

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 883 OF 2019

BETWEEN

TIB DEVELOPMENT BANK LIMITED..... APPLICANT

VERSUS

SILAS MGANA & 60THERS..... RESPONDENTS

JUDGEMENT

Date of Last Order: 04/12/2020

Date of Judgment: 24/12/2020

Aboud, J.

The applicant, **TIB DEVELOPMENT BANK LIMITED** made this application for the court to revise the decision of the Commission for Mediation and Arbitration (herein referred as CMA) delivered on 16/10/2019 by Hon. Kachenje J. J., Arbitrator, in Labour Dispute No. CMA/DSM/KIN/R.368/17/1018. The application was made under the provisions of Section 91 (1) (a), 91 (2) (b) (c) 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) Rule 24 (1), 2 (a), (b), (c), (d), (e), (f), 3 (a), (b), (c) and (d) and Rule 28 (1) (a) (b) (c), (d) and (e) of the Labour

Court Rules, 2007 GN. No. 106 of 2007 (herein the Labour Court Rules). The applicant prayed for the following orders:-

- (i) That the Honourable Court be pleased to call for the records of the proceedings and the award of the Commission for Mediation and Arbitration in labour dispute No. CMA/DSM/KIN/R.368/17/1018 by Hon. Kachenje, J.J., Arbitrator dated 16/10/2019.
- (ii) That the Honourable Court be pleased to make such any other orders as it may deem fit.

Whereas the applicant was represented by Ms. Jacqueline Kinyasi, State Attorney, the respondent was represented by Mr. Prosper Mrema, Learned Counsel. With leave of this court the matter proceeded by way of written submissions.

The dispute emanates from the following background; the respondents were employed by the defunct Tanzania Housing Bank on different occasions holding different positions. In the late 1997 Tanzania Housing Bank was declared bankruptcy and placed under the Bank of Tanzania (BOT). It was alleged that, later on the Treasury took it and appointed the applicant at hand as a Receiver

Manager. The applicant picked some of the employees including the respondents and continued to work with them under her receivership. It was further alleged that after the applicant finished his work as a Receiver Manager on 28/02/2017 he decided to terminate the respondents on the ground of operational requirement.

The Respondents were dissatisfied with the applicant's termination they then decided to refer the matter at the CMA claiming for unfair termination. CMA decided the matter on their favour by ordering the applicant to pay them twelve months salaries as compensation for unfair termination. Being aggrieved with the CMA's award the applicant decided to file the present application.

The application was argued by way of written submissions where both parties were represented, Ms. Jacqueline Kinyasi State Attorney, appeared for the applicant while Mr. Prosper Mrema, Learned Counsel was for the respondent.

Arguing in support of the application Ms. Kinyasi submitted that, the Respondents in the CMA F1 on the list of names attached thereto they appointed Silas Mgana as their representative. However during the hearing, it was Edward Christophe Sizya who appeared

and testified on behalf of the respondents as PW I. she stated that, since Edward Christophe Sizya was not appointed and authorized by others to represent them it suffices to say the Respondents did not prove their case. To strengthen her submission she referred the Court the case of **Lujuna Shubi Ballonzi V. Registered Trustees of Chama cha Mapinduzi**, 1996 TLR 203

It was submitted that, the said Edward Christophe Sizya prosecuted the case on behalf of other employees but he never had a mandate to do so. The Learned Counsel added that under representative suit each employee had to prove his/her claim on his/her own basing on the reason that the respondents were employed on different dates, at different salary rates and benefits hence a very great need of each to prove the respective claims. To support her argument she cited the case of **Reli Asset Holding Company Ltd. V. Japhet Casmir Mkoba & 1500** other Revision No. 6 of 2015, HC at Tabora.

Also it was submitted that the Arbitrator wrongly proceeded to hear the matter and issue an award in favour of the respondents who neither appeared nor prosecuted their claims. She argued that it was

contrary to the provisions of the law and invited the Court to find that the respondents failed to prosecute their case thus the impugned award be set aside.

It was further submitted that, the CMA's award is contrary to the law, irrational and defies logic. That at page 16-18, the last paragraph of the impugned award, the Arbitrator admitted that, respondents were appointed for specific task of assisting in liquidation processes. However, the termination letter states categorically that they were terminated based on the operational requirement (retrenchment). Surprisingly, at page 17-18 last line, on the last paragraph of the impugned award the Arbitrator finds the termination of the respondents to be procedurally unfair contrary to section 38 of the Act. She stated that, the mentioned (section 38) provides for the procedure on retrenchment which the Arbitrator had already enter a finding to be in-applicable in the Respondents scenario as stated above.

Lastly, Ms. Kinyasi submitted that, Rule 27(2)(e) of the Labor Institution (Mediation and Arbitration Guideline) Rule 2007 requires the award to contain reason for the decision. She stated that, in the matter at hand the Arbitrator entered findings that the employee who

holds a contract for a specific task cannot be retrenched and then he proceeded to hold that termination was procedurally unfair without giving reasons thereof. To lighten her submission she cited among others the case of **Feliciano Malaki v. Hosea William**, Misc. Land Appeal No. 17 of 2018 HC of Tanzania. She therefore prayed for the impugned award to be set aside.

In reply the respondent's Learned Counsel submitted that the applicant have failed squarely to interpret legally the spirit of **Rule 5 (1) (2) (3) of Labour Institution (Mediation and Arbitration) GN. 64/2007** he stated that basing on the cited rule since PW-1 is one of the respondents in this application, therefore nothing barred him from testifying on behalf of other employees as their matter have the same interest. He added that the above rule mandated Mr. Silas Mgana to sign documents on behalf of others and to be the Representative of other Complainants in the proceeding but, the law does not mandatory require him also to testify on behalf of others.

It was further submitted that the cited case of **Reli Asset Holding Co. Ltd (supra)** referred by the Learned Counsel for the

Applicant is quite different from the case at hand because the cited case was about lack of signatures of the employees who claimed that they have also sued, therefore applying the same in this case at hand will be misleading the Court in reaching justice to both parties therefore the same should be ignored.

Regarding the reasons for the decision, respondents' Counsel submitted that the reason is clearly reflected at page 12 to 21 of the typed award when the Honourable Arbitrator started to determine the three issues which have been narrowed down at page 3 of the typed award. He went on to state that, in those three issues the Honourable Arbitrator showed his argument in reaching the decision of each issue, therefore is not true that the award does not contain reasons for the decision as articulated by the Learned Counsel for the Applicant. He thus prayed for the application to be dismissed.

In rejoinder the applicant reiterated his submission in chief and raised a preliminary objection that the counter affidavit was neither filed to the court nor served to the applicant. On that failure he

argued that the respondents conceded to the application thus, they had no locus to challenge the same.

I have noted the applicant's preliminary objection that the counter affidavit was neither filed nor served to him. However the record of this Court proves the contrary as the counter affidavit in question was filed at this Court on 17/03/2020. In my view the allegation that the applicant was not served with the relevant document needs facts and evidence to be proved. Thus such an allegation is not a pure point of law which can be determined at this stage. Therefore the preliminary objection in question lacks merit and is dismissed accordingly.

Having gone through parties' submissions, Court's records and relevant labour laws I find this Court is called upon to determine the following issues, firstly is whether Edward Christopher had a mandate to testify on behalf of other respondents and whether the Arbitrator stated the reason for his decision.

Starting with the first issue as to whether Edward Christopher had a mandate to testify on behalf of other respondents, the applicant contended that Edward Christopher who testified on behalf

of others was not appointed by others to represent them. The Learned Counsel added that the respondents' claims differ as they were employed on different date, salary and differed on other employment benefits, on such basis there was a great need of each employee to prove his/her claims.

On other hand the respondents maintained that Edward Christopher was among the party of this application thus nothing barred him to represent others as their claims were the same. It is an established principle for someone to represent others they must have the same interest and should be appointed by others who wishes to be represented. On top of that leave of the Court should be craved for someone to act as a representative of others. This is in accordance with Rule 44 of GN. No. 106 of 2007 which is to the effect that:-

'Rule 44 (2) (2) - Where there are numerous persons having the same interest in a suit, one or more of such persons may, with the permission of the Court appear and be heard or defend in such dispute, on behalf of or for the benefit of all persons so interested,

except that the Court shall in such case give at the complainant's expenses, notice of the institution of the suit to all such persons either by personal service or where it is from the number of persons or any other service reasonably practicable, by public advertisement or otherwise, as the Court in each case may direct'.
[Emphasis is mine].

I have carefully examined the record, it is undisputed fact that Mr. Silas Mgana was the one who was appointed by the respondents as their representative to prosecute the matter on their behalf. It is also undisputed fact that the person who testified on behalf of other respondents was Mr. Edward Christopher. On the light of the above cited provision I fully agree with the Learned Counsel for the applicant that Mr. Edward Christopher had no locus to represent and defend the case on behalf of other respondents as he was neither appointed by the respondents nor the CMA. In my view even if Mr. Edward Christopher acted as a witness at the CMA it was wrong for the Arbitrator to rely on his sole evidence and award all respondents at hand.

The record reveals that the respondents were employed on different date as reflected in their opening statement at page 1, 2, 3 and 4 which was filed at CMA, also respondents' claims regarding salary and other employment benefits differ from one to another as evidence by Exhibit SIL-2 (termination letters) which was admitted collectively at CMA. Even the CMA's award justifies the difference of respondents' claim as indicated at page 19 of the same.

In such circumstance where the respondents' claims are not the same on different aspect including date of employment, salary and other employment benefits, it was not proper for the representative person to assume the position of each respondent to testify and justify their claims which are different ones. It has been discussed in a number of cases where employees have different claims against the employer it is prudent for each employee to prove his/her case separately despite the fact that the matter was jointly instituted by all of them. This is also the position in the case of **Reli Asset Holding Company Ltd** (supra) cited by the applicant of which I find it relevant. In that case it was held that:-

"It is also evident that only 5 employees appeared to prove the case..... because the employees had to prove their claims each

in his own basing on the reason that the 1500 were employed on different dates, at different salary rates and different other employment benefits differing from one employee to another hence a very great need of each to prove the respective claims."

Also in the case of **Manson Shaba and Others Vs. The Ministry of Works and another**, Land Case No. 201 of 2005 (unreported) it was held that:-

"The leave to the plaintiffs to lodge the representative suit does not dispense with the onus in each plaintiff to prove his or her own claim in respect of land in dispute."

Again in the decision of the Court of Appeal of Tanzania in the case of **The Attorney General v. Mathias Ndyuki and 15 others, Civil Appeal No. 31 of 2006** (unreported) the court held that:-

*'it was not enough for the respondents back up their claim for the alleged underpayment of salaries based on the evidence of PW. I, referring to the case of **Marcky Mhango v. Tanzania Shoes Company Ltd. and another**, Civil Appeal No. 36 of 1996*

(unreported) it was held further that it was not enough to the Appellants in the present case to make generalized claims on accumulative entitlements'.

On the basis of the above discussion it is my view that the award was improperly procured as correctly submitted by the applicant's Counsel. The evidence of PW1 was not sufficient to prove all respondents' claims. As stated above each respondent had an obligation to prove his/claim against the applicant but they have failed to do so. Under such circumstances the award procured thereto is improper.

In the result the award is revised, set aside and proceedings quashed. The matter is ordered to be remitted back to the CMA to be heard by another competent Arbitrator. Thus, the Court finds no relevance to labour much on the second issue as the first issue has finalized the matter.

It is ordered.



I.D. Aboud

JUDGE

24/12/2020