IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 80 OF 2022

(From the award of the Commission for Mediation and Arbitration at Arusha Dispute No. CMA/ARS/71/2022/83/2022)

OLORIEN VALLEY SCHOOL ..... APPLICANT

VERSUS

GRACE SAFIEL SENZOTA ..... RESPONDENT

JUDGMENT

17th August & 29th September 2023

KAMUZORA, J.

This is an application for revision brought under sections 91(1)(a), (2)(c), 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 Cap 366 R.E 2019 (ELRA) and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 28(1)(d)(e) of the Labour Court Rules GN No. 106 of 2007. The Applicant is challenging the award issued by the Commission for Mediation and Arbitrator (CMA) at Arusha in dispute No. CMA/ARS/71/2022/83/2022 on the ground that the CMA erred in holding that the Respondent's dismissal was unlawful after making a finding of

fact that the Respondent refused and or failed to sign and submit the written employment contract to the Applicant.

The application was argued orally and as a matter of legal representation, the Applicant was represented by Mr. Fredrick Lucas while the Respondent was represented by Mr. Keneth Ochina, both learned advocates.

Submitting in support of application, the counsel for the Applicant argued that the arbitrator misdirected himself for awarding 12 months compensation to the Respondent without considering the evidence placed before it which reveals that the Respondent was under probation period of 12 months and was given a contract to sign but refused. That, until the matter was preferred before the CMA there was no any permanent or fixed contract between the parties. To cement on his argument, he cited the case of **Mbeya Cement Company Limited Vs. Stella Stewart Kasambala,** Revision No 104 of 2021 HC where in that case reference was made to the case of **David Nzaligo Vs. National Microfinance Bank PLC,** Civil Appeal No 61 of 2016 CAT at DSM.

The counsel for the Applicant insisted that, the fact that a probationary period ended does not give automatic confirmation that the Respondent was employed on permanent basis. To him, the Respondent

was still under probation thus, the CMA had no jurisdiction to entertain the matter while the employee was under a probation. The Applicant also claimed that the award granted by the arbitrator was excessive and unjustified and it was tainted with irregularities by entertaining the matter which it had no jurisdiction. He urged this court to allow this revision application and set aside the award.

Replying to the submission made by the counsel for the Applicant, the counsel for the Respondent submitted that, three issues were framed before the CMA for its determination; whether the complainant was terminated, whether the termination was fair and just and reliefs to the parties. That, among the framed issues, probation was not an issue. He added that, even the Applicant's witness before the CMA one Mercy Kinabo testified that the Respondent was not under probation.

Responding on the issue regarding CMA jurisdiction, the counsel for the Respondent submitted that the matter before the CMA was pure labour matter to which the CMA had jurisdiction. That, the CMA determined the issue on whether there was termination and it went further to determine whether the said termination was fair and just. Referring section 37(1) of the ELRA it concluded that termination was

not fair both procedurally and substantively for failure to comply with section 38 of the ELRA.

The Respondent's counsel further submitted that the CMA is bound to observe the retrenchment procedures. Reference was made to the case of **Del Monte (T) LTD Vs. Emmanuel David Mwaisanila,** Labour revision No 402 of 2020, **Sharaf Shipping Agency Ltd Vs. Basilisa Constantine and 5 others,** Civil Appeal No 56 of 2019 CAT at DSM. He contended that in the current case, the CMA awarded 12 months compensation failure to comply with retrenchment process under section 40 of the ELRA. The counsel for the Respondent prays that the award be upheld.

Upon a brief rejoinder submission, the counsel for the Applicant reiterated his submission in chief and added that, the testimony by parties reveals that there was probation period and evidence revealing that after the lapse of that period the Respondent was confirmed. To him, there were never employment contract as between the parties. On the Respondent's argument based on retrenchment, the Applicant's counsel submitted that retrenchment was never an issue before CMA as the issue before the CMA was unfair termination. The counsel for the Applicant insisted on the prayer in the submission in chief.

From the records of the CMA and submissions by parties, the pertinent issue for determination is whether the CMA was correct to award compensation to the Respondent. In so doing I will first assess the allegation that the Respondent was a probationary employee.

The law under section 35 of the Employment and labour Relations Act No. 6 of 2004 read together with Rule 10(1) of the employment and Labour relations (Code of Good practice) G.N No. 42 of 2007 identifies all employees with less than 6 months' employment with the same employer, whether under one or more contracts as probational employees. In the case at hand, the record reveals that, the Respondent worked with the Applicant from January 2021 and was terminated on February 2022 an interval of almost one year. The sole witness for the Applicant one Messe Fredrick Kinabo, the assistance director for the Applicant stated that the probation period for the Respondent was supposed to last for 6 months counting from January to June 2021. That, after the lapse of the probation period the Respondent was to be given a permanent employment contract for two years. He also agreed that the Respondent employment was confirmed. With that evidence on record, it is clear that the Applicant acknowledged that the Respondent probation period ended and the Respondent was a confirmed employee

for two years contact save that she did not sign a written contract issued to her. The fact that the Respondent did not sign a written contract does not take away her recognition as employee and that does not make her probationary employee. I therefore conclude that the Respondent was not a probationary employee as suggested by the Applicant.

On the issue based on retrenchment, it was argued by the Applicant's counsel that retrenchment was not an issue before CMA as the issue before the CMA was unfair termination. I do not agree with the counsel for the Applicant which suggest that retrenchment was never an issue before the CMA. The record shows that the complaint form filed before the CMA indicate the reason for termination as by operational requirement (retrenchment). From that reason, the Respondent claimed the award of compensation for failure to comply to retrenchment procedures. In the testimony by the Applicant's witness one Messe Fredrick Kinabo clearly explained that the Respondent was retrenched because apart from being a non-performer, the school was undergoing crisis due to outbreak of COVID pandemic. That, the employees who had previous warnings, the Respondent being one of them were retrenched. In its deliberation, the CMA discussed the propriety of retrenchment procedures and made a conclusion that the same was not

adhered to by the Applicant. Thus, the argument that retrenchment was not an issue before CMA is unmerited.

The law is clear on the procedures for retrenchment. In this I refer section 38 of the Employment and Labour Relations Act, 2004 (ELRA) and Rule 23 & 24 of the Employment and Labour Relations (Code of Good Practice) G.N 42 2007 which refer procedures on termination for operational requirement (retrenchment). Section 38 (1) of the ELRA provide that:

"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 minimise 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 recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

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

The above provision set out number of procedures for retrenchment; the issuance of notice on the intended retracement, disclosure of all relevant information on the intended retrenchment, prior consultation with employees on the reasons for retrenchment, measures to minimise the retrenchment, methods to be used in retrenchment, timing, severance pay, the notice to the employee, disclosure and consultation with trade union or employees not registered by trade union.

From the records and submissions before this court, the Respondents complaint before the CMA was based on the fact that she was not notified of the retrenchment and not fairly paid her entitlements. Upon closely reading the proceedings, it without doubts that the above-named procedures were not adhered to by the Applicant before terminating the Respondent's employment by retrenchment. The Applicant's witness admitted that the trade union was not informed

same for the school board. He also stated that the Respondent was not issued with notice for retrenchment process and reasons associated with the retrenchment. He clearly started that the Respondent was retrenched for he was considered not performing and since the school had crisis in paying its employees, those with poor performance were terminated by way retrenchment. This court is persuaded by the reasoning of the Supreme Court of Malawi in the case of **Malawi Telecommunications Limited Vs. Makande & Another,** Civil Appeal No. 2 of 2006 which was borrowed by this court in Labour Revision No. 7 of 2021, **NAS DAR AIRCO CO. Vs. Gift Robison & 8 Others.** The supreme court found that the restructuring process including the procedure, criteria, duration and consequences of retrenchment were not discussed with the employees in general except members of senior management who were involved in the making of recommendation and selection of employees whose employment contracts had to be terminated thereby. The supreme court agreed with the Court of first instance that there was no compliance with fair procedures for effecting redundancies and agreed with the conclusion that the termination of employment of the Respondents was unfair.

From the above discussion and cited case laws, It is the finding of this court that the CMA correctly held that the Applicant was duty bound to prove that the Respondent's retrenchment was proper and adhered to the procedures. The CMA award of compensation to the Respondent for 12 months is therefore justified.

In the upshot and considering all what has been stated above, the Revision application is devoid of merit and its hereby dismissed. I find no reason to alter or vary the award issued by the CMA. Since this matter emanates from labour dispute, no order as to costs.

DATED at **ARUSHA** this 29th day of September 2023.

D.C. KAMUZORA

JUDGE