

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 473 OF 2016

BETWEEN

MACRINA RWECHUNGURA APPLICANT

VERSUS

MWANANCHI COMMUNICATION LTD.RESPONDENT

JUDGMENT

Date of Last Order 02/05/2018

Date of Judgment 18/05/2018

A.C. NYERERE, J.

The applicant has filed the present application seeking revision of the decision and award of the Commission for Mediation and Arbitration (Herein to be referred as CMA) which was delivered on 27th April, 2018 in favour of the respondent/ MWANANCHI COMMUNICATION LTD.

Facts leading to the present application as per supporting affidavit filed in this court in support of the application are that; the applicant employer by respondent as Field Sales Executive in 10th June, 2013, from 1st September, 2013 Applicant job position was changed to Executive Data Analyst and received salary increment from 600,000/= to 648,000/=

nevertheless applicant was terminated on operational requirement on 10th December, 2014.

Applicant being aggrieved by the respondent decision, he referred the matter to the CMA challenging the termination; thus praying to the CMA to reinstate him in his former position without loss of remuneration. The CMA heard the matter and decided that retrenchment process was according to law.

The decision aggrieved applicant who filed the present revision application faulting Arbitrator's award on three grounds articulated under paragraph 13 of the supported affidavit for easy of reference I quote them in verbatim.

- i. That, the honourable arbitrator erred in law and facts by failure to analysis properly the evidence which were before him and jump into the wrongly conclusion contrary to the evidences adduced by parties to the labour dispute.
- ii. That, the honourable arbitrator erred in law by failure to exercise power vested in him properly by showing clearly on how he attained to the conclusion that I was retrenched due to economic reasons and hence structure changes while there in no any evidence he has demonstrated in the award to shows that there was either economic reasons or structural changes.
- iii. That, the honourable arbitrator erred in law by failure to exercise power vested to him under the law by delivering the

award which is self contradictory, irrational and unreasonable
hence material irregularities.

At the hearing of the application both parties were represented by advocates Mr. Abdallah Kazungu learned counsel appears for the applicant whereas Mr. Bora Nicolaus learned counsel appears for the respondent and hearing proceeded orally.

Arguing the application Mr. Abdallah Kazungu Counsel for applicant prayed to adopt the affidavit of Macrina Rwechungura to form part of his submissions, and proceeded to argue that that applicant was retrenched due to organization changes (structure), on the other hand arbitrator stated the reason for retrenchment was due to economic reasons, this is at page 4 paragraph 7 of the CMA award. In that the applicant is disputing the termination in which there was no Organization change at Mwananchi Communication.

Counsel for applicant argued that it was the arbitrator findings that the applicant was retrenched due to economic reasons; however there is no evidence to support it, he contended that parties had adduced evidence on structural changes.

Counsel for applicant proceeded to argue, if the applicant was retrenched due to economic needs as stated by Hon. Arbitrator, in which Arbitrator had to show economic evidence adduced by the respondent, to

justify retrenchment, arbitrator decide on the evidence which was not produced before the commission.

Counsel for applicant submitting on ground no. 2, he argued that, there is no economic reason to justify applicant's termination as there is no evidence supporting that assertion.

Furthermore Counsel for applicant argued the award is contradicting, on one part Hon. Arbitrator observed applicant was retrenched due to structural changes, later on he said that applicant was retrenched due to economic changes. It's unclear what resulted to the retrenchment of the applicant. Thus Counsel for applicant prays for the award be quashed and set aside.

In rebuttal M/S Bora Alfred Nicolaus Counsel for respondent responding to the 1st ground he argued Applicant termination was due to operational requirement, in compliance with retrenchment procedures as provided under Section 38(1) (a), (b), (c) and (d) of The Employment and Labour Relations Act No. 6/2004.

Counsel for respondent submitting on the arbitrator's findings, he argued that applicant was terminated on structural changes as stipulated at page 4 paragraphs 7 of the award.

Counsel for respondent observed Rule 23(1) (2) (a) (b) (c) and (d) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42/2007 cited by the counsel for the Applicant, arguing that there is no mandatory provision that requires retrenchment or operational requirement shall only be based on the three, that is;

“Economic needs, Technological needs or structural need”

Counsel for respondent in responding to the 2nd ground argued that that the applicant retrenchment was due to economic reasons, hence structural changes as adduced by DW1 at page 2 paragraph 8 and page 3 paragraph 1,2 and 3 of the CMA award.

Counsel for respondent in responding to 3rd ground, he argued that Arbitrator exercised powers vested in him by delivering the award which is rational and reasonable; and was guided by framed issues at page 4 paragraph 5, 6, 7, 8 and page 5 paragraphs 1 to 4 of the CMA award. Counsel for respondent prays the application be dismissed.

In rejoinder Mr. Abdallah Kazungu Counsel for Applicant reiterated his submission in chief and proceeded to argue that it is not true that termination procedure is not disputed,

Further Counsel for Applicant highlighted on page 4 at paragraph 7 of the CMA award, in which Counsel for respondent implied to mean :

structural change was due to economic reasons. And argued that that is not what was written in the CMA award, the paragraph is misconstrued and concluded that the award be revised.

After carefully considered parties' submission, CMA records, Affidavit and Counter affidavit filed in this court, labour laws, and my decision on the grounds are as hereunder.

The issue for determination is whether operational reasons were the genuine cause for termination or a pretext.

On perusing the court records, it's clear that Applicant termination was due to operational requirement, respondent aiming at attaining organizational efficiency thus structure change as per Exhibit MLC-3 TERMINATION OF EMPLOYMENT CONTRACT DUE TO OPERATIONAL REQUIREMENTS.

A fact that is being challenged by the applicant, that there was no structural change in respondent's management. Further applicants is faulting the arbitrator's findings, in which he observed that the applicant was retrenched on economic grounds, contrary to evidence adduced at the CMA , applicant contends that evidence adduced at CMA is in regard to structural changes.

In determining applicant's termination, it's prudent to observe whether operational reasons were genuine reasons for applicant's

termination. The opinions of the ILO Committee of Experts on Application of Convention 158 and Recommendation 166 (CEACR); the policy objective of the law in regulating retrenchment or termination for operational requirements starts from the premises that, employees have a right not to have their contract of employment prematurely terminated unfairly or unjustifiably.

Thus the court is tasked in ensuring operational reasons are not used by employer as a cover up to terminate employees unfairly thus circumventing employees rights, as observed in the case of **Bakari Athuman Mtandika v. Superdoll Trailler Ltd Revision No. 171/2013 DSM Registry (Unreported)** here the court stated:

"To ensure that operational reasons are not used by the employer as pretext to terminate an employee unfairly at the employer's will; thus 'circumventing the employee's right to security of tenure guaranteed under the parties contract of employment."

According to Exhibit MLC -1 TERMINATION ON OPERATIONAL REQUIREMENTS, respondent issued a general notice on the intention to retrench to all staff on December 8, 2014. Consultation meeting was held on 15th, December 2014 in which reason for redundancy was that business

was to undergo structure change to enable the organization to have efficiency as per Exhibit MCL-2 MINUTE OF CONSULTATION....

The burning issue at this point is whether operational reasons were genuine reasons for applicant's termination, as observed at page 4 at paragraph 7 of the CMA award,

"sababu kubwa ya kuachishwa kazi mlalamikaji ni structural change iliyopelekea nafasi ya mlalamikaji kuondolewa... yaani operational requirement. Sababu inayopingwa vikali na mlalamikaji" (Emphasis is mine).

From the above observation it's without doubt court records and supporting evidence, are consistence with operational needs, which required structural change to improve business efficiency. Rule 23 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42/2007 that provides termination arising from the operational requirements, which are based on economic, technological, structural needs, thus, I find no reason to fault arbitrator's decision, as he evaluated evidence on record and properly arrived at the conclusion that applicant termination was due to operational requirements.

Now, whether the applicant's termination was procedurally fair I wish to quote the required procedure as provided under the law, to wit, Section 38(1) of the ELRA No. 6/2004 which requires;

S. 38 (1) "In any termination for operational requirement (retrenchment) an employer shall comply with the following principles:-

(a) That the **employer shall give notice of any intention** to retrench as soon as is contemplated.

(d) Shall 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 with member in work place not represented by recognized trade union;
- (iii) Any employees not represented by a recognized or registered trade union.** (Emphasis mine)

From the records it is apparent respondent did comply with the mandatory procedures as stipulated on the above provision, and had valid reason for terminating applicant's employment, as stipulated under Rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007.

It is also in record that respondent did consider possible alternatives before retrenching the respondent, including applicant stopping Lake Zone region operations, being leasing vehicle designated for distributing newspapers, however proved futile. In conclusion I find applicant's termination was procedurally and substantively fair. In the end result I find this application is without merit and I hereby dismiss it for lacking merit.

It is so ordered.



A.C. Nyerere

JUDGE

18/05/2018