IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 418 AND 619 OF 2019

BETWEEN

BONI MABUSI.....APPLICANT

VERSUS

THE GENERAL MANAGER (T)
CIGARATES CO. LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 03/03/2020 & 27/03/2020

Date of Judgment: 22/05/2020

A. E. MWIPOPO, J

This consolidated Revision application arise from the decision of Hon. G. M. Wilbert, Arbitrator dated 25/05/2017 in labour dispute no. CMA/DSM/KIN/183/11 between Boni Mabusi and General Manager (T) Cigarette Co. Ltd. Boni Mabusi (employee) was employed by the respondent on 01/01/2007 as a logistic Officer for a salary of Tshs. 2,500,000/=. The employment contract was permanent employment. The employer terminated the employee employment on 01/07/2009 for operational requirements and was paid total of Tshs. 36,192,460/= being terminal benefits. The employee was aggrieved by the employers decision and he

decided to refer the dispute to the Commission for Mediation and Arbitration (CMA). The Commission heard both side and awarded payment of Tshs. 33,416,652/= being 12 months' salary compensation for unfair termination. Both parties were aggrieved by the CMA award and each instituted Revision Application before this Court. The employee Boni Mbusi instituted Revision No. 619 of 2019 while the employer filed Revision no. 418 of 2019. The two Revision Applications were consolidated by this court on 29/07/2019 following parties' prayer that the two Revisions to be consolidated and heard by the same Judge. After consolidation order, both parties (Boni Mabusi – Employee) and the respondent (General Manager, Tanzania Cigarette Co. Ltd – employer) agreed to file consolidate legal issues. The applicant {employee} have three legal issues while the respondent {employer} have two legal issues. The Employee's legal issues are following;

a. Whether it was proper for the trial Arbitrator to declare the compensation of twelve months salaries of Tshs. 33,416,652/= after the proof that the employer failed to comply with the laws both procedurally and substantively which lead to unfair termination while the applicant prayer was to be re-instated without loss of his monthly salaries and other benefits from the date of unfair termination to the date of his re- instatement.

b. Whether the Hon. Arbitrator erred in law and fact in holding that the applicant was not necessarily represented by a Trade Union Officer with regards to his retrenchment while it is known that once the employer signed collective Agreement with the Trade Union at workplaces it covers all employee regardless are members or not members of the recognized Trade Union.

c. Whether the Hon. Arbitrator erred in law and fact in holding that the Applicant and Respondent reached into consensus and discussed on retrenchment package in which the applicant signed; while in other hand the Arbitrator held that during the retrenchment process, once parties agreed on retrenchment, the signed retrenchment agreed is paramount importance to show the reality of the process.

Whereas the employer's legal issues are as following;

i. Whether it was proper for the trial Arbitrator to declare unfair termination even after established proof of consultation and consent by the respondent to his termination by agreement.

ii. Whether it was fair for the trial Arbitrator to Award the Respondent Compensation of Tshs. 33,419,652/= even after proof of the previous payment of Tshs. 36,192,460/= made by the applicant during retrenchment process.

When the matter came for hearing both parties were represented and the matter was heard orally. The employer (General Manager, Tanzania Cigarette Co. Ltd) was represented by Advocate Frank Killian whereas Advocate Noel Nchimbi appeared for the employee (Boni Mabusi).

Mr. Frank Killian, the learned Counsel for the Employer submitted on the first ground that the arbitrator faulted the procedure for retrenchment by stating that the employer was supposed to call the employee during negotiation for retrenchment. He disagree with this position of the trial arbitrator for the reason that the arbitrator in his finding in the CMA award agreed that there was sufficient reason for retrenchment, procedure was followed and the employee was terminated for operational requirement caused by technological advancement. The retrenchment process was initiated by the employer who negotiated with the employee and signed retrenchment Agreement – Exhibit T2 which prove that the employee agreed with the retrenchment process. By signing the agreement the respondent was agreeing to the term of the agreement. In his testimony before the Commission, the respondent (Employee) did not say that he was forced to sign the agreement.

Further, he submitted that the arbitrator agree in page 8 of the CMA award that there was free consent in signing retrenchment agreement – Exhibit T2. But the arbitrator ended holding in paragraph 5 of page no. 12 of the Commission award that the consultation was not made before signing of exhibit T2. If the respondent was of the view that there was no agreement reached on the retrenchment then he was supposed to refer the dispute to the CMA without signing it according to rule 23 (8) of the G.N. No. 42 of 2007.

The learned counsel argued that the retrenchment process was adhered by the applicant as there is evidence that the employee signed retrenchment agreement after consultation with the employer as the employee was not a member of Trade Union, there was no ill motive in the restructuring process, and there was valid reason for termination. He prayed for the Court to overrule the finding of the CMA that there was no consultation between the employer and employee before termination was effected.

On the second issue whether it was fair for the arbitrator to award the respondent 33,419,652/= even after proof that the respondent have already been paid Tshs. 36,192,460/= as terminal benefits, he submitted that the employer is punished twice by the CMA Award. The terminal benefit which

were paid to the employee was after tax deduction. If the arbitrator did find that the termination was unfair he could have ordered the applicant to retain the payment he had benefited out of the retrenchment agreement. The arbitrator was supposed to find out that the employee had already received Tshs. 36,192,460/= from the employer and make decision which is fair to both parties. He prayed for the Court hold that the Tshs. 36 million paid to employee have covered retrenchment package.

The learned counsel for Boni Mabusi who is the respondent in this application replied to the two grounds of revision as submitted by the applicant. On the first ground of the revision he submitted that the employer failed to make consultation and no consent was made by the employee regarding the retrenchment. The retrenchment must have retrenchment agreement which was entered or made. The employee was asked to sign a letter by the employer but the same is no a retrenchment agreement. According to rule 23(4) of GN. No. 42 of 2007 it is a duty of the employer to make sure that the procedure for termination or retrenchment are followed.

He argued that retrenchment has its own process as provided by section 38 of the Employment and Labour Relations Act, 2004. The law needs the employer to provide notice to the trade union as there was Collective Bargain Agreement entered between the employer and employees' trade

union. It is a trite law that you cannot avoid to negotiate with the trade union at work place so long that trade union have exclusive bargain unit. By saying that the employee was not a member of a trade union was wrong. Therefore the procedure for termination was not followed by the employer.

He submitted further that as the employer called and terminated the employee on the same date it was not possible for the employee to register a labour dispute on the retrenchment. Collective Bargaining Agreement - Exhibit T3 provides for criteria for retrenchment including the condition that the workers union to be consulted on behalf of the employee during retrenchment. There is no evidence to prove how retrenchment process was conducted.

Regarding the applicant's second ground of revision he submitted that as long as the termination was not fair the Commission was supposed to give the employee the compensation for unfair termination. To support his argument he cited the case of **Edra Robert v. Tanzania Revenues Authority, Revision no. 282 of 2009, High Court Labour Division, at Dar Es Salaam, (Unreported),** where the Court held that "when the Commission find a termination is unfair then the arbitrator is mandatorily required to order a compensation of not less than 12 months remuneration". He prayed for revision no. 418 of 2019 to be dismissed for want of merits.

The counsel for the respondent Boni Mabusi proceeded to submit on the grounds for Revision no. 619 of 2019. On the first issue as to whether it was proper for the arbitrator to award Tshs. 33,419,652/= being the compensation for 12 months salaries to the employee, he submitted that the employee prayed to be re – instated without loss of salaries and benefits from the date of unfair termination to the date of re- instatement. As the termination was found to be unfair the arbitrator was supposed to consider the employee's prayer. The arbitrator have failed to give reasons for changing the applicant prayer from re – instatement to compensation. In support of this argument the respondent cited the case of **NBC Ltd Mwanza v. Justa B. Kyaruzi, Revision No. 79 of 2009, High Court of Tanzania Labour Division, at Mwanza, (Unreported).**

The second ground in employee's revision is that whether Hon. Arbitrator erred in law and fact to hold that it was not necessary for the applicant to be represented by the trade union officer in the retrenchment. He submitted on this ground that all Tanzania Cigarette Company employees are members of the trade union and employees who are not members of the trade are bound to benefit from the Collective Bargaining Agreement signed between The TCC and TUICO according to section 71(1)(c) of the Employment and Labour Relations Act, 2004.

The respondent's (employee) third ground of revision is that whether the Hon. Arbitrator erred in law and fact in holding that the Applicant and Respondent reached into consensus and discussed on retrenchment package in which the applicant signed; while in other hand the Arbitrator knowingly that during the retrenchment process, once parties agreed on retrenchment, the signed retrenchment agreed is paramount importance to show the reality of the process. On the ground, the counsel for the respondent adopted his submission on Applicant's second ground of Revision that the termination was not fair substantively and procedurally as there was no agreement on the retrenchment process. The arbitrator was supposed to re instate the employee without loss of remuneration for unfair termination.

In support of his submission he cite the case of **Barick North Mara Mine Ltd Vs. Fanuel Reto Sasi Revision No. 8 of 2013 High Court of Tanzania Labour Division at Dar es salaam,** Where it was held that the applicant should adhere the evidence on the retrenchment. Failure to do that leads to unfair termination.

He prayed for the Court to set aside CMA Award and alternatively order the Respondent (Boni Mabusi) to be re-instated and be paid salaries and other benefits for the date of his termination to the date of Re-instatement.

In rejoinder, the Counsel for the applicant (employer) retaliated his submission in chief.

Then the counsel for the applicant proceeded to reply on issues submitted by the respondent in respect of **Revision No. 619 of 2019**. In regards to the first issue he argued that the respondent is not satisfied by compensation for 12 months which was awarded by the Commission. He submitted that the Higher Court in Revision could not interfere with a trial court or arbitrator in issuing punishment unless it is proved that the trial arbitrator acted on wrong principal of law. This was held in the case of **James Yoran Vs. Republic [1948] is E.A CA at page 126** and also in the case of **Benadeta Paulo Vs. Republic [1992] TLR 92.** The Respondent never proved that the arbitrator relied on wrong principle in awarding the respondent with 12 months salary compensation. When issuing the compensation of 12 months salaries, the trial Arbitrator relied on Section 40(1)(ii) of ELRA, 2004, that gave him discretion to choose among several options in deciding the kind of compensation. There was an option for re-instatement, re-engagement and compensation. Once the arbitrator has exercised his discretionary powers vested by law, such powers cannot be faulted unless the appellate Court is satisfied that the arbitrator acted on a

wrong principle. There was no principle which was cited to have been supporting the submission and prayers revise the award of the CMA.

The **Labour Revision No. 78 of 2009 between NBC LTD Mwanza vs. Justa B. Kyaruzi** the court refused to interfere with the discretionary power of trial arbitrator. Also in the case of **Leopald Tours Ltd vs. Rashid Juma and Another, Revision No. 55 of 2013, High Court of Tanzania, Labour Division at Dar es Salaam, LCCD of 2014** this court held that the Arbitrator had discretion to award 12 months salaries or more depending on the circumstances. In the present case the circumstances proves that as the position is held by the Respondent is no longer at the Company, there was no need for the order of re-instatement. He prayed for the court to hold that the arbitrator exercised his discretionary power and there was no abuse of the power.

On the issue number two, the counsel for the applicant prayed to adopt his submission on issue number one and two by the employer. As regarding to Section 71 of the ELRA, he disagree on what has been submitted by the respondent as the same has nothing to do with the complainant. The Collective Bargaining Agreement does not provide or cover for employee who are not members of the Union to which is TUICO. The Respondent failed to prove if he was a member of a Trade Union.

Regarding the 3rd legal issue by the respondent, he prayed to adopt his previous submission. He proceeded to distinguish the cited case of **Barrick North Mara Mining Ltd vs. Fanuel Reto Sasi** that the material facts is based on the conflict of interest between employer and employee and the subject matter is land. The employer terminated the employee on allegation that he noted that an employer have an interest in the land. The employer never provided the evidence of how employer could have noted such an interest. In this case exhibit T2 is sufficient to show that the employee had a knowledge of the retrenchment process. Basing on the submission, he prayed for the court to dismiss the claim by respondent and allow the Revision prayers by the employer.

After hearing submission from both parties and after reading CMA record and parties pleadings there are three issues to be determined. The issues are as following;

i. Whether reason for termination of respondent employment by the applicant was fair.
ii. Whether the procedure for retrenchment was fair.
iii. What remedies are entitled to the parties?

The employment and Labour Relations Act, 2004 provides in section 37 (1) that it shall be unlawful for an employer to terminate the employment

of an employee unfairly. The same Act in section 37 (2) states it is the duty of the employer in dispute for termination of employment to prove that the termination was fair. The termination is unfair if the employer fails to prove that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair. The section reads as follows:-

> **"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-**
>
> **(a) that the reason for the termination is valid;**
>
> **(b) that the reason is a fair reason-**
>
> **(i) related to the employee's conduct, capacity or compatibility; or**
>
> **(ii) based on the operational requirements of the employer, and**
>
> **(c) that the employment was terminated in accordance with a fair procedure."**

The above section requires employers to terminate employees on valid and fair reason and on fair procedures, but not on their own whims.

Starting with the determination of the first issue whether the reason for termination of respondent's employment was valid and fair, it is a well-established principle of law that once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise. (see **Tiscant Limited Vs. Revocatus Simba, Revision No. 8 of 2009, High Court, Labour Division, at Dar Es Salaam** and **Amina Ramadhani vs. Staywell Appartment Limited, Revision No. 461 of 2016, High Court Labour Division, ata Dar Es Salaam**).

According to rule 23(2) of the Employment and Labour Relations {Good 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 reasons to this one. The evidence available in this application especially the testimony of DW1 have proved that reasons 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.

The second issue is whether the procedure for retrenchment was fair.

The Employment and Labour Relations Act, 2004 provides in section 38 for termination based on operational requirements (retrenchment). Section 38 (1) of the Act reads as follows:

> **38.-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be 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) shall 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.

From above provision, in termination for operational requirement the employer is required to comply with four mandatory principles which includes giving notice of any intention to retrench; disclosure of all relevant information on the intended retrenchment; consult prior to retrenchment; and to give the notice of retrenchment. The section is read together with rule 23 (1), (2), (3), (4), (5), (6) an (7) of the Employment and Labour

Relations (Code of Good Conduct) Rules, G .N. No. 42 of 2007 which provides for the requirement of the law on the operational retrenchment of the employee by employer.

The evidence available in the record shows that the employer argued that the retrenchment process was adhered by the applicant as there is evidence that the employee signed retrenchment agreement – Exhibit T2 after consultation with the employer. By signing the agreement the employee was agreeing to the term of the agreement. In contest the counsel for the employee submitted that the employer failed to make consultation and no consent was made by the employee regarding the retrenchment. The retrenchment must have retrenchment agreement which was entered or made. The employee was asked to sign a letter by the employer but the same is no a retrenchment agreement.

I have read the alleged retrenchment agreement – Exhibit T2. Exhibit T2 is not a retrenchment agreement. It is a termination letter which was written on 01/07/2009. The Exhibit T2 shows that the employee was retrenched from 01/07/2009 following the agreement between the applicants company and the employee. The termination letter – Exhibit T2 was signed by the employee and employers principal officers. This is the major evidence which the employer relied to prove that the retrenchment

procedures were adhered. Apart from this exhibit the remaining evidence is the testimony of Masoud Matenge - DW1 that the procedure was followed. However even in his answers during cross examination DW1 stated that there was no retrenchment agreement between the employer and the employee. There was no minutes of the alleged consultative meetings or the notice of the employer to the employee on his intention to terminate him. Further DW1 was not remembering as to when the alleged consultative meeting was held.

As provided by section 39 of the Employment and Labour Relations Act, 2004 it is the duty of the employer to prove that the termination was fair. Failure of the employer to prove that the retrenchment followed the laid down procedure means that the termination was unfair procedurally. The signature of the employee in the termination letter do not prove at all that the employee agreed to the retrenchment or that the procedure for termination such as giving notice of any intention to retrench, disclosure of all relevant information on the intended retrenchment and consult prior to retrenchment were adhered.

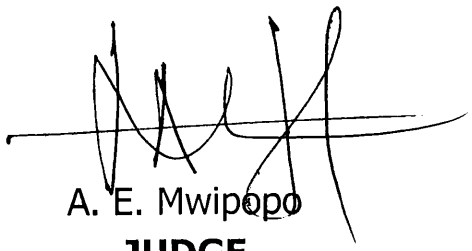
According to Section 38 (1) (d) (i) (ii) and (iii) of the ELRA, 2004 the employer is required to consult with any trade union or the respective trade union in the workplace or the employees. As the employer did not consult

with any trade union at the workplace which according to the evidence in record the workers union was TUICO, then it was mandatory for the employer to consult with individual employees. There is no evidence whatsoever in the record to prove that consultation was done. According to rule 23(4) of G.N. No. 42 of 2007 it is a duty of the employer to make sure that the procedure for termination or retrenchment are followed. And the employer in the present case have failed to prove that the procedure for retrenchment such as giving notice to the employee and consultation prior to retrenchment was followed. Therefore, I find that the termination of the employee employment was unfair procedurally.

The last issue is what remedies are entitled to the parties? The arbitrator awarded the employee Boni Mabusi to be paid by the employer total of Tshs. 33,419,652/= being 12 months' salary compensation for unfair termination. The employee has praying for the court to order for his re-instatement without loss of remuneration while the employer prayed for the court to consider the payment of Tshs. 36 million to the employee as terminal benefits to be considered as payment for unfair termination. As I have already find that the termination was unfair procedurally in the second issue, the employee is entitled for 12 months compensation only and not for re instatement as prayed by the respondent. Re-instatement is only ordered

where the termination is found to be unfair both substantively and procedurally. Therefore, I find that the CMA award was in accordance with Section 40(1) of the Employment and Labour Relations Act, 2004.

The employer have prayed that the Tshs. 36 million paid to the employee as the terminal benefit to be considered to be as the payment for unfair termination. However, the Employment and Labour Relations Act, 2004 provides in Section 40(2) that an order for compensation made under this Section shall be in addition to, and not a substituted for, any other amount to which the employees may be entitled in terms of any law or agreement. From the evidence available, the Tshs. 36 million was paid to the employee as terminal benefits and not as compensation for unfair termination. Therefore this prayer that the terminal benefits to be considered as compensation for unfair termination is not tenable in law. Thus, the employer have to pay compensation for 12 months salaries as it was ordered by the CMA. As result, I hereby dismissed both revision applications (Revision Application No. 418 and 619 of 2019) for want of merits. The CMA award is upheld.



A. E. Mwipopo

JUDGE

22/05/2020