IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 185 OF 2019

ST. MATHEWS SECONDARY SCHOOL ..... APPLICANT

VERSUS

CHARLES MKOTA & 27 OTHERS..... RESPONDENTS

09/09/2020 & 22/10/2020

JUDGMENT

BANZI, J.:

The Respondents, Charles Makota and 27 others were employed by the Applicant on different dates in a position of security guards. The Applicant is a registered school providing its services within Mkurunga District. Sometime in February 2016, during an inspection conducted by the District Commissioner ("DC") of Mkuranga at the school, it was revealed that, the Applicant was running a security unit at the school of more than 50 security guards without registration. Due to security issues prevailing in the said District at that particular time, the Applicant was advised or ordered to either register a security company or outsource a registered security company. Upon such advice or order, the Headmaster informed the Director of the school who, after realising that the registration process of a security company would take long, decided to contract a registered security company. On 31st August, 2016, the Respondents and their fellow guards were summoned and during a master parade, they were informed about termination of their employment. On the same date, they were given their

letters of termination. On the following day, the Respondents and their colleagues received their terminal benefits including severance pay, salary for the month of August and one-month salary in lieu of notice.

Aggrieved with their termination, the Respondents referred the dispute at the Commission for Mediation and Arbitration ("the CMA") at Kibaha for unfair termination against the Applicant. The Arbitrator decided on their favour and ordered the Applicant to pay compensation of 6 months' salaries to each Respondent for unfair termination based on retrenchment. Dissatisfied with the decision and the award of the CMA, the Applicant knocked the doors of this Court with the present revision.

At the hearing, the Applicant enjoyed the services of Mr. Musa Kiobya, learned counsel, whereas, the Respondent was represented by Mr. Prosper Mrema, learned counsel. By consent, the revision was argued by way of written submissions.

Expounding the grounds for revision as articulated in paragraph 13 of the affidavit, Mr. Kiobya submitted that, the Respondents did not indicate the nature of dispute in CMA Form No. 1. Since parties are bound by their pleadings, it was an error on the party of the Arbitrator to grant the relief basing on retrenchment while it was not pleaded in the CMA Form No. 1. He was of the firm view that, any evidence in support of the averments not pleaded must have been disregarded. He supported his stance by citing the case of **James Funke Gwagilo v. Attorney General** [2004] TLR 161. Apart from that, it was further his contention that, the Applicant obliged with the order of the District Commission to cease the security unit at the school because the requirements for registration of a security company was somewhat cumbersome. According to him, the act of ceasing the security

unit amounted to loss of business hence it a justifiable cause for automatic termination as per rule 5 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 ("GN No. 42 of 2007"). He added that, the Applicant's witnesses at the CMA explained in details the reasons and the procedure taken in the process of termination. As per testimony of the fourth witness, termination was the last resort as there was no any other alternative position for the Respondents. However, the Arbitrator did not consider this evidence which shows that termination was substantively fair. By failing to analyse the evidence, the Arbitrator arrived at a wrong and unjust decision as it was stated in the case of **Stanslaus Rugaba Kasusura and Attorney General v. Phares Kabuye** [1982] TLR 338. In a very peculiar way, which in my view might come from "a copy paste style" the counsel for the Applicant in his conclusion stated and I quote:

> *"Following the above, there is nothing submitted to warrant the applicant grant (sic) of the sought, and no any piece of submission can fault the Arbitrator's decision and should be upheld and so that Respondents can enjoy the fruits of the award be (sic) it is our humble submission that we strong (sic) the Applicant application has nothing than wasting the time of this court."*

In his reply, Mr. Mrema was quick to admit non-indication of the nature of the dispute. But he was of the view that such omission is not fatal as the Applicant was aware of the nature of the dispute right from the beginning following the explanation by the Respondents at part B of the CMA Form No. 1 which is termination. Apart from that, when the mediation failed, Form No. 5, was filled and the same specified the nature of the dispute that, it was termination. Moreover, it was submitted that, what happened to the

Respondents was not automatic termination but rather retrenchment for operational requirement. He added that, ceasing the security unit does not amount to loss of profession business as stipulated under rule 5 (1) of GN No. 42 of 2007. Since it was retrenchment, the Applicant was required to comply with the procedure provided for under rules 23, 24, 25 and 26 of GN No. 42 of 2007. Furthermore, he submitted that, the evidence of the Applicant's fourth witness was not ignored but rather, the Arbitrator avoided to repeat the same considering the fact that it was similar with the third witness. In conclusion, he prayed for the CMA award to be upheld and for increment of the amount of compensation to twelve months as provided under section 40 (1) (c) of the Employment and Labour Relations Act, No. 6 of 2004 ("ELRA") instead of the awarded amount of six months.

In his short rejoinder, apart from reiterating his chief submission, Mr. Kiobya submitted that, the nature of the dispute cannot be curable by filling in part B of the CMA Form No. 1. He insisted that, cessation of the security unit amounted to loss of business and hence automatic termination. He added that, the Arbitrator was duty bound to consider the evidence of the fourth witness which was material and failure to do so occasioned injustice on the Applicant. On the issue of increment of compensation amount to twelve months, he argued that, the prayer is not reflected in the counter affidavit of the Respondents. Therefore, he urged the Court to dismiss it as it was held in the case of **Tanzania Broadcasting Corporation (TBC) v. John Chidundo Mbele** [2014] LCCD 82. Finally, he reiterated his eccentric prayer as appeared in his chief submission.

After careful consideration of parties' arguments and grounds for revision in the light of evidence on CMA record, the issues for determination

here are, thus, one, *whether the present dispute falls under automatic termination or retrenchment* and two, *whether the order of six months compensation was justifiable*.

Automatic termination and retrenchment are among the forms of termination of employment stipulated under the ELRA and GN No. 42 of 2007. Circumstances that might lead to automatic termination are stipulated under Rules 4 and 5 of GN No. 42 of 2007. The rule 4 (2) provides as hereunder;

> *"4 (2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise."*

Likewise, rule 5 (1) and (2) provide that;

> *"(1) A contract of employment may be terminated automatically in certain circumstances such as death or loss of profession of the business (sequestration) of the employer.*
>
> *(2) Unless the contract of employment provides otherwise, a contract of employment may terminate automatically when the employee reaches the agreed or normal age of retirement."*

According to the extract above, there are three circumstances that might lead to automatic termination of a contract of employment. These are, one, when the agreed period expires; two, on the death of employee or loss of profession of the business of the employer and three, when the employee reaches age of retirement.

On the other hand, termination on operational requirement, or in other words retrenchment, is based on the economic, technological, structural or

similar needs of the employer. See section 4 of ELRA and rule 23 (1) of GN No. 42 of 2007. Sub rule (2) of rule 23 provides that;

> *"(2) As a general rule the circumstances that might legitimately form the basis of a termination are*
>
> > *(a) economic needs that relate to the financial management of the enterprise;*
> >
> > *(b) technological needs that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace;*
> >
> > *(c)* ***structural needs that arise from restructuring of the business as a result of a number of business related 'causes such as*** *the merger of businesses, a change in the nature of the business,* ***more effective ways of working****, a transfer of the business or part of the business."* (Emphasis supplied).

From the excerpt above, retrenchment might be caused by restructuring of business arising from merger of businesses, change in the nature of business, transfer of business or improving more effective ways of working. In the present matter, learned counsel for the Applicant was of the firm view that, what happened to the Respondents after cessation of security unit amounts to loss of business hence, automatic termination. On the other hand, according to the learned counsel for the Respondents, the circumstances leading to termination fall under retrenchment.

I have carefully considered the submission of both sides in the light of above quoted provisions of the law and the evidence on record. According to the evidence on record, it is undisputed that none among the Respondents died or had reached the age of retirement on the date of termination. The only question to be answered is whether the act of ceasing the security unit within the Applicant's institution amounts to loss of business of employer as contented by the counsel of the Applicant.

In order to establish loss of business of the employer, first, there must be evidence to show that, the said institution ceased to operate as a whole or is phased out and not just one unit and second, there must be evidence to indicate that the Applicant's institution was liquidated. All these were not the case in the present matter. According to the evidence of the Headmaster, there were two advices / orders purported to be issued by the DC. First, the Applicant should register a security company or second, they should outsource the registered security company. The purported orders by the DC did not disturb the existence of the school that would have led to loss of business. Also, they did not cause liquidation of the school. In that regard, it is the considered view of this Court that, what happened to the Respondents does not fall under automatic termination as suggested by counsel of the Applicant.

However, since the advice or purported orders issued by the DC were two options, the Applicant was required to either register a security company for the school or outsource a registered security company. No evidence was adduced to show if there was timeframe for the orders or advice to be complied with. According to the evidence of the school Director, the government issued a circular on security issues following various killings

within Kisarawe, Mkuranga and Rufiji districts. In the course of implementation of the said circular, the DC visited the school after learning that they had many security guards. Thus, they decided to cease the unit because according to this witness, the conditions for registration were difficult. Be it as it may, the explanation given by this witness does not amount to automatic termination as suggested by counsel for the Applicant. In the view of this Court, the act of ceasing the security unit after failing to register a security company falls under operational requirement, or retrenchment based on structural needs. Thus, what happened to the Respondents was retrenchment rather than automatic termination. Therefore, the second ground lacks merit.

Since it was termination on operational requirement, the Applicant was required to follow the procedure provided under section 38 (1) of ELRA. The same provides as hereunder;

> *"(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 minimize the intended retrenchment;*

(iii) the method of selection of the employees to be retrenched;

(iv) the timing of the retrenchments;

(v) severance pay in respect of the retrenchment.

(d) 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."

For retrenchment to be considered procedural fair, the requirements of above quoted provisions must be complied with. In the matter at hand, according to the evidence of the Headmaster and the school Director, the Respondents were given notice at a master parade and on the same day they were terminated. It is undisputed that the procedure narrated in section 38 above was not followed. Therefore, it is obvious that, the procedure for retrenchment was not followed and hence termination was procedurally unfair.

The issue of failure to mention the nature of dispute in the CMA Form No. 1 need not detain this Court. According to Mr. Kiobya, the Respondents did not indicate nature of dispute by failing to tick in the appropriate box. I had the opportunity of perusing the Form in question. Although the Respondents did not indicate nature of dispute at part 3 but taking the Form as a whole, it shows clearly that the Respondents were challenging

termination of their employment. Even if we go by the submission of counsel for the Applicant that parties are bound by their own pleadings, yet still, the issue of unfair termination is in CMA Form No. 1 and the evidence adduced by witnesses for both parties. Thus, the Arbitrator was correct to decide on the termination based on retrenchment which is depicted from the evidence before her. Concerning the third ground, the Arbitrator at page 5 of the award did not summarise the testimony of the fourth witness in order to avoid repetition as it looked similar with the testimony of other witnesses. Nevertheless, at page 5 of the award, the Arbitrator before arriving at her conclusion on the reason for termination, she analysed the material evidence that caused the dispute before her which in the view of this Court includes the testimony of the fourth witness. Therefore, the first and third grounds lack merit.

In regard to the second issue, the Arbitrator ordered the Respondents to be paid six months' salary as compensation for unfair termination. However, the law, section 40 (1) of ELRA regulates minimum compensation of not less than twelve months' salary. Nevertheless, this Court has consistently held that section 40 (1) of ELRA gives discretion to the Arbitrator or Labour Court to order compensation of less than twelve months' salary provided that it is just and equitable depending on circumstances of each case and extent to which termination was unfair. See the cases of **Michael Kirobe Mwita v AAA Drilling Manager** [2014] LCCD 42, **Deus Wambura v. Mtibwa Sugar Estates Ltd** [2014] LCCD 120, **Salum Omary Mavunyira v. The Director General NHC** [2014] LCCD 107 and **Easy Travel & Tours Ltd v. Andrea Ezekiel Kiwale**, Revision No.33 of 2019 [2020] TZHC 1082 at www.tanzlii.org to mention just a few.

In the present matter, the Arbitrator considered the circumstances of the case in the light of rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007. In the circumstances of the case, the Arbitrator found six months' salary as the appropriate compensation for the Respondents who on the outset accepted payments from the Applicants and for the Applicant who failed to follow the procedure prescribed by the law. Thus, I find the order of six months' salary compensation justifiable and appropriate in the particular circumstances of the case. Therefore, I find no basis to vary compensation order as suggested by counsel for the Respondents.

That being said, I find the application to have no merit and dismiss it accordingly. Consequently, I uphold the decision and the award of the CMA.

It is so ordered.

I. K. BANZI
JUDGE
22/10/2020