counsel whereas respondents were represented by Lawrence Mollel, CHODAWU's officer from Karatu District. This application was disposed by way of written submissions.

Submitting for the first ground of complaint Mr Philemon argued that it was improper for the Arbitrator to hold that respondents were member of Chodawu basing on the pay in slips which were issued by a different company, that is "The New Rhino Lodge", the respondents' former employer not the applicant herein. He contended that the said pay slips were issued before the respondents were employed by applicant. The applicant had not deducted any amount of money from the respondents' salaries for payment of monthly contribution to Chodawu He went on submitting that the applicant does not recognize Chodawu as the trade

union which had a members among its employees because it had never brought any letter to the applicant to notify him about the membership of any of his employee. There is no any collective agreement which was entered into between the applicant and Chodawu. To cement his argument he cited section 64 (1) (2) and (3) of the Employment and Labour Relations Act, Cap. 366 R.E 2019. ("ELRA").He maintained that the respondents were not members of Chodawu.

On the second ground of complaint, Mr. Phillemon submitted that the applicant was adversely affected economically by the outbreak of Covid-19, which resulted into drastic decrease of the applicant's business and income.The applicant was compelled to take several measures to rescue the situation such as encouraging employees to exhaust all their paid leave, conducting consultation meetings, reduction of employee's salaries and allowances. These measures were taken in order to minimize the issue of retrenchment but the same was not that much helpful since the applicant's financial condition continued to deteriorate

Moreover, Mr Phillemon submitted that the respondents were all served with a notice to attend a consultative meeting which was held on 25th may 2020 at Manyara Garden and they attended that meeting. To cement his argument, he cited section 38 (1) (a) (b) and (c) of The Employment and

Labour Relation Act (CAP 366 R.E 2019). On the criteria used to select employees for retrenchment the learned counsel submitted that the respondents signed the exit agreement which stipulated the criteria for the retrenchment of the employees and terminal benefits payable to the employees. Both sides, that is the respondents and the applicant mutually agree to terminate the employment contract on the ground on retrenchment due to the economic impact caused by Covid -19 pandemic

On the third ground of complaint, Mr Phillemon submitted that arbitrator erred to award to the respondents twelve-months salary as compensation. The arbitrator failed to consider the circumstances the applicant was facing and the financial difficulties brought by the outbreak of Covid-19 which affected the applicant's business. Expounding on this point, Mr Phillemon contended that it is trite law that when it is found that unfairness of the termination was on procedure only then, the CMA or Court has to award lesser penalty below the minimum amount of compensation provided by the law. To strength his argument he cited the case of **Felisian Rutwaza vs World Vision Tanzania, Civil Appeal No. 213 of 2019,** (unreported).

In rebuttal , Cyprian Mwaimu who was engaged in drawing the submission for the respondents, on the first ground of compliant

submitted that section 64 (1) and (2) of the ELRA is irrelevant in this application and on the retrenchment process since the said section is only applicable in the rights which are conferred by part V of the Act. He went on submitting that the fact that Chodawu had never exercised the organizational rights conferred to it under part V of the ELRA does not mean that the applicant can rely on that loophole to dispute the respondents' membership in Chodawu. He further argued that the applicant as a the respondents' new employer did not change terms and conditions from the former employer, thus the applicant took over the rights and liabilities of former employer including recognition of the existence of Trade Union at his work place. He maintained that the respondents were members of Chodawu.

With regard to the second ground of complaint, Mr. Mwaimu submitted that there is nowhere in the Award stated that the termination was procedurally unfair rather the CMA stated that the retrenchment process was not done in accordance with the labour laws which simply meant that the termination of the respondents' employment contract was not in line with labour laws substantively and procedurally. He contended that measures like to encourage employees to exhaust all their paid leave and requesting employees to voluntary consent to reduction of their salaries

and allowances is a statutory right of employees and it cannot be used as measure to avoid intended retrenchment. To cement his argument, he cited Rule 23 (4) (b) of the Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2004.

Responding to the last ground of complaint, Mr Mwaimu argued that since the arbitrator was satisfied that the respondents were terminated without following the procedures stipulated in the labour laws, he cannot be faulted for awarding the respondents twelve months salary as compensation for unfair termination. In addition, Mr Mwaimu refuted the assertion made by Mr Phillemon that it is a trite law that when the Court finds out that the unfairness of the termination is only on the procedure, then the Commission or Court has to award less penalty below the minimum amount of compensation as provided by law.

Having analyzed the rival submissions made by the learned advocates and perused the court's records, in my opinion the issues to be determined by this Court are as the follows;

i) Whether or not termination of the respondents' employment contract was done in accordance with the law.

ii) Whether the Arbitrator's award for compensation equivalent to the respondents' twelve months salary is correct.

It is not in dispute that the respondents were the employees of applicant. It is also not in dispute that there was valid reason for the termination of employment of respondents. It is a common knowledge that tourism industry was the most affected sector by Covid-19 pandemic. That's why the issue whether the reason for termination was fair and valid was not before CMA. The issue was whether the procedure provided by the law in retrenchment of employees was followed before the termination of the respondents employment contract. The evidence adduced proves that before the termination of the respondents' employment contract the applicant gave them a notice concerning the intended retrenchment. A consultative meeting was held on 25/5/2020 at Manyara Garden. The same was attended by the respondents. In that meeting the respondents were informed how the Covid-19 pandemic had affected the tourism industry and all matters related to the retrenchment process . Finally, the respondents voluntarily signed an exist agreement, which stipulated the criteria used to select employees for retrenchment and the amount payable to each one of them. Pay in slips were tendered before the CMA to prove that each respondent was paid his/her terminal benefits, that is why none among the respondents is claiming payment of terminal benefits.

With regard to respondents membership in Chodawu, I am in agreement with Mr. Phillemon that there was no sufficient evidence adduced by the respondent to prove that they were member of Chodawu.The pay-in-slip tendered in evidence by the respondent was an old one issued by the respondents' former employer in 2016.The question is, why the respondent failed to bring in evidence the current pay in slip issued to them by the applicant if at all is true that they were valid members of Chodawu and paid their contributions up to the date of termination of their employment contract?. In fact no any sensible explanation was offered by the respondent on the above query. It appears the respondents after being employed by the applicant stopped their membership in Chodawu as no any contribution was made to Chodawu. And no any communication was ever made to the applicant regarding the respondents' membership in Chodawu. In fact, in the absence of any former communication as required by the law on the existence of Chodawu branch or members at the applicant 's work place, it is not proper to fault the applicant for not involving Chodawu in the retrenchment process. After all, no evidence was adduced to the effect that the applicant was notified in any way that the respondents were members of Chodawu.

From the foregoing, it is the finding of this Court that the provisions of section 38 (1) of the ELRA were complied with. The termination of the respondents were both procedurally and substantively fair.

With regard to the second issue, having held that the termination of the respondents were both procedurally and substantively fair, it goes without saying that the Arbitrator's erred in law to award to the respondents twelve months salary as compensation.

This application is hereby granted. The award made by the Hon, Arbitrator on the 8th of June 2021 is hereby set aside. It is so ordered.

Date this 15th day of February 2022

B. K. PHILLIP

JUDGE