IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

LABOUR REVISION NO. 05 OF 2023

(Originating from Labour Dispute No. CMA/KLM/SAM/ARB/22/2022)

BAHATI JUMA KIMWANA ..... 1ST APPLICANT
AISHA ABDALLAH H. HUSSEIN ..... 2ND APPLICANT

VERSUS

REGISTERED TRUSTEES OF ISLAMIC PROPAGATION CENTRE..... RESPONDENT

JUDGMENT

17/01/2024 & 15/02/2024

SIMFUKWE, J.

The applicants herein unsuccessfully instituted their dispute before the CMA challenging their retrenchment on grounds of reasons and procedures. After being aggrieved with the Award of the Commission for Mediation and Arbitration at Moshi they filed the instant application under **section 91(1)(a), (2)(b)** and **section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (ELRA);** read together with **Rule 24 (1)(2)(a)(b)(c)(d)(e)** and **(f)** and **Rule 24(3)(a)(b)(c)(d)** and **Rule 28 (1)(c)(d)** and **(e)**

of the Labour Court Rules, GN No. 106 of 2007 and any other enabling provision of the law. The Applicants prayed for the following orders:

1. *That, the Honourable Court be pleased to call for and examine the record and proceedings of the Commission for Mediation and Arbitration at Moshi in Labour Dispute No. CMA/KLM/SAM/ARB/22/2022 with view of satisfying itself as to its legality, propriety and correctness thereof.*
2. *That, the Honourable Court be pleased to set aside the Award in Labour Dispute No. CMA/KLM/SAM/ARB/22/2022 issued on 07th February 2023.*
3. *That, the Honourable court be in pleasure to grant any other order which it deems proper and fit to grant.*

The application was supported by a joint affidavit sworn by the applicants which was contested by the counter affidavit sworn by one Said Omari Nsigarila the principal officer of the respondent.

The brief history of the dispute is that, the applicants were employed by the respondent as teachers at Kirinjiko Secondary School for a fixed term contract of two years under renewable basis. Their last contract commenced on 01st July 2021 and it was to end on 30th June 2023. On

20/01/2022 the contract of employment of the applicants was terminated by the respondent by way of retrenchment. Dissatisfied with the reasons and procedures for the retrenchment, the applicants filed a labour dispute at the CMA. The said dispute was decided in favour of the respondent. Hence, the instant application for revision on the following grounds:

(a) That, the Honourable Arbitrator erred in facts and law in favour of the respondent because the reasons of retrenchment were not proved by the respondent.

(b) That, the Honourable Arbitrator improperly and erroneously awarded the respondent because the procedures for retrenchment were not followed by the respondent.

(c) That, the Honourable Arbitrator improperly procured the dispute in favour of the respondent as she failed to award the applicants with remaining period of contract.

The application was argued by way of written submissions. The applicants had the service of Mr. Exaud Mgaya Personal representative, while the respondent enjoyed the service of Mr. Othman Kalulu learned advocate.

Mr. Mgaya started his submission by praying to adopt the joint affidavit of the applicants to form part of his written submission in chief. He submitted inter alia that, the reasons of the retrenchment of the applicants were

unfair and the procedures were not followed by the respondent. Thus, the applicants were claiming their lawful remaining salaries in their contract of employment.

Supporting the first ground of revision, Mr. Mgaya submitted that, on the face of the record it is very clear that, the CMA award lacked merit on the basis of material particulars and evidence presented at the time of hearing. He made reference to page 4 of the CMA Award where the witness of the respondent stated the reasons for retrenchment to be decrease of the number of students from 1400 to 811. He was of the opinion that the retrenchment by the respondent was unfair in terms of the stated reason, on the following grounds:

1. The respondent never produced or tendered any statistical records as evidence before the CMA to prove the same on number of students on periodic decrement.
2. The respondent never produced or tendered any financial record as evidence before the CMA to prove the same on financial constraints.

Mr. Mgaya continued to cement his argument by **citing rule 23 (2) (a) and (c) of the Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2007,** which provides that:

"23(2) As a general rule circumstances that might legitimately form basis of retrenchment are:

(a) Economic needs that relate to financial management of the enterprise.

(b) .....

(c) Structural needs that arise from restructuring of the business as the result of number of business-related causes such as the merger of businesses, a change in the nature of business, more effective ways of working, a transfer of business or part of the business."

He stated that, there was no circumstance proved by the respondent in relation to the law or likewise that the reason was just based on the will and whims of the respondent and an arbitrator supported the same without any basis to stand on.

Another reference was made to **section 37 (2) of Employment and Labour Relations Act** (supra) which provides that:

"37(2) ……. The termination of employment by employer is unfair if the employer fails to prove:

(a) The reason for the termination is valid.

(b) That the reason is a fair reason."

He explained that, the position was discussed in the case of **Pascal Bandiho v. Arusha Urban Water Supply and Sewerage Authority, Revision No. 76 of 2015,** High Court Labour Division, in which **Hon. A. C. Nyerere, J** held that:

> *"… it is trite law that any termination of employment must be accompanied by fair reasons. This is clearly provided under section 37(2) of Employment and Labour Relations Act No. 6 of 2004. …. The intention of the above provision is to ensure employers terminates employees only with valid reasons and not at their own will or whims."*

Mr. Mgaya cited another case of **Stamil M. Emmanuel v. Omega Nitro (T) Ltd, Revision No. 213 of 2014 [2015] LCCD** at page 17 where it was held that:

> *"I have no doubt that the intention of the legislature is to require the employer to terminate the employee only basing on valid reasons and not their will or whims. This is also the position of International Labour Organization Convention (ILO) 158 of 1982 Article 4. In that spirit employers are required to examine the*

concept of unfair termination on the bases of employees conduct, capacity, compatibility and operational requirement before terminating employment of their employees."

Mr. Mgaya cited further the case of **Moshi University College of Cooperative and Business Studies (MUCCOBS) v. Joseph Reuben Sizya**, Labour Revision No. 11 of 2012, (HC).

In light of the above authorities, it was Mr. Mgaya's view that the reason of retrenchment/termination was not justifiable to warrant retrenchment for breaching applicant's fixed term contract. That, periodic decrease of students and financial constraint was not proved at the time of hearing rather than the employer at the time of hearing jumped into afterthought reasons.

On the second ground that, the Arbitrator improperly and erroneously awarded the respondent as the procedures for retrenchment were not followed by the respondent; Mr. Mgaya submitted that **rule 23(4) of GN No. 42/2007** provides that:

"……. The purpose of the consultation required by section 38 of the Act is to permit the parties in the form of joint problem-solving exercise to reach agreement on;

(a) The reasons for intended retrenchment (i.e. the need to retrench)

(b) Any measures to avoid or to minimize retrenchment…….

(c) Criteria for selecting employee for termination such as Last In First Out (LIFO) and First In Last Out (FILO)……

(d) The timing of retrenchment.

(e) ……..

(f) Steps to avoid the adverse effect of the termination such as time off to seek work."

From the cited provision, Mr. Mgaya asserted that, there was no proof of consultation meetings by the respondent and the applicants were issued notice on 17/01/2022 (Exhibit B-1 and B-4). On 20/01/2022 they were retrenched unlawfully. He was of the opinion that the dates of notice and retrenchment proves that there was poor timing in retrenchment. Hence, the applicants were not consulted throughout and they were not given time off to seek for new work.

He sought aspiration from the case of **Sijaona Moshi and 20 Others v. Double Tree by Hilton and Gold Service Apartment Limited**, Labour Revision No. 540 of 2019, HC at Dar es Salaam.

Moreover, Mr. Mgaya referred to page 5 of the Award where it was stated that, the respondent used the criteria of academic qualification, applicants' performances and Headmaster's reports on applicants' performances (Exhibit P-9). He went on to contend that, the aforementioned issues were not declared in the applicants' notice of retrenchment and retrenchment letter. Hence, the same were just afterthoughts for lack of merit and proof.

Concerning the issue of proving that the principle of FILO was not complied with, Mr. Mgaya cited the case of **Registered Trustees of Moshi Catholic Diocese v. Evetha Mkenda,** Labour Revision No. 27 of 2018, HC at Moshi. He elaborated that, the issue of employee's performance must be proved by giving the employee the right to be heard and defend the same.

Mr. Mgaya proposed that, the respondent should have fairly proposed an offer of early retirement, alternative job or an agreement to terminate the fixed term contract.

On the issue of breach of contract, Mr. Mgaya referred **rule 8(2) (a) and (b) of GN No. 42 of 2007** which provides that:

> *"8(2)(a) ..... Where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract*

before expiry of contract period if the employee materially breached the contract.

(b).....Where there is no breach, to terminate the contract lawfully is by getting the employee to agree to early termination..."

Referring to the case at hand, Mr. Mgaya said that there were no proof on the face of the records of the applicants' breach of contract. That, the reasons were based on will and whims. Also, there was no any proof of record of agreement by the respondent to terminate the applicants' contract. Thus, the respondent's breach of contract was sudden and unlawful.

Submitting on the third ground of revision that the CMA Award was unlawful and irrational; Mr. Mgaya stated that, there was no agreement to early termination as stated by the Arbitrator on her conclusion of the Award contrary to **rule 8(2) (b) of GN No. 42/2007** (supra). He supported his point with the case of **Good Samaritan v. Joseph Robert Savari Munthu, Revision No. 165 of 2011**, in which Hon. Rweyemamu, J stated that:

"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of unexpired term is

direct, foreseeable and reasonable consequence of employer's wrongful action."

Guided by the above authority, Mr. Mgaya was of the view that, the applicants are entitled to be paid their salaries of the remaining period of unexpired term.

In conclusion, the following reliefs were prayed:

1. For the first applicant, the salaries of 17 months of the remaining period of contract. That is 17months X 664,000 monthly salary=11,288,000/=.
2. For the second applicant, salaries of 17months X 437,000 monthly salary=7,429,000/=.

Grand Total for both 18,717,000/=.

In his reply submission, Mr. Kalulu for the respondent adopted the counter affidavit of the respondent and stated that, this application is devoid of merit.

On the first ground of revision, Mr. Kalulu submitted that, the reasons advanced by the respondent were based on the economic and needs of the respondent. That, the applicants were retrenched for operational requirements necessitated by attenuation of the number of students which

negatively impacted the revenue of the respondent. He referred to the testimony of one Mfaume Sufian Kilongosi who stated that, in 2017 the number of students were 1400. By the time when the applicants were retrenched, the number was 811. Hence, the institution was working under loss which necessitated structural changes upon which the number of teachers had to be retrenched. (page 4 of the CMA Award).

Mr. Kalulu submitted further that, the economic reason for retrenchment as per **rule 23 (2) (a) of GN No. 42/2007** was dully communicated to all employees as per exhibit P7 and P8. That, according to exhibit P5 and P6 the applicants were consulted prior to retrenchment. Thus, the applicants were ready to be retrenched as per exhibit P10. The retrenchment of the second applicant was said to be due to structural reasons as she had no certificate from NECTA. Therefore, she was not fit to serve the position and meet structural needs. In the circumstances, Mr. Kalulu said that the retrenchment was fairly exercised by the respondent.

The learned counsel warned this court not to interfere with the decision of the employer to retrench as it was held in the South African case of **Hendry v. Adcock Ingram [1996] 19 ILT 85** [LC] at page 92 where it was stated that:

"…. If the employer can show that a good profit is to be made in accordance with a sound economic rationale and it follows a fair process to retrench an employee as a result thereof it is entitled to retrench. When judging and evaluating an employer's decision to retrench an employee, this court must be cautious not to interfere to the legitimate business decision taken by employers who are entitled to make a profit and who in doing so, are entitled to "restructure" their business…."

Mr. Kalulu submitted further that, this court has to refrain to interfere with the findings of the trial Arbitrator who rightly held that the respondent sat with the employees and agreed on termination pursuant to **section 38 of the Employment and Labour Relations Act**. He said that, the act of the applicants receiving payments as per exhibits P1, P2, P3 and P4 depict that they agreed to be retrenched. Thus, there was no need to prove by submitting statistical records to prove financial constraints while the applicants agreed to be retrenched. Therefore, they are estopped by the doctrine of estoppel as held in the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd and 2 Others,** Civil Appeal No. 51 of 2016 (unreported), that:

"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go bade upon it."

On the strength of the above cited authority, Mr. Kalulu was convinced that the applicants in this case are estopped as they participated, agreed to be retrenched and received their terminal benefits. Thus, the respondent had a valid reason and proved the same.

Contesting the cited case of **Pascal Bandio** (supra), the learned counsel was of the view that it was distinguishable to the instant case.

On the second ground of revision, which concerns procedure, Mr. Kalulu averred that the respondent complied with procedures of termination. That, after realising that the school economic position is deteriorating from day to day, immediately the management served the applicants with the Notice for retrenchment as per **section 38(1) (a) of the Employment and Labour Relations Act.** The said notice was never objected during the trial at the CMA. The notice was followed by the meeting between the

employer and individual applicant and the discussion was held between the employer and individual applicant. Also, there was consensus agreement as evidenced at page 7 of the CMA Award and exhibit P7 and P10. It was stated further that, the applicants received monies which they were entitled and agreed that they would receive the remaining amount on the 4th day of February 2022 the fact which was never denied.

Furthermore, it was submitted that in the circumstances of this case as a matter of procedure, the principle of FILO and LIFO does not apply as the applicants were served with notice and others had written to their employer letters for terminating their contracts of service prior the notice of retrenchment. That, all procedures were complied with and parties mutually agreed on the exercise. Mr. Kalulu was of the opinion that, all the cited cases of **Sijaona Moshi** and **the Registered Trustees of Moshi Catholic Diocese** are distinguishable and does not serve the purpose due to the fact that the applicants agreed to be retrenched.

On the third ground that the Hon. Arbitrator erred in law and facts in favour of the respondent since the award was unlawful and irrational; Mr. Kalulu stated that it is settled law that, the court will only look into matters which came up at the Commission and decided. He was of the view that this ground was an afterthought. He made reference to the case of **Abdul**

Athuman v. R [2004] TLR 151 to cement his submission. He prayed that the third ground be disregarded and strike out from the record.

It was finalised that, the trial Commission was justified to dismiss the complaints of the applicants as they agreed to the retrenchment and received some payment as shown by the Arbitrator while resolving issues after evaluating evidence.

Having considered submissions of both parties, joint affidavit in support of the application, counter affidavit and evidence on CMA record, it is crystal clear that the applicants are not challenging the reasons for retrenchment. Their main complaint is that they were not paid salaries of the remaining 17 months of contract. At page 15, paragraph one of the proceedings of the CMA, the second applicant stated as follows:

> *"**Nilipunguzwa kazi bila taratibu kufuatwa**. Mwajiri alipaswa kutupa taarifa ya kupunguzwa kama mkataba unavyoeleza yani mwezi mmoja kabla ya kuachishwa."* Emphasis added

At page 13 of the CMA proceedings, the first applicant while being cross examined said inter alia that:

> *"Swali: Walilipa nini?*

Jibu: Certificate of service, salary arrears, leave, arrears za Novemba.

Swali: Kwa hiyo mnadai nini?

Jibu: ***Miezi iliyobaki kwenye mkataba.***

Swali: Ambayo hamkufanyia kazi?

Jibu: ***Mngefata taratibu tusingedai****." Emphasis added*

However, before this court Mr. Mgaya for the applicants faulted the reasons for retrenchment as well as the procedures for retrenchment. Mr. Kalulu for the respondent vehemently opposed the application. Thus, the issues for determination are:

1. *Whether the reasons for retrenching the applicants were valid and fair?*
2. *Whether the procedures for retrenchment were adhered to?*
3. *Whether the applicants are entitled to be paid the salaries of 17 months as prayed?*

On the first issue on whether the reasons for retrenchment were fair; **rule 23(1) of the Code of Good Practice** prescribes the reasons for retrenchment. The rule provides that:

"23-(1) A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. ***An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.****" Emphasis added*

This court has in a number of decisions discussed the above quoted provision. I subscribe to the decision in the case of **Boni Mabusi vs The General Manager (T) Cigarettes Co. Ltd (**Consolidated Revision No. 418) [2020] TZHCLD 43 (22 May 2020) Tanzlii at page 14 where it was held that:

"According to rule 23(2) of the Employment and Labour Relations {Code of Good Practice} GN No. 42 of 2007 the reasons for termination by operation requirement (retrenchment) may be ***economical needs****, or* ***technological needs*** *or* ***structural needs*** *or a similar reason to this one. The evidence available in this application especially the testimony of DW1 have proved that reason for termination was the structural needs that*

led to the abolition of the employee's position after restructuring of the organization. Therefore, this reason for retrenchment was valid and fair as it is among the valid reasons for termination according to the law."

Guided by the above authorities, retrenchment is termination of employment of an employee prematurely which is neither caused by breach of employment contract, misconduct of the employee nor incapacity.

In the case at hand, according to the CMA record and submissions of both parties, the reasons for retrenchment were economic constraints due to decrease of number of students and structural requirement for the second applicant who had no teaching certificate. The applicants fault their retrenchment on the main reason that they were not paid compensation of the remaining months of contract as procedures were not adhered to. Mr. Mgaya was of the view that the CMA erred for holding that the applicants were fairly terminated.

From the quoted pieces of evidence of the applicants, it goes without saying that they had no problem with the reasons for retrenchment. Thus, they cannot question such reasons at this stage. Even if they were

disputing the reasons for retrenchment, I agree with Mr. Kalulu that the respondent had valid and fair reasons to retrench the applicants.

On the second issue on whether the procedures of retrenchment were followed; Mr. Mgaya for the applicants was of the view that the procedures for retrenchment were not complied with, while Mr. Kalulu submitted that the procedures were followed. At page 8 of the Award, the Hon. Arbitrator found that:

> *"Kwa kuwa imethibitika **walalamikaji walishirikishwa kwenye mchakato wa kupunguzwa kazi na walifikia makubaliano ya kulipwa kwa mujibu wa makubaliano hayo**, Tume imeona hawastahili kulipwa fidia na kwa mantiki hii basi madai yao yametupiliwa mbali."*

The procedures of retrenchment are provided under **section 38 (1) (a) (b) (c) (i)- (v)** of the **Employment and Labour Relations Act,** which provides that:

> *38 (1) In any termination for operational retrenchment (requirements) 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 redundancies on-

(i) The reasons for the intended retrenchment

(ii) Any measures to avoid or minimise the intended retrenchment

(iii) The method of selection of employees to be retrenched

(iv) The timing of the retrenchment *and*

(v) Severance pays in respect of retrenchments." Emphasis mine

Based on the above prescribed procedures, I agree with the learned Arbitrator that, the procedures in this matter were followed. The applicants were issued with notice of retrenchment, the reasons of retrenchment were stated, they had a meeting with the employer and agreed to be

retrenched subject to agreed terms and they were paid accordingly. Moreover, all relevant documents were tendered before the CMA as exhibits (exhibits P1 to P10). With due respect to Mr. Mgaya, his assertions that the procedures were not adhered to, are misconceived as there is proof on record of the agreement to the retrenchment. Moreover, the second applicant stated at page 15 last paragraph of the CMA proceedings that they were paid salary of one month ahead. Thus, the complaint that they should have been given notice one month before the retrenchment, is unfounded.

On the last issue *whether the applicants are entitled to be paid the salaries of 17 months as prayed*; as correctly found by the learned Arbitrator, based on the reason that the applicants agreed to be retrenched and all procedures were complied with, the applicants are not entitled to be paid the salaries of the remaining months in their contracts of employment. That could have been the case if the employer had violated the procedures for retrenchment. I concur with Mr. Kalulu that the cases which were cited by Mr. Mgaya in respect of this issue are distinguishable as they are not related to retrenchment.

In the upshot, I find the CMA Award as proper, lawful and rational. The same is hereby upheld and the instant application is dismissed forthwith for lack of merit. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 15th day of February 2024.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

15/02/2024