IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 409 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 26th day of October 2022 in Labour Dispute No. CMA/DSM/ILA/565/2021/58/22 by (Mbeyale: Arbitrator)

EVEREST FREIGHT LIMITED..... APPLICANT

VERSUS

ELIZABETH P. NYAGAYA.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

20th March 2023 & 31st March 2023

This Revision application arises from the award delivered by Hon. Mbeyale, R, the Arbitrator, dated 26th October of 2022 in **Labour Dispute No. CMA/DSM/ILA/565/2021/58/22** originating from the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA). The Applicant herein is praying for the following orders of the Court: -

1. That this Honourable Court be pleased to call for the records of the proceedings of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/DSM/ILA/565/2021/58/22**, revise and set aside

the decision dated 21st October 2022 delivered by Hon. Mbayale, R. Arbitrator.

2. That the Honourable Court be pleased to make such any other orders as it may deem fit.

I would start by narrating the fact leading to this application as traced from the record of CMA, the affidavit of the Applicant, the counter affidavit of the Respondent and parties' submissions. It appears that the Applicant employed the Respondent as a Secretary, working under unspecified term contract. On 30th November 2021 their relationship ended due what the applicant claimed to be financial constraints encountered by the business.

Feeling to have been unfairly terminated and discriminated, the respondent referred her dispute to the CMA. The arbitrator in the CMA confirmed that the respondent was employed by the Applicant on an unspecified term contract and that there was no fairness of the reason and procedure used to end the employment. The Arbitrator awarded the Respondent 24 months compensation, unpaid salary, and damages all summed to **TZS 57,882,500.00**.

The Applicant was dissatisfied by the award issued by the CMA hence the present application. In the affidavit in support of this application the applicant advanced 5 grounds of revision which are: -

i. The trial arbitrator erred in law and fact by holding that the reason for termination was unfair.

ii. The trial arbitrator erred in law and fact by holding that the applicant discriminated the respondent without any proof.

iii. The arbitrator erred in law and fact by granting three monthly salaries to the respondent without the proof thereof.

iv. The arbitrator erred in law and fact for failure to weigh, consider and evaluate properly the evidence henceforth reached on wrong decision.

v. The trial arbitrator erred in law and fact by awarding the respondent 24 months in calculation of TSZ 950,000/= without proof thereof.

The application was challenged by the respondent's counter affidavit sworn by the Respondent, Elizabeth P. Nyagaya. The deponent of the counter affidavit vehemently disputed the applicant's assertion that he was unfairly terminated alleging that she was terminated unfairly, as her employment was culminated due to her pregnancy.

The application was disposed of by a way of oral submissions. The Applicant was represented by Mr. Oscar Milanzi, Advocate from a firm styled as Lexicon Attorney, while the respondent was represented by Mr. Denis Mwamkwala, Personal Representative.

In his submissions, Advocate Milanzi addressed the 1st and the 2nd grounds separately and all other grounds jointly.

Starting with the first ground on the reason for termination, Advocate Milanzi argued that the main reason of termination of the Respondent's employment was economic reason where the business of the applicant has been operating on loss. He stated that retrenchment was necessary as the applicant encountered debt. According to him, under **Section 38 of the Employment and Labour Relations Act, Cap 366 R.E 2019**, an employer is allowed to retrench an employee upon complying with the law. It is Advocate Milanzi's submission that in this matter, procedures were complied with in undertaking the retrenchment exercise by calling all employees to attend a consultative meeting.

Mr. Milanzi submitted that the applicant explained about the economic situation and the need to retrench before she fails to pay employees salary including respondent. He averred that the respondent was among 48 employees who were called for a meeting, retrenched and paid terminal benefits including certificate of service, 3 months salaries of total of **TZS 1,500,000** and leave payment of **TZS 1,000,000**. According to Advocate Milanzi, the Respondent was therefore paid **TZS 2,500,000.00** in total, but she refused to accept the offer and decided to leave the office and stopped working.

Cited the case of **Pascal Bandiho vs. Arusha Urban Water Supply & Seawarage Authority**, Civil Appeal No. 4 of 2020, Court of Appeal of Tanzania, at Arusha, (unreported). at page 11, Mr. Milanzi stated that, reasons based on operational requirements are legally fair reasons. According to Advocate Milanzi, the Court in the above case held that a reason based on operational requirements is fair.

Regarding discrimination, Mr. Milanzi submitted that among the 48 employees who were retrenched, there were male and female staff. According to him the employer followed the **International Labour Organization Convention, Rule No. 23 (4) (c)** of the Convention which proposes two ways to follow in retrenchment process including the principle of Last in First Out (LIFO) and First in Last Out (FILO). He added that in complying with the convention the most recent employed employees are the first to be retrenched and the Respondent was among the lastly employed staff. He denied any kind of discrimination in implementing the retrenchment exercise.

On reliefs Mr. Milanzi submitted that the respondent's salary per month was **TZS 500,000.00** and not **TZS 950000.00** as submitted by the respondent in the Commission. He further added that since remuneration of **TZS 950,000.00** was never mentioned before, he is of the view that the respondent owes legal duty of proving the same.

Bolstering his stand, he cited the case of **Abdul Karim Haji vs. Raymond Nchimbi Aloyce & Others**, Civil Appeal No. 99 of 2004 at page 14 where the Court stressed the position that he who alleges must prove. On that basis he believes that the arbitrator was not right in awarding compensation by relying on the salary of **TZS 950,000** for 3 months. He thus prayed for this Court to revise the CMA award.

Opposing the application, **Mr. Mwamkwala** submitted that the Respondent was terminated with no fair reason because, as testified by DW1, there was no any evidence that Body Resolution was there to bless retrenchment on economic hardship or constraints. According to Mwamkwara, lack of the said Board Resolution was contrary to the requirement of **Section 38 of the Companies laws**. He is of the view that there was no valid reason for termination.

Mr. Mwamkwara further submitted that the fact that 48 employees were called does not prove that a meeting for consultation was conducted. He added that the applicant could not bring minutes of the meeting nor the outcome. In Mr. Mwamkwala's view, what triggered the Respondent's termination, according to DW1 was the respondent's claim of maternity leave. He stated that the applicant gave her 30 days leave instead of 84 days.

According to Mr. Mwamkwara, for a termination to be fair, the applicant must comply with **Section 38 of ELRA Cap. 366 R.E 2019**. He added that there was no valid reason for implementing retrenchment exercise, and that's why the respondent did not hold any meeting to inform the staff that the company was on economic hardship.

Regarding the 2nd ground concerning discrimination, Mr. Mwamkwala submitted that since the Respondent was pregnant and that the Applicant was aware about it, as was testified by DW1, then giving the Respondent 30 days leave and not 84 days for maternity leave was contrary to **Section 33 of the ERA, Cap 366 R.E 2019** and it amounts to discrimination. He referred to leave request documents and delivery certificate which were admitted as **exhibits P1 and P2**. According to Mr. Mwamkwara, the respondent asked for additional days but the Applicant refused hence she worked while she was just from maternal delivery contrary to **Section 33 (3) of Cap 366 of 2019 R.E**. He further added that due to the Applicant's act of discrimination, within 30 days after delivery, the respondent had to resume at her workplace on **22nd September 2021** and worked till **November 2021**. That she was promised to be given leave in November but the promise was not honored.

According to Mr. Mwamkwala, all this amounts to discrimination and the employer admitted it. Supporting his submission, he cited the case **Mtikila Mchungaji Christopher vs. AG,** Civil Appeal No. 27 of 2000 TLR 172 whereby the Court of Appeal said that exemplary damages are allowed where the defendant's conduct has been calculated for his own benefit. In Mwamkwala's view, the respondent was denied maternal leave to the benefit of the Applicant.

On the last issue relating to reliefs, Mr. Mwawakala submitted that the salary was **TZS 950,000** and not **TZS 500,000** as asserted by the Applicant's counsel. Mr. Mwamkwala submitted that the law is imposes a legal duty to the employer to keep record of her employee including remuneration as per **Section 15 (6) of the ERLA, Cap 366 R.E 2019.** In his view, it is upon the employer to prove the issue of salary and not the employee. He added that the applicant did not bring any document to prove the salary of **TZS 500,000.00** neither payroll nor contract. The documents, **exhibit D-3** referred to by the applicant is a petty cash voucher and not a contract.

In rejoinder, Mr. Milanzi reiterated his submission in chief but emphasized that the applicant asked for sickness leave and not maternity leave. He remarked that the allegation of being discriminated against holds no water.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I noticed two issues to address. The first issue **is whether there are sufficient grounds for this Court to revise and vary the CMA award** issued in Labour Dispute No. CMA/DSM/KIN/87/19/169. If the answer is affirmative then the second issue is, to **what reliefs are parties entitled?**

In addressing the issue as to **whether the applicant has adduced sufficient grounds for this Court to revise and interfere with the CMA award**, the four grounds of revision will be considered as they all fall under the ambit of two aspects of fairness of termination namely substantive fairness or fairness of reason and fairness of procedure.

For observance of fairness in terminating employment contracts, employers must consider the standards that regulate termination process. There are standard designed internationally and nationally to ensure fairness in ending or terminating employment contract in enhancing economic development as the main objective of the **Employment and Labour Relation Act, Cap 366 of 2019 R.E (ELRA).**

Nationally, employment termination is said to be fair if it is carried out in accordance with **Section 37 of the Employment and Labour Relation Act, Cap 366 R.E 2019** which provides: -

"37 (2) - A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer "

Again, in the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 High Court of Tanzania, it was held thus: -

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

Internationally, **Article 4 of ILO Termination of Employment Convention, 1982 (No. 158)** provides: -

"Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services."

I will start to see whether there were valid and fair reasons for termination of the Respondent's employment. According to the Applicant, termination was due to financial crisis and not due to maternity leave request as asserted by the Respondent. In Respondent's view there was no evidence to justify economic hardship and that the Respondent was terminated due to her demand to be given maternity leave.

Retrenchment exercise is guided by **Section 38 of ELRA and Rule 23 and 24 of GN No 42 of 2007**. It provides:-

"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 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.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment.

To ascertain what exactly prompted the Respondent's termination from employment, I have noted that each party maintained its opposing position. In my view, since the Respondent disputed existence of any economic hardship on the part of the Applicant, and any retrenchment exercise, the applicant needed to bring a tangible proof to substantiate that there was indeed a financial crisis. Since the Applicant is the custodian of the official records of employment **(See Section 15 (1) of the ELRA**), he was in a better position to produce in the CMA the record to substantiate the said economic hardship. The mere words of DW1 which were countered by the

Applicant cannot be confirmed to sufficiently prove the economic hardship to necessitate retrenchment. The Applicant ought to have brought the evidence of compliance with **Section 38 supra** to uncover what was communicated to the employees including the Respondent pursuant to **Section 38 (1) (b) and (c) (i)** of ELRA cited above which requires disclosure of information relating to the intended retrenchment and the reasons for it.

From the aforesaid, I see no reason to differ with the arbitrator on this aspect since no sufficient evidence to prove the alleged financial hardship to the extent of exercising retrenchment. The applicant's ground on the fairness of reasons therefore fails.

Having found that the termination was exercised by way of retrenchment and that the reason was not valid and fair, the next question on the ground of revision is whether the procedure for retrenchment was adhered to by the employer. Arguing in this aspect of termination, Mr. Milanzi submitted that all employees including respondent were called to a meeting which was conducted and the reason for retrenchment was explained to the employees.

Disputing procedural propriety, Mr. Mamkwala submitted that the Respondent was never called into a meeting as there was no minutes tendered in CMA to justify the applicant's compliance with the legal procedures in retrenchment.

My interpretation to the cited **Section 38 supra** is that, an employer is mandatorily required to comply with the listed procedures during retrenchment process. The procedures include notice of intention to retrench, disclosure of all relevant information on the intended retrenchment, consultation prior to retrenchment and issuance of notice for retrenchment. I make it clear that consultation under **Section 38 (1) (d) (i) to (iii),** needs to be done to a registered and recognized trade union or the employees who are not the members of such kind of a Trade union. It requires the employer to inform the employees about the operational requirements and the need and reasons for retrenchment, hold consultation meetings to discuss about what should be done and agree on who should be retrenched. This is just to mention a few.

Apart from mere words of DW1 that the above-listed procedures in **Section 38 of ELRA** were followed in the asserted retrenchment, which is disputed by the Applicant, there was no documentary evidence to substantiate existence of the consultation process. As rightly observed by the arbitrator, I could not find in the CMA any sufficient explanation coupled with evidence to prove that the Applicant was facing financial constraints to warrant retrenchment exercise and that the said retrenchment was the only option available. The Applicant could produce copies of notices issued to

notify her employees about the retrenchment, the minutes of the consultation meetings and even any further evidence to prove financial hardship.

Could the Applicant, by any chance, manage to produce the said evidence, yet she should have been required to as well explain whether the Respondent was effectively covered by the said consultation. But none of the said documents was made to the CMA to prove that the procedure for retrenchment was duly followed. Due to this, I am to hold that there was no fair procedure in terminating the Respondent.

It is due to what is stated above I am moved to agree with the arbitrator's findings that the Applicant did not prove that there was a sufficient reason to terminate the Respondent and that the procedure was duly followed. It is therefore my finding that there was no fairness in terms of reasons and procedures.

Regarding discrimination, the contention centres on the allegation that the Respondent was given only one month for her maternity leave instead of 3 months in accordance with the law which amounted to discrimination. The arbitrator confirmed that there was sufficient prove that the Respondent was given that one month for her maternity leave which was contrary to the provision of **Section 33 (3) of the ERA, Cap 366 R.E 2019** which provides thus:

"33 (3) No employee shall work within six weeks of the birth of her child unless a medical practitioner certifies that she is fit to do so".

The arbitrator was further guided by **Section 7 (1) of the ELRA, Cap 366 of 2010 R.E** which requires employers to promote equal opportunities and eliminate discrimination, **Section 7 (4) (j) of the ELRA, Cap 366** which prohibits discrimination on the grounds of pregnancy, **Section 33 (6) (a) and (b) of ELRA Cap 366 of 2019 R.E** which provides for 84 days of maternity leave and **Rule 29 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N No. 42 of 2007** which prohibits discrimination.

I got opportunity to look at the evidence produced in the CMA. **Exhibit P-1** (leave certificate) shows that respondent was given a leave of one month, starting from **21st August 2021** and supposed to report at her workplace on **22nd September 2022** and it was issued as a maternity leave. This disproves the Applicant's assertion that the Respondent sought a sick leave and not a maternity leave. It raises a question as to how an employee who seeks a sick leave gets granted a maternity leave.

It remains that the Applicant had knowledge of maternity leave request, that's why she granted it but for only one month. This means, the Respondent being a female her unique legal right ought to have been protected by the Employer and failure of which must be considered as a discrimination. I agree with the arbitrator that giving a female employee a maternity leave of 30 days violated **Sections 33 (3) and 7 (1) of the ELRA, Cap 366 R.E 2019.** In my view, it was proper for the arbitrator to find that there was discrimination against the respondent because the applicant did not take care of her unique needs as a woman. I therefore confirm that there was discrimination against the Respondent and therefore the Applicant's ground that the arbitrator errored in her findings on this issue contains no merit.

The applicant thought that since there was no discrimination, the damages should not have been awarded. On the reasons that will be explained later, I partially disagree with the Applicant. In my view, since there is a confirmed discrimination, damages is a direct consequence of such discrimination. But the amount may be varied due to the reasons I shall explain later. It seems to be excessive.

Regarding relief, the Applicant challenged the arbitrator's finding of the amount of salary payable to the Respondent. I agree with the Mr.

Mwamkwala that it is the Applicant who had a duty to prove the amount of salary payable to the Applicant. I have explored the records of the CMA to find if at all, there was evidence concerning the amount of the salary of the Respondent.

Although the contention featured in the CMA, the Applicant did not bring documents to substantiate the amount of the salary paid to the Respondent. It was on this basis the arbitrator found no sufficient proof that the salary was **TZS 500,000.00** and not **TZS 950,000.00**. With the similar reasoning that the applicant who was the custodian of the employment record ought to have produced evidence of the salary payable to the Respondent. **(See Section 15 (6) of ELRA)** The arbitrator was correct to base the award on the salary of **TZS 950,000.00.**

As said earlier, at this point, I would like to address the awarded damage arising from the discrimination. The arbitrator awarded **TZS 30,000,000.00** having reduced the requested amount of **TZS 40,000,000.00**. Awarding damage should also consider the economic impact to the employer. Damages are not meant to paralyze businesses. In my view, since the Respondent is already awarded compensation for unfair termination, the award of **TZS**

30,000,000.00 is still on the high side. I will reduce it to **TZS 10,000,000.00**.

On that basis, I find the application to have no merit except on the quantum of damages. I see no reason to interfere with the arbitrator's findings, except for the amount of damages which is reduced form **TSZ 30,000,000.00** to **TZS 10,000,000.00**. I give no order as to cost. It is so ordered.

Dated at Dar es Salaam this 31st day of March 2023.

KATARINA REVOCATI MTEULE

JUDGE

31/03/2023