

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 275 OF 2019

BETWEEN

**PATRICK BUNDALA MLINGWA 1ST APPLICANT
ROSE CYPRIAN MGALIKA 2ND APPLICANT
WOLFRAM SAMWEL ZINGI 3RD APPLICANT
LINUS TOBIAS BOIMANDA 4TH APPLICANT
YAHAYA KHAMIS KIKOBO 5TH APPLICANT**

VERSUS

RIKI HILL HOTEL RESPONDENT

EXPARTE JUDGMENT

Date of Last Order: 19/05/2020

Date of Judgment: 17/07/2020

S.A.N. Wambura, J.

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] which was delivered on 17/03/2017, the applicants **PATRICK BUNDALA MLINGWA & 4 OTHERS** have filed this application under the provisions of Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), (11)(b), 28(1)(b)(c)(d) and 55(1)(2)

of the Labour Court Rules, 2007 and Sections 91(1)(a), (2)(a)(b)(c); (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 praying for Orders that:-

- 1. That, this Honourable Court be pleased to call for CMA Arbitration proceedings and the award issued on 17th March, 2017 by Hon. M. Mgendwa, Arbitrator in Complaint No. CMA/DSM/ILA/R.727/14/655 revise the said proceedings and set aside the said award.*
- 2. That, this Honourable Court be pleased to make any other order that may meet the good ends of justice.*

The application was supported by their joint affidavit.

The respondent **RIKI HILL HOTEL** did not file a counter affidavit nor enter appearance on the hearing date though fully aware of the same. This is because Advocate Gasper Truway who was representing the respondent entered appearance on 02/03/2020 when the matter was scheduled for hearing on 30/04/2020. As he did not enter appearance and no reason was adduced for the same, I thus granted leave for the matter to proceed ex parte by way of written submissions. I thank the applicants for their submissions which were filed as scheduled.

Briefly the applicants were employed by the respondent who also owned Palace Hotel and Ubungo Terminal Hotel along with a number of Bureau De Changes. After it was realized that he was under paying the employees in September, 2011 they entered into an agreement with CHODAWU (Workers Union) to have the employees paid their arrears. According to DW1 and DW2 the Chairperson of CHODAWU the same was paid accordingly.

On 13/10/2013 the respondent through Exhibit D1 notified the employees of the need to undertake a retrenchment exercise due to poor performance of the hotel businesses. The said exercise was concluded at the end of the month of October, 2013 as per Exhibit D4. This was after having undertaken a number of consultative meetings as witnessed by Exhibit D2. The applicants are amongst the employees who were retrenched.

Dissatisfied the applicants filed a complaint at CMA which found in favour of the respondent. Aggrieved with the same the applicants have now filed this matter.

It was submitted by the applicants that:-

- (i). Though the respondent agreed to pay the applicants their salary arrears being Tshs. 1,750,000/= each; they were only paid 500,000/= and are thus claiming Tshs. 1,250,000/= each.
- (ii). The pretext of retrenchment was used by the respondent to terminate them as they were regarded as troublemakers. This is because the 1st, 3rd and 4th applicants were Security Guards and not employed at the Hotels, while the 2nd and 5th applicants who were hotel employees were not consulted prior to termination.
- (iii). The criteria used to retrench the applicants was arbitrary and did not relate to their attributes or conducts. That it disregarded the First In Last Out (FILO) principle citing the case **Omary Ali Dodo Vs. Air Tanzania Company Ltd**, Lab. Rev. No. 322/2013 to that effect.

They thus prayed for the application to be granted and they be paid Tshs. 1,250,000/= each as prayed for.

Now even where the matter is heard exparte the onus of proof of the issues alleged lies upon the applicant as was held in the case of **Onesmo N. Richard Vs. Kigume Security Services**, Lab. Rev. No. 438 of 2017.

Likewise the applicants are expected to prove the allegations raised herein even though they have not been challenged by the respondent.

It is on record that there was an agreement between the respondent and CHODAWU to have the employees paid their arrears as witnessed in the Collective Bargaining Agreement entered into in September, 2011.

It is also on record that the applicants were paid their arrears as per Exhibit D3. However, the applicants are arguing that it was merely forged. Now the proof of allegation of forgery has to be more than in a normal civil matters as it was held in the cases of **Patel Vs. Lalji Makanji** [1957] EA 314 pg. 316 and **Omari Yusuph Vs. Rahma Abdulkadir** [1987] TLR 169 which held that:-

"I think it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of

fraud justifies the imposition of a strict standard of proof.....”

[Emphasis is mine].

According to the record this cannot be said to have been so proved.

But again it is only the form of Linus Boinmanda which does not have the stated amount on it. Others have signed with the stated figures of money paid so to say that they were forced to sign an unknown amount and only paid Tshs. 500,000/= is doubtful.

Moreover, DW2 who was the Chairperson of CHODAWU adduced evidence at CMA stating that all employees were paid their arrears and he had not received any complaints of employees being underpaid. One wonders as to why did the applicants not launch their complaints at CHODAWU which negotiated for payments of the said arrears, and waited to raise the same upon being retrenched?

With all these questions in mind I fail to hold that the applicants were indeed underpaid.

As for the procedures for retrenchment, they are provided for under Section 38 of ELRA and Rule 23 of ELRA (Code of Good Practice) GN

42/2007. According to the evidence adduced by DW1 and DW2 and as later found by the Arbitrator, the procedures were complied to by the applicants. This can also be witnessed by Exhibits D2 and D5.

It is therefore unknown as to why the 2nd and 5th applicants did not attend the consultative meetings which took place on three different dates as per Exhibit D2.

That the 1st, 3rd and 4th applicants were Security Guards so ought not to have been effected by the retrenchment is also not a reason to challenge the same. It is on record that the alleged Bureau De Changes were within the Hotel premises. The Hotel businesses were either closed down or rented to other persons. Now how could the Security Guards remain in employment at the premises run by other persons and continue to be paid by the respondent?

According to the issues raised in this application I am of the view the applicants have failed to prove their allegations. I have therefore found nothing to fault the findings of the Arbitrator.

I thus uphold CMA's award and dismiss the application for want of merit.

S.A.N. Wambura
JUDGE
17/07/2020

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VERSUS

RIKI HILL HOTEL RESPONDENT

Date: 17/07/2020

Coram: Hon. S.R. Ding'ohi, Deputy Registrar

Applicants: Present in person

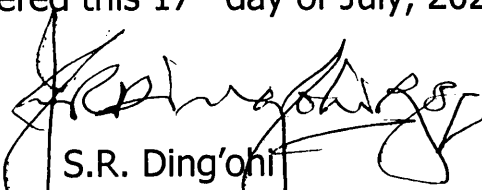
For Applicants:

Respondent:

For Respondent: } Absent

CC: Lwiza

COURT: Judgment delivered this 17th day of July, 2020.


S.R. Ding'ohi
DEPUTY REGISTRAR
17/07/2020