IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 25 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 12th day of December 2022 in Labour Dispute No. CMA/DSM/ILA/154/21/51/21 by (Igogo: Arbitrator)

KENNEDY JEREMIAH..... APPLICANT

VERSUS

ANDALUS CORNER LIMITED.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

02nd May, 2023 & 10th May 2023

This Revision application emanates from the award of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) in **Labour Dispute No. CMA/DSM/ILA/154/21/51/21.** The prayers contained in the Chamber summons are that: -

1. This Honorable Court be pleased to call for the records of the proceedings and the award from the Commission for Mediation and Arbitration at Dar es Salaam, in **Labour Dispute No. CMA/DSM/ILA/154/21/51/21,** for revising, correcting and set aside the award delivered by Hon. Igogo, Arbitrator.
2. Any other relief(s) this Honourable Court deems fit and just to grant.

Some brief facts leading to this application are extracted from the CMA record, applicant's affidavit, and the Respondent's counter affidavit as hereunder explained. The Applicant was employed by the Respondent as a storekeeper. On **31st Day of May 2021** his employment ended due to what the Respondent claimed to be the reason of structural needs in business operations. The Applicant claimed that he was terminated on reasons known to the Respondent after being asked to submit his academic certificates. Being dissatisfied with the exit from the employment, the respondents referred the matter to the CMA claiming for unfair termination and for payment of remunerations for 36 months being compensation for such unfair termination.

The CMA confirmed that the Applicant was retrenched from the employment and further confirmed the retrenchment to be fair in terms of both procedure and reason. The CMA awarded only a certificate of services. The award aggrieved the Applicant who decided to lodge this application for revision.

In his affidavit, the Applicant deponed some facts elucidating the chronological events leading to this application in which the applicant claimed that he was unfairly terminated by the respondent.

The affidavit supporting the application, contains 5 legal issues as raised by the applicant to wit:-

i. Whether it was correct for the arbitrator to hold that there was valid reason of exercising retrenchment basing on accountant report

ii. Whether the arbitrator was right in his findings that applicant's termination was caused by operation requirement, while the alleged Audit Report was not availed to the applicant.

iii. Whether the arbitrator was right in holding that the retrenchment exercise was conducted in accordance with the law.

iv. Whether the arbitral award was properly procured without considering final submission of the parties.

The application was contested by the Respondent vide a counter affidavit which denied the alleged unfair termination and any lack of procedural compliance in the retrenchment exercise.

During the hearing of the application, the applicant was represented by Mr. Rajabu, Personal Representative, whereas the Respondent was represented by Mr. Mangula, Advocate. The hearing of the matter proceeded by a way of written submissions. I thank both

parties for complying with the Court's schedule in filing the submissions and for their industrious work done. In the submissions, the applicant opted to argue on ground one, two and three jointly.

In the consolidated grounds 1, 2 and 3, Mr. Rajabu formed an argument that the arbitrator errored in law and facts in deciding that there was a valid reason for the termination of the applicant's contract of employment under operational requirements. While referring to page 3 of the CMA award, Mr. Rajabu recalled the evidence of DW1 who testified that there was a report from the accountant which discovered misuse of property and records where the report advised some changes in the store department. He averred that the applicant has never been given any feedback on the investigation exercise. According to Mr. Rajabu the evidence of DW1 reflects the facts that there was no justification for the said operational requirements and neither was there a misconduct nor underperformance found against the Applicant. In his view, this contravenes **Section 37 (1) (2) (a) (b) (i) (ii) and (c) of the Employment and Labour Relations Act, Cap 366 of 2019 R.E.**

According to Mr. Rajabu, the applicant was not afforded with any opportunity to defend himself from any allegation, neither had the applicant ever availed with investigation report prior to hearing. It is

therefore Mr. Rajabu's view that the meeting alleged to have been held was not impartial and that the applicant's right of being heard was violated. Bolstering his position, he cited the case of **Tanzania Local Government Workers Union (TALGWU) Vs. Sospeter Gallus Ommollo, Labour Revision No. 265 of 2020 (Unreported)** where the court held that failure to conduct investigation and avail its report to the applicant amounted to denial of right to defend.

Regarding procedure, Mr. Rajabu submitted that the Applicant was retrenched without complying with retrenchment procedures. He asserted that the Respondent never conducted any consultation in general or to individual employees and no criteria for selection and no measures to avoid the effects of the intended retrenchment. He added that no alternative job was offered to the applicant before terminating his employment without considering his length of service of 12 years. In his view, this contravened the provision of **section 38 of the Employment and Labour Relation Act, Cap 366, R.E 2019.**

Resisting the application starting with the first issue as to whether the employer had valid reasons to terminate employment of the Applicant, Advocate Mangula submitted that there were no such

reasons. According to him, the ***TALGWU's*** *case (supra)* is distinguishable, on the reason that, in this application the Applicant was never charged with any misconduct as it was in ***TALGWU***. He averred that the instant applicant was terminated on the grounds of operational requirements, and it was so agreed in a meeting with signed minutes. He submitted further that the applicant received his benefits except certificate of service to which he did not make a follow- up. On such basis, Advocate Mangula is of the view that the applicant's allegation that he was not afforded with a right to be heard are baseless and unfounded.

Regarding the lack of investigation report, Mr. Mangula argued that there was no disciplinary accusation but the report revealed that the applicant had no enough knowledge and this culminated to the question of certificate requirement. He stated that the Applicant was summoned in a meeting and asked if he had further studies regarding his position as a storekeeper apart from Form Four Certificate. He added that it was realized that the applicant had no further studies and they agreed to terminate his employment so that the employer could find another person fit for the job. He referred to **Exhibit D1** which served as notice to the meeting.

It is further submission by Mr. Mangula that the meeting for retrenchment was conducted on **29th Day of May 2021** involving five persons including the applicant. He stated that the Applicant agreed to terminate his employment contract, on ground of being unfit or unqualified person for the position. In his view, the employer managed to prove that the reason for termination was fair in accordance with **section 39 of the Employment and Labour Relations Act cap 366 R.E 2019**.

On the second issue as to whether the procedure for retrenchment was followed, Mr. Mangula submitted that the employer followed **section 37 (2) of the Employment and Labour Relations Act cap 366 R.E 2019.**

According to Mr. Mangula, it was submitted that, since the reasons advanced by the employer was valid that the Applicant was not fit in his position, keeping him would jeopardize the business. He further added that since the applicant agreed to take his terminal benefits, he could not complain about the procedure used in terminating his employment. He therefore prayed for the application to be dismissed for having no merit.

Having considered the submissions made by both parties, the applicant's affidavit, the Respondent's counter affidavit and CMA

record, I formulate two issues for determination. Firstly, **whether the applicant has provided sufficient ground for this Court to revise and set aside the CMA award** and secondly **what reliefs are parties entitled to?**

In approaching the above issues, the grounds identified in the affidavit will be considered as presented by the parties in their submissions. Fairness in termination of employment is practically conceived in two aspects which are the fairness of the reasons and the fairness of the procedures. Termination of employment is generally guided by **Section 37 of the Employment and Labour Relations Act, 2004** which provides that it is unlawful for the employer to terminate the employment of an employee unfairly. The section imposes on the employer a duty to prove that the reason for any termination was fair to the employee in terms of employees conduct capacity or compatibility; or based on the operational requirements of the employer.

Section 37 (1) and (2) reads as follows: -

> *"37 (1) It shall be unlawful for an employee to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer falls to prove:-*

(a) That the reasons for 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, and

(c) That the employment was terminated in accordance with a fair procedure."

The above provision makes unfair termination to be unlawful unless the employer (applicant) proves the validity and fairness in both reason and procedure. For the purposes of this Application, the focus is on operational requirements. **Section 39 of Cap 366 of 2019 R.E**, is more direct on the employer's duty to prove the fairness of termination.

To start with the fairness of the reasons, it is obvious that the termination of the employment contract between the parties was done by retrenchment. This is evidenced by Exhibit D1 which was a letter titled "Taarifa ya Mabadiliko ya Uendeshaji Idara ya Store" meaning, Notice of Operational Changes in the Store Department, as well as Exhibit D2 which is a letter from the Applicant acknowledging receipt of Exhibit D1. The contention in this application centres on

whether there was a valid and fair retrenchment. In the CMA, the arbitrator confirmed that the applicant lacked enough skills to cover the position of being a storekeeper as per the employer's requirements.

The decision is challenged by the Applicant who questioned the how the report concerning loss of property was dealt with, being by a way of retrenchment instead of disciplinary process where the Applicant could get opportunity to defend himself.

According to the evidence of DW1, the retrenchment exercise was triggered by the accounts report which discovered loss in the store department. There is no evidence that the report was directly attributed to the Applicant's misconduct. What I noted, the Applicant seems to attribute the loss with him personally and therefore demanding disciplinary process which should have involved a hearing. It was not disputed in the CMA that there was a loss in store department. There are exchanges of letters among the parties, one being a letter by the applicant who acknowledged to have been informed about the changes in the store department and the need to have a qualified person to run the store department. **(See Exhibit D-2)**. Since it was undisputed by the applicant that there was a change to be undertaken in storage department including use of

computer and applicant lacking such skills then it is apparent that there was a structural change confirmed where a more qualified person was required to fill the post in the store department.

Whether these structural changes amounted to good reason I will refer to the cases of **Bakari Athumani Mtandika V. Superdoll trailer Ltd.** Labour Revision No. 171 of 2013 (Unreported); and **Security Group (T) Ltd. Vs. Samson Yakobo and 10 Others,** Civil Appeal No. 76 of 2016 (Unreported). In **Bakari versus Superdoll (supra),** it was explained that the basic duty of decision maker in unfair termination dispute where operational reasons are raised as a cause for terminating an employee, include to inquire whether or not operational grounds were genuine reason justifying termination or a pretext.

What constitute operational requirement is defined by **Section 4 of CAP 366 RE 2019** as:

> *"Operational requirements" means requirements based on the economic, technological, structural or similar needs of the employer".*

From the above definition, operational requirement can be based on structural needs, and this can validly result into retrenchment. The Respondent found a need to do structural adjustment in the store

department. This being the case, I agree with the arbitrator that since the Respondent encountered loss as testified by DW1, she had a right to rescue his business by improving the working tools and staffing. I agree with the arbitrator's findings that the reason for termination was valid and fair.

Having found that, the applicant's termination was exercised by a way of retrenchment which is in law a valid reason and fair, the next question on the 2nd ground of revision is whether the procedure for retrenchment was adhered to by the employer. This will cover 2nd and 3rd ground of revision. **Section 38 of Cap. 366** provides for mandatory procedures to be followed during termination based on retrenchment. **Section 38 (1)** provides as follows: -

> ***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 recognized trade union;

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

From the above provision, the employer is required to comply with 5 principles during retrenchment process. These grounds are notice of intention to retrench, disclosure of all relevant information on the intended retrenchment, consultation prior to retrenchment and issuance of notice for retrenchment. The applicant contended that there was no consultation. It is to be noted that **Exhibit D1** was a letter written to by the Respondent to the Applicant to inform him about the intended structural changes, which needed more skills

which the Applicant was required to meet. The letter was responded by **Exhibit D-2** which was a letter to acknowledge receipt of Exhibit D1, where the Applicant requested to be sponsored for training to enable him to acquire the required skills. Further to that, I have noted that through **Exhibit D-5 and Exhibit D-3** the Applicant received the retrenchment package and waived any further claim from his employer. By receiving that retrenchment package with a clause to waive any further claim, and further taking into consideration Exhibits D1 and D2, I am of the view that, all these amount to adequate consultation in the retrenchment exercise. Basing on the nature of this application as the applicant was not affiliated with any trade union, one should not expect a more detailed consultation than what was done.

Apart from the complaint of insufficient consultation, there is no other complaint regarding violation of any other procedure in **Section 38 of Cap 366 of 2019.**

As pointed out herein above I have no hesitation to say that the reason and procedure in terminating the applicant's employment was fair, and therefore the 3rd ground of revision lacks legal stance as the award was properly procured by the arbitrator.

For that reason, the issue as to whether the Applicant established sufficient grounds for this Court to revise and set aside the CMA award is answered negatively.

Regarding relief, I do not see any reason to differ with what was awarded by the arbitrator other than upholding it for having no merits. The appropriate remedy is the dismissal of the application.

From the foregoing, I hereby uphold the CMA proceedings and decision in **Labour Dispute No. CMA/DSM/ILA/154/21/51/21.** The application is not allowed. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 10th day of May 2023.

KATARINA REVOCATI MTEULE

JUDGE

10/05/2023